

Summaries of Published Opinions

September 6, 2018

2018 COA 127. No. 14CA2242. People v. Welborne. *Criminal Law—First Degree Arson—Criminal Mischief—Theft—Double Jeopardy—Merger—Lesser Included Offense.*

Welborne and his mother were charged with setting fire to their rented house and then filing false insurance claims based on the fire damage. Welborne was convicted of first degree arson, criminal mischief, theft, and attempted theft. The Court of Appeals previously rejected his challenges to his convictions based on *Reyna-Abarca v. People*, 2017 CO 15. After this decision, the Colorado Supreme Court clarified *Reyna-Abarca* and vacated the Court's judgment here as to the included offense statute and remanded this case.

On appeal, Welborne contended that criminal mischief is an included offense of first degree arson and, therefore, those convictions must merge under both statutory and double jeopardy dictates. Criminal mischief is included in first degree arson where both offenses are based on the same conduct. Here, when Welborne knowingly burned the rented house without the owner's consent, he committed both criminal mischief and first degree arson. The failure to merge the convictions was plain error.

The criminal mischief conviction and sentence were vacated. The judgment was affirmed in all other respects. The case was remanded for the trial court to correct the mittimus.

2018 COA 128. No. 15CA0868. People v. Jompp. *Criminal Law—Speedy Trial—Insufficient Evidence—Robbery—Assault—Noncustodial Escape—Jury Instructions—Lesser Nonincluded Offense—Resisting Arrest—Sixth Amendment—Habitual Criminal.*

Jompp, the victim, and an acquaintance, B.B., were driving around one evening in a stolen car while high on methamphetamine. After they picked up C.P., they later pulled the vehicle over and a fight broke out between Jompp and the victim. Jompp, B.B., and C.P. left the victim unconscious on the ground, and the victim later died of his injuries. Days later, police found Jompp. After the police handcuffed Jompp, he took off running. After a short chase he was caught and taken to jail. A jury convicted Jompp of third degree assault, robbery, and escape. The trial court adjudicated Jompp a habitual criminal and sentenced him to 48 years in prison.

On appeal, Jompp contended that the court violated his speedy trial rights by continuing his jury trial, over his objection, beyond six months after he pleaded not guilty and 13 months after he was arrested. Here, the trial court acted within its discretion by relying on the prosecution's offer of proof that they were diligently trying to find B.B. to secure her testimony at trial and by finding that there was a reasonable possibility that B.B. would be available to testify. Therefore, there was sufficient record evidence to support the court's granting of the prosecution's request for a continuance. Further, the trial court didn't plainly err because Jompp's constitutional right to a speedy trial wasn't obviously violated.

Jompp also contended that the prosecution presented insufficient evidence that he committed robbery, as either a principal or accomplice. Here, after Jompp attacked the victim, B.B. said she then saw C.P. get out of the car, go over to the victim, and start digging through his pockets. C.P. admitted that she went through the victim's pockets to get money at Jompp's direction and she gave him the money she found. Further, the Court of Appeals rejected

Jompp's argument that the prosecution had to show that the force he used against the victim was calculated to take the victim's money. The record contained sufficient evidence to support the jury's conclusion beyond a reasonable doubt that Jompp robbed the victim.

Jompp next contended that the court erred by failing to instruct the jury that it could convict him of the lesser nonincluded offense of resisting arrest. Here, the undisputed record evidence showed that Jompp was in custody. He had already submitted to the police officer's instructions, was handcuffed, searched, and led by the arm to a patrol car for transport to jail before he ran from the officer. Therefore, the court didn't abuse its discretion by declining to instruct the jury on the crime of resisting arrest.

Finally, Jompp contended that the court convicted him in violation of his Sixth Amendment right to a jury trial when, at sentencing, it, not the jury, found that he had prior convictions and increased his sentence under the habitual criminal sentencing statute. Jompp failed to preserve this issue at trial, and the prior conviction exception remains well-settled law, so the trial court did not err.

Finally, Jompp contended that his sentence is illegal because his noncustodial escape conviction can't be deemed a current offense under the habitual criminal statute. The Court held that CRS § 18-1.3-801(5) (2013) precluded a noncustodial escape conviction from being used as a current conviction for adjudicating a defendant a habitual criminal under subsection (2) of that section. Therefore, the trial court erred in adjudicating Jompp a habitual criminal on his noncustodial escape conviction.

The judgment of conviction was affirmed. The part of the sentence based on Jompp's escape conviction was vacated and the case was remanded for resentencing on that conviction. The remainder of the sentence was affirmed.

2018 COA 129. No. 16CA1298. People v. Ramirez. *Sexual Assault on a Child—Sexual Assault on a Child by One in a Position of Trust—Indecent Exposure—Intimate Parts—Semen.*

Ramirez was the victim's foster father. When the victim was 4 years old, Ramirez ordered her and her sister to approach him. He placed their

hands in front of him, pulled down his pants and underwear, and masturbated. Ramirez ejaculated into their hands and made them drink the semen. A jury convicted Ramirez of sexual assault on a child (SAOC), sexual assault on a child by one in a position of trust (SAOC-POT), and indecent exposure.

On appeal, Ramirez contended that there was insufficient evidence to support the charges of SAOC and SAOC-POT. To prove the crimes of SAOC and SAOC-POT the prosecution must prove, beyond a reasonable doubt, that “for the purposes of sexual arousal, gratification, or abuse” the defendant knowingly touched the victim’s intimate parts or the victim touched the defendant’s intimate parts. Semen is not an “intimate part” within the meaning of CRS § 18-3-401(2). Here, the victim testified that Ramirez never touched any of her “private parts” and that she never touched his “private parts.” The evidence was insufficient to prove beyond a reasonable doubt that Ramirez committed SAOC or SAOC-POT.

The SAOC and SAOC-POT convictions were vacated and the case was remanded for the trial court to dismiss those charges with prejudice. The convictions for indecent exposure were affirmed.

2018 COA 130. No. 16CA1884. People v. Gwinn. *Criminal Law—Driving While under the Influence of Alcohol—Evidence—Impeachment—Direct Examination—Jury Instruction—Search Warrant—Prior DUI Convictions—Sentence Enhancer—Preponderance of the Evidence.*

Gwinn rear-ended another car while driving home from work and was arrested for driving while under the influence of alcohol (DUI). Gwinn admitted drinking four beers before the accident occurred. After a jury convicted Gwinn of DUI and careless driving, the trial court, in a separate proceeding, found that Gwinn had three prior DUI convictions, adjudicated him a felony DUI offender, and sentenced him to 30 months of probation, two years of work release, and 90 days in the county jail.

On appeal, Gwinn first contended that the trial court’s refusal to allow the testimony of eight current and former Colorado Department of Public Health and Environment (CDPHE)

employees deprived him of his constitutional right to present a defense. Gwinn sought to introduce this testimony to show that the Intoxilyzer 9000 breath test machine did not produce accurate results. The trial court did not err when it granted CDPHE’s motion to quash the witness subpoenas, finding that the testimony was irrelevant to Gwinn’s refusal because it failed to establish Gwinn’s knowledge of the Intoxilyzer 9000’s alleged deficiencies at the time he refused to submit to chemical testing. Because the accuracy of the breath test machine was not relevant, Gwinn was not deprived of the right to present a defense.

Gwinn next contended that the trial court erroneously permitted the prosecutor to lead a friendly witness, Officer Perez, “under the guise of impeachment” where no impeachment occurred. Because Officer Perez’s direct testimony that Gwinn’s speech “sounded normal” was contradicted by his previous statement in the sobriety examination report that Gwinn’s speech was “mumbled,” no error occurred when the trial court allowed impeachment with leading questions about a prior statement.

Gwinn next argued that the trial court erroneously admitted People’s Exhibit 1, an express consent affidavit and notice of revocation form, under CRE 403. Officer Perez testified that he reviewed the express consent affidavit with Gwinn, which made the affidavit relevant to Gwinn’s knowledge of the consequences of his refusal to take a chemical test. Here, the trial court properly admitted the exhibit under CRE 803(6).

Gwinn also contended that the trial court erroneously rejected a tendered instruction informing the jury that law enforcement may obtain a search warrant to compel a defendant to submit to a blood test and instructing the jury that it was permitted to draw an inference from an officer’s failure to employ this procedure that the officer did not believe there was evidence to support a search warrant. However, the officer was not required to obtain a search warrant, and the officer testified that he does not usually do so in DUI cases. Therefore, there was no error.

Gwinn last contended that his prior DUI convictions trial, conducted by the trial court, violated his federal constitutional right to a jury

trial. The General Assembly intended prior DUI convictions to constitute a sentence enhancer rather than an element of DUI. A defendant is not entitled to have a jury determine the existence of the prior DUI convictions used to enhance his sentence from a misdemeanor to a felony. Further, the prosecution’s burden of proving prior convictions is by a preponderance of the evidence not, as Gwinn argued, beyond a reasonable doubt.

The judgment was affirmed.

2018 COA 132. No. 17CA1109. Hansen v. Barron’s Oilfield Services, Inc. *Torts—Wrongful Death—Standing to Sue—Adult Child.*

Wife died in an automobile collision with Hierro, an employee of Barron’s Oilfield Services, Inc. (Barron’s). At the time of her death, Wife was married to Husband and had no children. A law firm filed a wrongful death action on Husband’s behalf, naming Barron’s and Hierro as defendants. However, apparently unbeknownst to the attorneys, Husband had died of natural causes before the complaint was filed. Upon learning of Husband’s death, the law firm filed an amended complaint substituting Hansen, Wife’s father (Parent), as the plaintiff. Barron’s moved to dismiss under CRCP 12(b)(5) arguing that Parent lacked standing under the Colorado Wrongful Death Act (WDA). The trial court granted the motion.

On appeal, Parent argued that the district court erred in dismissing his wrongful death action because it interpreted the WDA too strictly. He further argued that fairness and public policy dictate that he should be allowed to file a wrongful death action for the death of Wife under the circumstances here. Parents of an adult deceased have the right to bring a wrongful death action only if the decedent is unmarried and without descendants. Under CRS § 13-21-201(1)(c)(I), the relevant time for determining if an adult deceased is “unmarried” is the decedent’s date of death. Here, it was undisputed that when Wife died, she was married to Husband, and Husband survived her.

The Court of Appeals also granted Barron’s request for attorney fees.

The judgment was affirmed and the case was remanded with directions for a determination

of the appropriate amount of attorney fees incurred on appeal.

2018 COA 133. No. 17CA1200. Bailey v. State Farm Mutual Automobile Insurance Co. Underinsured Motorist Insurance Benefits—Coverage Limitations.

Plaintiff was in a car accident and sued the other driver for negligence and State Farm Mutual Automobile Insurance Co. for underinsured motorist (UIM) benefits. Plaintiff’s policy covered him up to \$100,000 for damages caused by underinsured motorists. The other driver’s insurance company covered him for \$100,000 in damages and also agreed to pay the full extent of a jury’s verdict. At trial, State Farm presented evidence that plaintiff had not cooperated with claims adjusters and had committed fraud, and therefore plaintiff voided the insurance contract and he was not entitled to UIM benefits.

The jury rejected State Farm’s affirmative defenses of fraud and failure to cooperate and awarded plaintiff \$300,000 in damages. State Farm moved for entry of judgment based on a letter from the other driver’s insurance company that effectively provided unlimited liability insurance coverage for him. State Farm argued that because there was no difference between the coverage limit and the amount of damages, plaintiff was not entitled to UIM benefits. The other driver did not object. The trial court granted the motion and the other driver’s insurance company paid the entire judgment.

On appeal, plaintiff argued that it was error to grant State Farm’s motion for entry of judgment. Plaintiff contended that the trial court should not have considered the merits of State Farm’s motion because the motion raised an affirmative defense that State Farm waived by not presenting before trial. An affirmative defense must be in

the nature of a confession and avoidance. Here, State Farm did not contend that it owed UIM benefits but could avoid its obligation to pay them for some other reason; rather, the motion asserted that it did not owe benefits at all. State Farm’s motion did not raise an affirmative defense. The motion was properly made and the trial court did not err by entertaining it.



Plaintiff also contended that under the plain language of CRS § 10-4-609, State Farm is required to provide him with the full amount of UIM benefits. Plaintiff argued that even though he recovered the full amount of the jury’s verdict from the other driver’s insurer, he should still be allowed to recover an additional \$100,000 in UIM benefits. UIM benefits are intended to cover the difference between the negligent driver’s liability limits and the damages. The plain language of the statute does not allow a plaintiff to recover UIM benefits in excess of the total amount of actual damages. Further, the statute does not prevent an insurer from effectively increasing a driver’s liability coverage by offering to pay any damages awarded at trial. Here, there is no difference between the amount of damages and the amount of coverage, so UIM benefits are not triggered.

The Court of Appeals also found no statutory support for plaintiff’s arguments that (1) the letter from the other driver’s insurance company does not meet the requirements of a complying policy, and so it is not legal liability coverage; and (2) the determination of whether a driver is underinsured is made at the time of the accident.

The judgment was affirmed.

2018 COA 134. No. 17CA1616. Bill Barrett Corp. v. Lembke. Preliminary Injunction—Special District—Mineral Estates—Power to Tax—Summary Judgment.

In 2009, the Sand Hills Metropolitan District (Sand Hills) included the 70 Ranch within its boundaries and began assessing ad valorem taxes on the oil and gas extracted from the mineral estate. Plaintiffs Bill Barrett Corporation and Bonanza Creek Energy, Inc., and intervenor Noble Energy, Inc. (lessees), challenged these taxes and obtained summary judgment in Weld County District Court. Both sides appealed. In that appeal, the division agreed with the district

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court that when Sand Hills included the 70 Ranch it was a material departure from its 2004 service plan, which required approval from the Weld County Board of County Commissioners. Because that approval had not been obtained, the division held that Sand Hills lacked taxing authority after 2009.

Following entry of the summary judgment and before the *Sand Hills* appeal was filed, Lembke and 70 Ranch, LLC (the LLC) (collectively, defendants) petitioned South Beebe Draw Metropolitan District (South Beebe) to include the 70 Ranch. Defendants owned the surface estate where all of lessees' well heads are located. Lessees were not notified of this action. South Beebe resolved to include the 70 Ranch, and the Adams County District Court approved the inclusion. Lessees filed a motion for a preliminary injunction to prevent South Beebe from taxing oil and gas that lessees produce from the mineral estate underlying the 70 Ranch. The trial court denied the motion and entered summary judgment that under CRS § 32-1-401, the severed mineral estate underlying the 70 Ranch could not be included within South Beebe because all the owners and lessees of that estate did not petition for and consent to inclusion. Lessees obtained a temporary restraining order in the Weld County District Court that prohibited the Weld County Treasurer, who had collected the disputed taxes, from disbursing the monies to South Beebe. Venue was transferred to Adams County and, following an evidentiary hearing on lessees' motion for a preliminary injunction, the court found lessees had not shown a reasonable probability of success on the merits and denied the motion. Later, the court entered a final judgment against lessees on their CRS § 32-1-401 claim. Lessees appealed and asked that the status quo be preserved by enjoining the treasurer from disbursing taxes collected to South Beebe. A motions division granted the request.

On appeal, lessees argued that without their consent and that of the other mineral estate owners, the 70 Ranch, or at least the underlying mineral estate, could not have been included within South Beebe. South Beebe responded that because the mineral and surface estates were severed, only the surface owners needed

to petition for and consent to inclusion, and all of them did. The Court of Appeals first held that mineral estate owners are "fee owners," but lessees are not. Next, because the parties agreed and the record supports that not all of the mineral estate owners consented to the 70 Ranch's inclusion, the Court considered whether South Beebe's services can benefit the mineral estate. Because lessees did not argue that the mineral estate owners would benefit from the inclusion, the Court concluded that lack of consent by all mineral estate owners did not preclude South Beebe from taxing lessees. Consequently, the Court affirmed the trial court's entry of summary judgment as to lessee's CRS § 32-1-401(1)(a) claim.

Lessees also challenged the trial court's ruling that lessees had not shown a reasonable probability of successfully establishing that South Beebe had violated CRS § 32-1-207(2)(a) by failing to obtain Board of County Commissioners (BOCC) approval for a material change in its service plan, because it had obtained approval from the planning commission. However, the Court found that the actions of the planning commission and other officials did not satisfy the requirement that South Beebe had to obtain BOCC approval for a material modification of its service plan. Therefore, lessees have a reasonable probability of success in establishing that South Beebe did not obtain the requisite BOCC approval. Further, the trial court dissolved the temporary restraining order and denied a preliminary injunction on this ground alone, without considering the other factors set forth in *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982).

Lessees also argued that it was error to conclude that South Beebe's inclusion of the 70 Ranch was not a material modification. Boundary changes alone are presumptively not material modifications, and the Court found that inclusion of the 70 Ranch was just a boundary change. Thus, the trial court acted within its discretion in ruling that lessees had not shown a reasonable probability of success in challenging inclusion of the 70 Ranch as an unapproved material modification.

Finally, lessees argued that under CRS § 32-1-107(2), South Beebe could not levy and

collect taxes to support services if those services are already being provided by another special district (in this case, Sand Hills). The Court agreed with the trial court that the statute prohibits overlapping services, not merely overlapping territory. Here, no party asked the court to resolve the factual question of overlapping services, thus the question of whether the services were overlapping was not properly before the Court.

The summary judgment on lessees' CRS § 32-1-401(1)(a) claim was affirmed. The order denying lessees' motion for a preliminary injunction was vacated. The case was remanded for the trial court to make findings on the remaining *Rathke* factors and reconsider whether to enter a preliminary injunction. The temporary injunction will remain in effect until the trial court enters its renewed ruling on the motion for preliminary injunction.

2018 COA 135. No. 17CA1644. Colorado Health Consultants v. City and County of Denver. Retail Marijuana—Cultivation as an Accessory Use—Vested Interest—Equitable Estoppel—Taking.

Colorado Health Consultants, d/b/a Starbuds (Starbuds), is a retail marijuana business located in an I-MX-3 zone, which is a special context zone for industrial mixed use. In 2013, the zoning authority issued Starbuds a zoning permit for retail sales. Starbuds separately applied with the Department of Excise and Licenses (Department) for a retail marijuana cultivation (RMC) license, which was issued in 2014. The following year, Starbuds sought renewal of the RMC license and, following an uncontested hearing required by the Denver Revised Municipal Code (DRMC), the license was renewed.

Starbuds again sought renewal in 2016. The DRMC had been revised and a hearing was no longer required, so the Department immediately renewed the RMC license. Several days later the Department discovered that an interested party had requested a hearing on the renewal application. A hearing was held at which Starbuds argued that under DRMC § 6-214(a)(1), the Department was not authorized to conduct a hearing. In a detailed written

recommendation the hearing officer recommended the Department deny the renewal request. She found that plant husbandry was not a permitted use in the I-MX-3 zone and the original license had been issued in error. She also rejected Starbuds' argument that plant husbandry was a permitted "accessory use." The Department adopted the findings and denied the renewal.

Starbuds filed a CRCP 106(a)(4) complaint arguing that the Department did not have the authority to hold a public hearing on the renewal application because plant husbandry was a permitted accessory use. It also alleged that the Department was equitably estopped from denying its renewal application and the denial was an unconstitutional taking. The district court affirmed the Department's order.

On appeal, Starbuds first contended that the Department abused its discretion and legally

erred in concluding that plant husbandry is not a permitted accessory use in an I-MX-3 zone and that its zoning permit did not authorize plant husbandry. An RMC license requires that the retail marijuana establishment be located in a zone "where, at the time of application for the license, plant husbandry is authorized as a permitted use under the zoning code," with a few exceptions. The parties agreed that plant husbandry is not permitted in the I-MX-3 zone. Starbuds argued, however, that marijuana cultivation is a permitted, unlisted accessory use based on the zoning administrator's issuance of its retail sales permit. The Department rejected this argument because "retail sales" was the only use permitted by the permit. The Court of Appeals held that because plant husbandry is prohibited as a primary use, it cannot be an accessory use, so the RMC license renewal application was properly denied.

Starbuds then challenged the Department's subject matter jurisdiction to conduct a hearing under DRMC § 6-214(a)(2) and (3), given that the Department could only have issued the RMC license under § 6-214(a)(1), which contains no hearing provision. The Department separately possessed the discretionary authority to conduct a hearing under DRMC § 32-30. Further, plant husbandry is not a permitted primary or accessory use in an I-MX-3 zone, and therefore Starbuds was never eligible to receive an RMC license in the first instance.

Starbuds further argued that the district court erred in finding that equitable estoppel did not apply to provide it relief, contending that the Department's decision to hold a hearing caused an injury. First, it was unlikely that Starbuds detrimentally changed its position in reliance on the approval in the nine days between the application approval and its revocation. The record supports the trial court's finding that the Department mistakenly issued the RMC license in the first place, and Starbuds presented no evidence that its reliance on an unlawfully issued license was reasonable. Moreover, Starbuds was not ignorant of the provision that plant husbandry was not permitted in its zone.

Starbuds last contended that the denial of its RMC license was an unconstitutional taking because it had a reasonable expectation of continued licensure and did not receive due process. There is no vested right in the renewal of a license, and nothing precludes Starbuds' continued operation as a retail establishment, which was the primary use for which it was zoned. And Starbuds was afforded due process through the renewal hearing. The Department's denial of Starbuds' RMC license renewal application did not constitute an unconstitutional taking.

The judgment was affirmed.

2018 COA 136. No. 18CA0499. Cummings v. Arapahoe County Sheriff's Department. Employment Termination—Wrongful Discharge—Implied Contract of Employment—Summary Judgment—Interlocutory Appeal—Sheriff's Policies—CRS § 30-10-506.

Cummings was a deputy sheriff in Arapahoe County. The Sheriff terminated Cummings'



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employment, asserting that he violated the Sheriff's employee manual (the Manual) and was dishonest during the investigation of the original charges against him. Cummings exhausted his remedies within the Sheriff's department and sued for (1) wrongful discharge in violation of public policy, and (2) breach of an implied contract of employment, based on the policies in the Manual. The Sheriff moved to dismiss the wrongful termination claim based on governmental immunity, and the district court dismissed the claim with prejudice. The district court denied the Sheriff's motion to dismiss the implied contract claim, and the Sheriff moved for summary judgment. The district court denied the motion for summary judgment, holding that there was an implied contract of employment and disputed issues of material fact existed. The Sheriff brought an interlocutory appeal under C.A.R. 42 challenging the denial of summary judgment.

On appeal, the Sheriff contended that the trial court erred in denying his motion for summary judgment. He argued that the at-will employment concept in CRS § 30-10-506 requires the court to hold that all policies promulgated by a sheriff relating to termination of deputy sheriffs' employment are only precatory, and to conclude otherwise would mean that the sheriff lacks the power to terminate at-will employees. CRS § 30-10-506 requires a sheriff to promulgate written employment policies, and the sheriff must give deputies the rights of notice and opportunity to be heard. A sheriff's other employment policies may be, but are not required to be, binding. If the sheriff elects to confer binding employment rights on his deputies, those rights are enforceable according to their terms.

The Sheriff next argued that even if CRS § 30-10-506 allows sheriffs to promulgate binding personnel policies, the disclaimers in the Manual and the yearly disclaimers that Cummings signed preclude, as a matter of law, the formation of an implied contract of employment. Except with respect to the rights expressly granted to deputy sheriffs by statute, these clear and conspicuous disclaimers preclude, as a matter of law, Cummings' implied contract claims. But here, material facts are disputed on whether

Cummings received the required notice of the charges that led to his dismissal.

The part of the summary judgment order permitting Cummings to pursue an implied contract claim based on rights conferred in the Manual that effectuate the due process rights granted by CRS § 30-10-506 was affirmed. In all other respects, the summary judgment order was reversed and the case was remanded.

September 20, 2018

2018 COA 131. No. 15CA0210. People v. Aldridge. *Criminal Law—Right to Confrontation—Right to be Present During Trial—Child Testimony—Closed Circuit Television.*

C.O. and L.A. spent about three weeks camping alone with Aldridge, their maternal grandfather. At the time, C.O. was 4 years old and L.A. was 9 years old. Both girls alleged that they had touched Aldridge's penis during the camping trip and that it got stiff. A jury found Aldridge guilty of two counts of sexual assault on a child by one in a position of trust as part of a pattern of abuse, two counts of sexual assault on a child as part of a pattern of abuse, four counts of sexual assault on a child by one in a position of trust—victim under 15, four counts of sexual assault on a child, and two counts of aggravated incest. The trial court sentenced him to 116 years to life in the custody of the Department of Corrections.

On appeal, Aldridge contended that the trial court erred by excluding him from the courtroom while C.O. and L.A. testified. Before trial, the People moved for C.O. and L.A. to testify by closed-circuit television under CRS § 16-10-402. Over Aldridge's objection, the trial court granted the motion. Neither the trial court nor the parties indicated that Aldridge, rather than the children, would be removed from the courtroom. At trial, rather than having the witnesses testify from another room, the trial court permitted the children to testify in the courtroom while the judge and defendant watched from the judge's chambers. The jury could not see or hear defendant during the children's testimony. Aldridge's exclusion from the courtroom during the children's testimony, in the absence of a stipulation, violated CRS § 16-

10-402, and this procedure violated defendant's due process right to be present because he was denied an opportunity to exert a psychological influence on the jury. This error was not harmless beyond a reasonable doubt.

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

2018 COA 137. No. 15CA1912. People v. Koper. *Criminal Law—Jury Instructions—Self-Defense—Transferred Intent—Affirmative Defense—Prosecutorial Misconduct.*

While at a bar, defendant said something to Abram's sister that offended Abram. Defendant tried to make amends by offering Abram a beer. Abram responded by punching defendant twice in the face. Defendant then drew his firearm, for which he had a concealed carry permit, and aimed it at Abram. After a short standoff, defendant handed the gun to his fiancée and the two left the bar. A jury found defendant guilty of two counts of felony menacing and prohibited possession of a firearm. The first count of felony menacing named the alleged victim as a security guard who had stepped between defendant and Abram after defendant drew his weapon; the second count named the alleged victim as another bar patron who had been sitting near Abram.

On appeal, defendant contended that the trial court erred in rejecting his jury instructions on the affirmative defense of self-defense. Here, defendant raised credible evidence that he acted in self-defense against Abram. Defendant's intent to defend himself against Abram would, if the jury believed his testimony, allow the intent as to Abram to transfer to the encounter with the alleged victims. Thus, the trial court erred in rejecting defendant's jury instructions on self-defense as an affirmative defense to the menacing charges. Further, the error was not harmless because while the defense's theory of the case instruction referred generally to self-defense, the instruction did not require the prosecution to disprove self-defense beyond a reasonable doubt.

Defendant also contended that prosecutorial misconduct required reversal of his conviction for possession of a firearm while intoxicated. Here, the prosecutor asked defendant 44

times whether another witness's testimony was incorrect, wrong, or untrue, or whether the witness had lied; this went beyond asking non-prejudicial questions designed to highlight discrepancies in the evidence. The error was plain and warranted reversal.

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

2018 COA 138. No. 17CA0130. People in the Interest of A.V. Juvenile Delinquency—Sentencing—Restitution—Waiver—Evidence—Reasonableness.

A.V. was arrested in connection with a series of home and business burglaries. The victim businesses included Animal Attractions Pet Store (Animal Attractions) and the Country Inn Restaurant (Country Inn). Country Inn sustained extensive fire damage in the burglary, and the fire destroyed most of the business. As part of a global case disposition, A.V. pleaded guilty to some counts in exchange for dismissal of other counts, stipulating to a factual basis and agreeing to pay restitution to all victims, including those in the dismissed cases. The juvenile court ordered restitution of \$1,000 to Country Inn's owner for the deductible and \$681,600 to Country Inn's insurer for the repair work. The juvenile court further found that the loss amounts submitted by Animal Attractions and its insurer in the victim impact statements sufficiently established the victims' losses to order restitution in the amount requested.

On appeal, A.V. contended that no facts exist to show that he caused the Country Inn fire and that the prosecution failed to meet its burden of proving proximate cause for these claimed losses. Here, A.V. waived his challenge to proximate cause by (1) stipulating to a factual basis in the plea agreement and at the providency hearing; (2) stipulating to pay restitution to the victims of the dismissed counts (in this case the arson count) in the plea agreement; (3) agreeing with the prosecutor before the restitution hearing that A.V.'s stipulated factual bases in all cases included a stipulation to causation; and (4) asking the court to order \$470,874.47 for losses related to the dismissed arson count.

A.V. next contended that the juvenile court erroneously ordered him to pay the estimated

repair costs to Country Inn's insurer, rather than actual costs incurred to date. Here, the prosecution presented competent evidence of the estimated expenses, which A.V. did not rebut. Therefore, the juvenile court did not err.

A.V. also contended that the invoices submitted with Animal Attractions' victim impact statement were insufficient to establish restitution and that the prosecution was required to present witness testimony to satisfy its burden. The restitution statute does not require the prosecution to present evidence in the form of testimony. Here, because the documents support the court's order and A.V. offered no rebuttal evidence, the juvenile court's order was not an abuse of discretion.

A.V. last contended that the juvenile court was required to make specific reasonableness findings before ordering restitution and that \$692,806.20 was not a reasonable amount of restitution to be awarded against an incarcerated juvenile. However, the statute's plain language mandates that the juvenile court order full restitution for the victims' losses, and the juvenile court is not required to make specific reasonableness findings before imposing restitution.

The restitution orders were affirmed.

2018 COA 139. No. 17CA0782. People v. Chavez. Criminal Procedure—Post-Conviction Remedies—Search Warrant—Crim. P. 35—Return of Property—Sentencing—Jurisdiction.

In 2004, the police obtained a warrant to search Chavez's house as part of an investigation and seized evidence they used to charge Chavez in five separate criminal cases, none of which underlie this appeal. In the case underlying this appeal, Chavez pleaded guilty to both sexual assault and kidnapping and was sentenced for those crimes. Three years later, Chavez moved the criminal court for the return of the items seized during the search of his house. The district court denied the motion on the merits.

On appeal, Chavez contended that the district court erred in denying his motion for return of property. The imposition of sentence ends a criminal court's subject matter jurisdiction, with the sole exception of motions brought under Crim. P. 35. Because a motion for return

of property is not authorized by Crim. P. 35, criminal courts do not have jurisdiction over such motions made after sentencing. Thus, the criminal court lacked jurisdiction to address the merits of Chavez's motion.

The order denying Chavez's motion was vacated for lack of jurisdiction.

2018 COA 140. No. 17CA0851. Schulte v. Colorado Department of Revenue. Criminal Law—Motor Vehicle—Express Consent—Blood or Breath Test—Refusal Untimely as a Matter of Law.

Police responded to a report of a car parked in the middle of a field. When an officer arrived, he found Schulte asleep in the car with the engine running. A deputy sheriff contacted Schulte and had him perform voluntary roadside maneuvers. Schulte did not perform the tests like a sober person, so the deputy asked him to submit to a chemical test under Colorado's express consent law. Schulte refused. The deputy later arrested him, drove him to jail, turned him over to booking officers, and drove back to the scene. When the deputy returned to the jail, he completed the license revocation paperwork and began to serve Schulte with the notice of revocation. Before he could do so, Schulte asked to take a blood test. The deputy told him that it was too late. Schulte requested a Division of Motor Vehicles hearing to contest his license revocation. The hearing officer revoked his driving privileges, and the district court upheld the revocation.

On appeal, Schulte contended that the hearing officer and the district court erred when they decided, as a matter of law, that his retraction of his refusal was untimely. Colorado's express consent law requires a driver to cooperate with law enforcement's request to take a blood or breath test. If a licensee refuses to submit to a test, law enforcement must serve a notice of revocation on him or her and then take possession of the driver's license. If a licensee does not offer to retract an initial refusal while the officer remains engaged in requesting or directing the completion of the test, the attempted retraction is untimely as a matter of law. Here, substantial evidence supports the hearing officer's determination

that Schulte did not cooperate with the deputy while the deputy was engaged in requesting or directing the test. The retraction of the refusal was untimely as a matter of law.

The order was affirmed.

2018 COA 141. No. 17CA0991. *Herrera v. Lerma*. Subsequent Accident Jury Instruction—Personal Injury—Negligence—Evidence Relevancy—Voir Dire.

Defendant's truck hit plaintiff's car from behind as she slowed for traffic. A week later plaintiff was diagnosed with neck strain. The following year, plaintiff was involved in a second car accident in which she hit a car from behind. She testified that the second accident did not injure her.

A year later, plaintiff sought additional medical treatment for her neck and lower back. She sued defendant for negligence, claiming damages of \$38,356.46. She was awarded \$1,980.81 by a jury in economic damages and zero on her claims of physical impairment and noneconomic damages.

On appeal, plaintiff argued it was error to instruct the jury to consider whether the second accident worsened any injuries, damages, or losses caused by the first accident because defendant hadn't presented any evidence supporting such an instruction. Here, neither party presented evidence that plaintiff suffered any injury or aggravation of an existing injury because of the second accident, so the evidence was insufficient to justify instructing the jury about the second accident and the trial court abused its discretion. Further, but for the trial court's improper instruction, the jury might have reached a different verdict.

Plaintiff also argued that the trial court erred by excluding her expert's testimony about her 15% permanent whole body impairment rating. Before trial, defendant requested that the court exclude testimony about plaintiff's impairment rating. While it allowed testimony that plaintiff suffered an impairment, the court excluded testimony about the impairment rating as irrelevant under CRE 401 and prejudicial under CRE 403. The Court of Appeals could not discern any reason that the percentage rating of the impairment would not be relevant, and

found reasons why it would be relevant. The Court similarly found no support for the trial court's belief that such testimony would be unfairly prejudicial, confusing, or misleading. The trial court abused its discretion by excluding the testimony.

Plaintiff finally contended that it was error for the trial court to prevent her counsel from asking prospective jurors during voir dire whether they had an interest in defendant's insurance carrier. Counsel was entitled to ask the insurance question during voir dire to determine the biases and prejudices of the prospective jurors, so the trial court abused its discretion.

The judgment was reversed and the case was remanded.

2018 COA 142. No. 17CA1111. *Digital Landscape Inc. v. Media Kings LLC*. Arbitration Clause "Arising Under"—Broad Definition—Attorney Fees.

Media Kings LLC (Media) entered into a contract to provide marketing services to Transcendent Marketing, LLC (Transcendent). Media then contracted with Digital Landscape Inc. (Digital) to provide advertising services to Transcendent. The contract between Media and Digital had an arbitration clause providing that any disputes arising under the agreement would be resolved by binding arbitration. Per the contract, Media agreed to pay Digital a portion of its earnings from Transcendent in exchange for Digital's work on the project. Media failed to pay Digital, and Transcendent proposed that Digital take over the project. Digital's principal officer agreed, but had one of his other companies take over the work. Thus, Media was effectively cut out of its agreement with Transcendent.

Digital sued Media for breach of contract, and as relevant here, Media filed a counterclaim alleging that Digital had breached the implied covenant of good faith and fair dealing. The district court ordered the parties to arbitrate the dispute. The arbitrator awarded Digital \$68,197.41. While discussing the counterclaim, the arbitrator also referred to it as addressing a breach of Digital's duty of loyalty to Media. The arbitrator decided that Digital still owed a duty

of loyalty to Media that it had breached, and she awarded Media damages on the counterclaim. Lastly, finding that there was no prevailing party, she declined to award either party attorney fees. The district court confirmed the order.

On appeal, Digital contended that the arbitrator lacked jurisdiction to consider whether Digital had breached a duty of loyalty to Media because this claim did not "arise under" the arbitration clause. The Court of Appeals analyzed the phrase "arising under" and concluded that it was sufficiently broad to include the duty-of-loyalty counterclaim. Further, the arbitration clause was unrestricted.

Digital further contended that the arbitrator improperly converted the counterclaim alleging breach of implied covenant of good faith and fair dealing to a different one, breach of loyalty, which Media had not raised. It alleged that the ruling on this different claim was unfair and the award to Media was therefore void. The Court found as an initial matter that the arbitrator did not intend to rule on a facially different counterclaim. But even assuming that she had, the different claim was within the issues that the parties had agreed to submit. The arbitrator did not exceed her powers because the substituted counterclaim "arose under" the contract between Digital and Media. Further, the evidence and arguments were encompassed in the breach-of-the-duty-of-good-faith-and-fair-dealing claim. The district court did not err when it confirmed the arbitrator's award.

Finally, Digital argued that the arbitrator exceeded her authority by refusing to award attorney fees because neither party had prevailed. The Court concluded there was clearly no prevailing party, so the arbitrator did not have to award attorney fees.

The judgment was affirmed.

2018 COA 143. No. 17CA1295. *In re Marriage of Durie*. Division of Marital Property—CRCP 16.2(e)(10)—Post-Dissolution Proceeding—CRCP 12(b)(5).

Three years after a decree was entered incorporating a separation agreement dividing the parties' marital property, wife moved under CRCP 16.2(e)(10) to reallocate proceeds from husband's post-decree sale of business assets.

She alleged that husband had failed to disclose facts that materially impacted the value of the parties' business assets. In response, husband filed a motion to dismiss wife's motion. The district court applied the plausibility standard in *Warne and Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–56 (2007), and granted husband's motion to dismiss. Wife moved for attorney fees, but the district court did not rule on her request.

On appeal, wife contended that the district court erred in dismissing her motion. After briefing, but before argument, a division of the Court of Appeals decided *In re Marriage of Runge*, 415 P.3d 884 (Colo.App. 2018), concluding that Rule 12(b)(5) and the *Warne* plausibility standard do not apply to a Rule 16.2(e)(10) motion. The Court agreed with *Runge* and concluded that the district court erred in dismissing wife's motion under that standard.

The Court also rejected husband's argument that CRCP 9(b), which requires that pleadings asserting fraud or mistake must allege the circumstances with particularity, applied in this context. Rule 16(e)(10) does not refer to fraud, but to misstatements or omissions. While some claims not denominated as fraud may be subject to the Rule 9(b) pleading requirements, the Rule 9(b) particularity requirement does not apply to Rule 16.2(e)(10) motions.

The parties also disagreed as to whether a movant under Rule 16.2(e)(10) can make allegations based on information and belief. The Court concluded that Rule 8(e)(1) allows allegations based on information and belief in the context of a Rule 16.2(e)(10) motion, and wife properly included allegations based on information and belief in her motion.

However, wife's allegations here did not enable the district court to conclude that her

motion was sufficient on its face. The Court instructed that (1) given Rule 16.2(e)(10)'s lack of applicable standard for determining a motion under the rule, a preponderance of the evidence standard should apply and the moving party bears the burden of proof; and (2) wife is entitled to undertake discovery in support of her motion.

The Court further concluded that wife is entitled to seek attorney fees under CRS § 14-10-119 on remand, but is not entitled to attorney fees under CRS § 13-17-102. The district court may also award wife appellate attorney fees in its discretion under CRS § 14-10-119.

The order was reversed and the case was remanded.

2018 COA 144. No. 17CA1672. Andres Trucking Co. v. United Fire and Casualty Co. Insurance—Breach of Contract—Statutory Bad Faith Delay—Appraisal.

Andres Trucking Co. (Andres) operated a dump truck that caught fire while it was insured by United Fire and Casualty Co. (United). The parties agreed that the truck was a total loss but disagreed about its value. Ultimately, Andres filed an amended complaint alleging breach of contract and bad faith denial and delay of an insurance claim under CRS §§ 10-3-1115 and -1116 and challenging the enforceability of the contractual appraisal provision. The district court struck the amended complaint on the ground that the insurance policy required an appraisal. Following an appraisal, United paid Andres the truck's appraised value and moved for entry of judgment under CRCP 12(b)(5), contending that as a matter of law the appraisal process had resolved Andres's claims. While this motion was pending, Andres moved to amend its complaint. The district court again denied the motion, reasoning that the appraisal process concluded the issues before the court, and entered judgment for United.

On appeal, Andres argued that the district court erred in dismissing its complaint because the appraisal process did not resolve whether United had breached the insurance policy or unreasonably denied or delayed payment of benefits. The Court concluded that the appraisal process did not determine United's liability for

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breach of contract or statutory bad faith delay. The district court erred in determining that the appraisal precluded Andres from pursuing these claims.

Andres also raised various challenges to the appraisal process itself. The Court rejected the arguments that (1) the appraisal provisions are unconstitutional; (2) United did not properly invoke the appraisal because it never demanded it; and (3) the appraisal process did not result in a binding loss valuation. The appraisal award is a binding determination of the value of the insured property, and thus Andres may not further litigate that issue. The district court did not err in enforcing the appraisal provision.

The Court also determined that the district court did not err in awarding United attorney fees, but it denied United's request for appellate attorney fees.

The order approving the appraisal value was affirmed but the judgment was reversed and the case was remanded for reinstatement of the complaint. The order awarding United costs as the prevailing party was vacated but the order awarding United attorney fees for its response to Andres' motion for clerk's entry of default was affirmed.

2018 COA 145. No. 17CA2147. Dos Almas LLC v. Industrial Claim Appeals Office. *Unemployment Tax—CRS § 8-76-104(1)(a)—Successor Employer.*

Dos Almas LLC began operating a restaurant after it acquired nearly all of the assets of WooPig LLC, which had operated a different restaurant at the same location. After the acquisition, Dos Almas applied for an unemployment compensation insurance account and a determination of employer liability by submitting a form along with a copy of the asset purchase agreement to the Department of Labor and Employment (Department).

A deputy ruled that Dos Almas was a successor employer to WooPig for unemployment compensation tax rate liability purposes because it met the requirements of CRS § 8-76-104(1)(a) due to the acquisition. Dos Almas appealed more than eight months after the applicable 21-day time limit. Nevertheless, a hearing officer ruled that good cause was shown for the delay, and

following a hearing the officer found that Dos Almas was not a successor entity to WooPig under the statutory criteria largely because it did not retain the employees as part of the asset sale. A panel of the Industrial Claim Appeals Office (the Panel) reversed. The Panel upheld the factual findings, but based on Dos Almas having acquired 90% of WooPig's physical and intangible assets, ruled that it had acquired substantially all of WooPig's assets and thereby met the statutory criteria to be considered a successor employer for unemployment compensation tax rate liability purposes.

On appeal, Dos Almas contended that the Panel erred in ruling that it is a successor to WooPig for unemployment tax rate liability purposes. The hearing officer's factual findings support the conclusion that Dos Almas is a successor employer to WooPig for unemployment compensation tax rate liability purposes

under the applicable statutory criteria in CRS § 8-76-104(1)(a). Further, the lack of employee retention in the asset purchase transaction is irrelevant to the successor issues in this case. The Panel did not err.

The order was affirmed. 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.

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