COLORADO LEGAL DIGEST

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A Compilation of case summaries affecting the litigation defense community from 2021 through June, 2022.

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APPEAL

LHM Corp. v. Martinez- *Finality of Judgement and appeal* - 2021CO78 (12/13/21). The Supreme Court considers whether a judgment is final for purposes of appeal when the district court has determined that a plaintiff who prevails on a claim under the Colorado Consumer Protection Act is entitled to an award of attorney fees but has not yet determined the amount of those fees. The supreme court reaffirms the bright-line rule adopted in *Baldwin v. Bright Mortgage Co.,* 757 P.2d 1072 (Colo. 1988), and holds that a judgment on the merits is final for purposes of appeal notwithstanding an unresolved issue of attorney fees. In so doing, the court overrules *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993), and the cases that followed it to the extent those cases deviated from Baldwin's bright-line rule.

APPRAISAL

Owners Insurance Co. v. Dakota Station II Condominium Ass'n, Inc. – *In the second Dakota station appeal, the Court of Appeals affirms trial court order vacating appraisal* - 2021 COA 114 (8/26/21). Dakota Station II Condominium Association, Inc. represents the owners of a 49-building residential property. It filed two claims with its insurer, Owners Insurance Co., after the property sustained storm damage. The parties couldn't agree on the amount of the damage, so Dakota invoked the appraisal provision in its insurance policy. Dakota hired Benglen to serve as its public adjuster to handle the claims, and Benglen retained Haber initially as a policy and damage expert and later as Dakota's appraiser. In accordance with the appraisal procedure, the parties' respective appraisers submitted their estimates, and the umpire issued an award adopting some estimates from each appraiser. Owners later filed a motion to vacate the appraisal award, alleging, among other things, that Haber wasn't impartial as required by the policy. Ultimately, the Supreme Court heard the case and remanded it to determine whether Haber was impartial as required by the policy. The trial court then issued new findings and conclusions finding that Haber wasn't impartial and vacated the award. On appeal, Dakota contended that the remand court failed to follow the law of the case in its proceedings on remand, a contention rejected by the Supreme Court as the remand court wasn't prohibited from reconsidering the prior factual findings on remand. Dakota also argued that the remand court applied the wrong legal standard when it vacated the appraisal award. However, the Dakota's policy unambiguously required that, for an appraisal award to be binding on the parties, it must be agreed to by an umpire and a competent impartial appraisal or two competent impartial appraisers. Here, the award was signed by the umpire and Haber, who was determined by the remand court not to be impartial, so the award was not binding. Thus, the remand court did not err by vacating the award.

Reeves, et al. v. Enterprise Products Partners - *Another 'compelling arbitration' decision – substantially interdependent misconduct claims are to be compelled* - Docket: 20-5020 (11/9/21). Plaintiffs-appellees Darrell Reeves and James King worked as welding inspectors for Enterprise Products Partners through third party staffing companies, Cypress Environmental Management

and Kestrel Field Services. Reeves brought a collective action claim to recover unpaid overtime wages under the Fair Labor Standards Act. King later consented to join the putative collective action and was added as a named plaintiff. Enterprise argued that both Reeves and King signed employment contracts with their respective staffing companies that contained arbitration clauses for disputes. The Tenth Circuit found that indeed both plaintiffs' respective contracts contained arbitration clauses, and that under the doctrine of equitable estoppel, these agreements require the claims to be resolved in arbitration. "Because Reeves and James's claims allege substantially interdependent and concerted misconduct by Enterprise and non-defendant signatories, Cypress and Kestrel, arbitration should be compelled for these claims." The Court reversed the district court's denial of Enterprise's motions to compel.

BAD FAITH

Hall v. Allstate Fire – *Tenth Circuit affirms summary judgement on bad faith case due to insured's failure to cooperate* - No. 21-1040 (10th Cir. 2021). Plaintiff-Appellant Neil Hall appealed the district court's grant of summary judgment in favor of Defendant-Appellee Allstate Fire and Casualty Insurance Company on his claim for underinsured motorist benefits due to his failure to cooperate. Hall was injured in a car accident caused by underinsured motorist Teri Johnson. Johnson only carried $25,000 in liability insurance coverage. Hall carried underinsured motorist coverage through Allstate. Allstate gave Hall permission to settle with Johnson for her $25,000 limit. Hall's counsel submitted a request for benefits to Allstate asserting that he was entitled to more than the $25,000 he had received. An Allstate claims adjuster reviewed the medical expenses in the letter and determined that the reasonable amount of expenses was $25,011.68. Allstate sent Hall's counsel a payment of $11.68 along with a letter that stated: "I will be in contact with you to resolve the remaining components of your client's claim." Counsel did not respond to any of the five attempts over three months: two voicemails and three letters. Without any prior notice to Allstate, Hall filed suit against Allstate for breach of contract, statutory unreasonable delay, or denial of payment of benefits, and common law bad faith. The district court dismissed for failure to cooperate. The Tenth Circuit affirmed, finding that because the insured's failure to cooperate resulted in a material and substantial disadvantage to the insurer, the insurer properly denied coverage on this ground.

Skillett v. Allstate Fire and Casualty Insurance Co. – *Supreme Court holds that statute does not permit claim against adjuster personally* - 2022 CO 12 (03/14/22). The Supreme Court was asked to decide whether an action for unreasonably delayed or denied insurance benefits under CRS §§ 10-3-1115 to -1116 may proceed against an individual claims adjuster. The Court concluded that, given the plain language of CRS §§ 10-3-1115 to -1116—read in context and in their entirety—an action for unreasonably delayed or denied insurance benefits proceeds only against an insurer, not an individual adjuster.

COLLATERAL SOURCE/MEDICAID/OFFSET

Harvey v. Centura - 2021 CO 65, and **Manzanares v. Centura** – *Supreme Court requires hospitals to bill Medicare prior to filing lien* (9/13/21). These cases analyzed the interplay between Colorado's hospital lien statute and the Medicare Secondary Payer statute. Specifically, the court was asked to decide whether, under Colorado's Lien Statute, a hospital must bill Medicare before it can file a lien against a patient who has been injured in an accident and whose primary health insurance is provided by Medicare. The Court concluded that when Medicare is a patient's primary health insurer, the Lien Statute requires a hospital to bill Medicare for the medical services provided to the patient before asserting a lien against that patient. The Court held that this distinction reflects the legislature's intent to protect insureds from abusive liens, finding support in the language of the Lien Statute, which distinguishes between "the property and casualty insurer," on the one hand, and "the primary medical payer of benefits," on the other.

COMMON OWNERSHIP ACT

Accetta v Brooks Towers Condominium Ass'n, Inc. — *Court holds attorney's fees awardable to prevailing party in CCIOA case* - 2021COA147 (12/09/21). A July 2021 decision [2021 COA 87] by another division of the court of appeals concluded that section 38-33.3-118 provides the exclusive means for a common interest community association that existed before the effective date of the CCIOA to elect to be governed by the entirety of CCIOA. In this challenge to the attorney fees and costs awarded in the merits litigation, the majority concluded that section 38-33.3-123(1)(c)— which requires a court to award reasonable attorney fees and costs to the prevailing party "[i]n any civil action to enforce or defend the provisions of [CCIOA] or of the declaration, bylaws, articles, or rules and regulations" — applies to a civil action concerning a common interest declaration that predates CCIOA as provided in section 38-33.3-117(1)(g). Accordingly, the division concluded that defendants are entitled to recover their attorney fees, including those incurred in this appeal, and remands the case to the trial court to determine the amount of such fees and award them to defendants. Judge Welling dissented.

C & C Inv. v. Hummel – *HOA must make good faith effort to notify homeowner of foreclosure sale* - 2022COA42 (04/14/22). The Court of Appeals considered whether, before proceeding with a foreclosure sale, a homeowner's association, is constitutionally required to do more than serve notice by mailing and publication. Applying the reasoning of *Jones v. Flowers*, 547 U.S. 220 (2006), the Court concluded that due process required homeowner's associations to make a good faith, rather than highly technical, effort to effectuate actual notice to a homeowner before foreclosing on their property. When, as in this case, a homeowner's association does not take steps reasonably calculated to serve an owner with actual notice before proceeding with a foreclosure, the trial court does not have jurisdiction, and any resulting judgment, sheriff's sale, and confirmation deed are void *ab initio.*

CONSTRUCTION

Johnson v. MEP Engineering — *Limitation of liability clauses not void when ambiguous* - 2021COA125 (9/23/21). Johnson Nathan Strohe, P.C. (architect) designed a building and contracted with MEP Engineering, Inc. (engineer) to provide mechanical, plumbing, and electrical engineering services for the building. The contract contained a clause limiting the engineer's liability to $2,000 or twice the engineer's fee, whichever was greater. The architect alleged that as the building was nearing completion and the engineer was close to completing its work, the owner and architect discovered substantial problems with the building's heating and hot water systems. The architect also alleged that the engineer admitted it erred and then designed and implemented repairs. Additional problems were subsequently discovered, and the architect hired another firm for those repairs. The building owner initiated an arbitration proceeding against the architect regarding the heating and hot water systems, and the arbitrator awarded the owner $1.2 million in damages. The architect then sued the engineer for negligence and moved under CRCP 56(h) for a legal determination of the validity of the limitation of liability provision, claiming it was too vague and ambiguous to be enforceable. The district court found the provision unambiguous and enforceable. On appeal, the architect argued that the district court erred by concluding that the limitation of liability provision was clear and unambiguous and because the liability limitation clause was ambiguous, it was void. The Court of Appeals agreed the clause was ambiguous, but also held that a limitation of liability in a commercial contract is not void merely because it is ambiguous. Rather, like other ambiguous contract provisions, the meaning of the ambiguous clause is a question of fact that courts must determine using ordinary methods of contract interpretation.

CONSTITUTIONAL LAW/CIVIL RIGHTS

North Mill Street v. City of Aspen, et al. – *No taking until final zoning decision on development laws is made* - Docket: 20-1130 (7/27/21). North Mill Street, LLC ("NMS") owned commercial property in Aspen, Colorado. It sued the City of Aspen and the Aspen City Council in federal court, alleging the City's changes to Aspen's zoning laws and denial of a rezoning application caused a regulatory taking of NMS's property without just compensation in violation of the Takings Clause of the Fifth Amendment. The district court concluded NMS's action was not ripe under Article III of the Constitution because NMS did not obtain a final decision from the City on how the property could be developed. The court thus dismissed the case for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Finding no reversible error in that judgment, the Tenth Circuit affirmed.

Duda, et al. v. Elder – *Political firing is actionable under §1983* - Docket: 20-1416 (7/27/21). The elected Sheriff of El Paso County, Colorado, and head of the El Paso County Sheriff's Office fired Keith Duda, a patrol sergeant. Duda believed he was fired for supporting candidate Mike Angley, who challenged Sheriff Elder's reelection bid, and for giving an interview to a local newspaper about sexual harassment and other misconduct at the EPSO. Duda brought First

Amendment retaliation claims under 42 U.S.C. § 1983. At summary judgment, the district court denied qualified immunity to Sheriff Elder. After review, the Tenth Circuit affirmed the district court's denial of qualified immunity to Sheriff Elder on Duda's Angley speech claim. The district court did not err in finding a constitutional violation. On the reporting claim, Sheriff Elder did not contest there was a constitutional violation. Instead, he argued no law clearly established it was unconstitutional to terminate Duda for the reporting speech, contending the district court incorrectly relied on *Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989). The Tenth Circuit affirmed the district court because *Wulf* was substantially similar to the facts of this case. "Under *Wulf*, it was 'sufficiently clear that every reasonable official [in Sheriff Elder's position] would have understood' that firing Mr. Duda based on his speech reporting misconduct at EPSO to The Independent was unconstitutional."

Tudor, et al. v. Southeastern OK St. University, et al. – *Court reverses Title VII case due to trial court errors on remedies* - Docket: 18-6102 (9/13/21). Dr. Rachel Tudor sued her former employer, Southeastern Oklahoma State University, under Title VII, claiming discrimination on the basis of sex, retaliation, and a hostile work environment after Southeastern denied her tenure, denied her the opportunity to reapply for tenure, and ultimately terminated her from the university. A jury found in favor of Dr. Tudor on her discrimination and retaliation claims and awarded her damages. The district court then applied the Title VII statutory cap to reduce the jury's award, denied Dr. Tudor reinstatement, and awarded front pay. Both Dr. Tudor and the University appealed: Southeastern challenged certain evidentiary rulings and the jury verdict; Dr. Tudor challenged several of the court's post-verdict rulings, the district court's denial of reinstatement, the calculation of front pay, and the application of the statutory damages cap. After review, the Tenth Circuit rejected Southeastern's challenges. Regarding Dr. Tudor's appeal however, the Court held that there was error both in denying reinstatement and in calculating front pay, although there was no error in applying the Title VII damages cap.

Thompson v. Ragland – *Encouraging negative feedback about professors is a protected speech* - Docket: 21-1143 (01/26/22). Metropolitan State University of Denver student Rowan Thompson had a classroom dispute with her chemistry professor that ultimately prompted Thompson to drop the professor's class. But when Thompson emailed her former classmates to express her displeasure with the professor and to suggest that her classmates leave "honest" end-of-term evaluations, Thomas Ragland, MSU's Associate Director for Student Conduct, allegedly prohibited Thompson from further contacting the professor or even discussing the professor with any students taking any of the professor's classes. Thompson sued Ragland under 42 U.S.C. 1983, arguing that he violated her First Amendment right to freedom of speech. The district court dismissed the complaint for failure to state a claim, holding that Ragland had not violated clearly established law and therefore was entitled to qualified immunity. The Tenth Circuit disagreed and reversed. "Because one can infer from the allegations in the complaint that there was no proper justification for Ragland's actions, the complaint states a violation of clearly established law governing the regulation of student speech."

Litzsinger v. Adams County Coroner's Office – *Adams County coroner's dismissal found not pretextual as a matter of law* - Docket: 21-1106 (02/15/22). Plaintiff-appellant Tiffany Litzsinger worked for the Adams County Coroner's Office from 2013 until she was terminated in 2018. During her time there, Litzsinger suffered from anxiety and depression, both of which worsened in the months leading up to her termination. After an anxiety episode, Adams County granted Litzsinger temporary leave under the Family and Medical Leave Act. When Litzsinger returned from her FMLA leave, the Coroner placed Litzsinger on probation for myriad violations of workplace policies. Shortly after Litzsinger's probation began, the Coroner terminated Litzsinger for violating the terms of her probation. Litzsinger sued the Coroner's Office under the FMLA and Americans with Disabilities Act, claiming the Coroner terminated her in retaliation for exercising her rights under both statutes. The district court granted summary judgment for the Coroner's Office because Litzsinger failed to demonstrate that the Coroner's reason for terminating her was pretextual. The Tenth Circuit affirmed, finding a rational jury could not find that the Coroner's proffered reason for firing Litzsinger was pretextual.

Heard v. Dulayev, et al. - Docket: 19-1461 (10th Cir. 03/29/22). Plaintiff-appellee Gregory Heard sued Denver Police Officer Greg Dulayev and the City and County of Denver pursuant to 42 U.S.C. 1983. Heard claimed Dulayev used excessive force in violation of the Fourth Amendment during an event that took place in June 2016. Heard further claimed this alleged constitutional violation was a foreseeable consequence of the City's alleged failure to train, supervise, and discipline its employees, including Dulayev, with respect to the use of force. As to the substance of the appeal, the Court held Heard failed to show Dulayev's use of the Taser violated a constitutional right clearly established at the time where Dulayev had ordered Heard to crawl, threatened to use his Taser, and repeatedly ordered Heard to stop, but where Heard still continued to approach Dulayev. The district court's denial of summary judgment as to Dulayev was reversed, and that issue was remanded with instructions to grant Dulayev qualified immunity and for entry of judgment in Dulayev's favor.

Doe v. University of Denver — *Student discipline case* - 2022COA57A. The University of Denver initiated an investigation in 2016 into a first-year student, named in court documents as John Doe, after another student, named in documents as Jane Roe, made a complaint to the school's Office of Equal Opportunity alleging Doe had sex with her without her consent. The Office of Equal Opportunity gave Doe a copy of its procedures, a standard practice, that explained the process after a complaint is made. DU's procedures require an impartial investigator be assigned to the complaint who writes a report at the end of the investigation summarizing the information gathered, where witnesses agree and where they don't. Both parties are given the opportunity to review the report to offer any additional comments or information. After that step, the investigator is to decide if there's a preponderance of evidence that a violation happened, including a determination of responsibility. A violation with a determination of responsibility is then handed off to DU's Outcome Council which decides, based on an impartial review of the report, if any sanctions need to be taken. The investigator assigned to Doe and Roe's case and concluded, "it is

more likely than not that [Doe] engaged in non-consensual sexual contact with [Roe] on the morning in question." DU's Outcome Council decided dismissal from the school was appropriate and Doe was immediately expelled. Doe unsuccessfully appealed the decision to DU and then filed a lawsuit in federal court claiming the investigation and ruling violated his Title IX rights and broke state laws for breach of contract, breach of good faith and fair dealing, promissory estoppel, and negligence. A federal court granted summary judgment in favor of DU, but the 10th Circuit later reversed and remanded the decision, finding that the facts of the case were too disputed to grant summary judgment and there were inconsistencies and deficiencies in DU's investigation. Doe raised the state claims in Denver District Court. The court granted summary judgment in favor of DU and held that DU's promise of a "thorough, impartial and fair" investigation was too vague to be enforced for his contract claims. It added that DU didn't have an extra-contractual duty to "non-negligently investigate claims of sexual assault by one student against another." On appeal, Doe reraised his state claims, except the promissory estoppel, and asked the Colorado Court of Appeals to decide if the OEO procedures are definite enough to be enforceable and if a private educational institute has any tort duties to its students to investigate and punish claims of sexual misconduct by students. The Colorado Court of Appeals found that while the OEO procedural documents didn't define the words "thorough," "impartial" or "fair," its investigation requirements allow an understanding of the contract's intent and terms. Together, the court ruled, "the contractual term providing for a 'thorough, impartial and fair' investigation, coupled with the prescribed investigation requirements, is sufficiently definite and certain to be enforced under Colorado contract law." The Court of Appeals further ruled that the material facts of the case weren't sufficient for the lower court to grant summary judgment. Like the 10th Circuit Court of Appeals' holding, the Colorado Court of Appeals found inconsistencies and gaps in DU's investigation that could affect all of Doe's state law claims. The court also rejected the holding that DU didn't owe Doe a duty of care to investigate the claims of sexual assault. Relying on precedent, the Court of Appeals analyzed four questions to understand if DU had a duty of care. First, what was the risk in the defendant's conduct? Second, what's the likelihood of injury weighed against the conduct? Third, what's the burden of protection from injury? And finally, what are the consequences of placing the burden on the defendant? The Court of Appeals looked at each factor and found that the risk in investigating sexual misconduct claims is significant. The Court of Appeals held DU has a duty of care of investigating claims of sexual assault fairly and properly.

CONSUMER PROTECTION

Colorado v. Center for Excellence in Higher Education, Inc. – *Multiple holdings in State suit against for profit college* - 2021 COA 117 (8/26/21). CollegeAmerica advertised its college degree program on television, on the radio, and in print. In December 2014, the attorney general and the administrator of the Uniform Consumer Credit Code sued the corporate entities and the individuals that made up CollegeAmerica's Colorado operation. The complaint alleged that CollegeAmerica's efforts to recruit consumers and enroll them as CollegeAmerica students

violated the Colorado Consumer Protection Act (CCPA) and the Colorado Uniform Consumer Credit Code (UCCC). The court decided that all the named defendants were jointly and severally liable for violating the CCPA. It ordered them to pay $3 million in civil penalties; issued injunctions against CollegeAmerica under both the CCPA and UCCC; denied the AG's request that CollegeAmerica pay back every dollar that its Colorado consumers had ever paid on tuition and for fees; and determined that CollegeAmerica's loan program, EduPlan, was not unconscionable. While the court construed this section too narrowly, its factual findings were supported by the record, and based on those findings, the AG did not prove that all EduPlan loans were either substantively or procedurally unconscionable.

Dream Finders Homes v. Weyerhaeuser NR —*Sophisticated buyer limited to contractual warranty claims* - 2021COA143 (12/2/21). The Court of Appeals considered whether sophisticated buyers of a defective product, who received a warranty from the manufacturer of the product, may assert tort claims based on the manufacturer's alleged misrepresentations about the product and failure to disclose the defect, even though the buyers received the remedy specified in the warranty and the warranty expressly excluded the very type of damages the buyers seek to recover through their tort claims. The Court held that the economic loss rule bars the buyers from asserting such tort claims because the manufacturer did not owe the buyers a duty of care under tort law independent of its contractual duties. The Court also held that the economic loss rule does not generally bar private rights of action under the Colorado Consumer Protection Act.

CONTRACT

Gravina v. Frederiksen — *Existence of contract does not obviate equitable remedies in case of breach* - 2022COA50A (05/05/22). The Frederiksens contracted with Gravina Siding and Windows Co. to replace their home's cedar siding with steel siding for $42,116. Plaintiffs put down a $10,000 deposit toward the contract price. The work was to commence within 10 and 14 weeks after the contract was signed and was estimated to take up to four weeks to complete. Four and a half months after work began, and before the work was completed, Gravina Co. requested final payment on the outstanding contract balance. Plaintiffs terminated the contract and denied Gravina Co. further access to their property. Gravina Co. sued, alleging breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The Frederiksens answered and counterclaimed against Gravina Co., its owner, and two of its employees. Gravina moved to dismiss, and the trial court dismissed all claims except the breach of contract claim against Gravina and the negligent supervision claim against the three individual third-party defendants. The trial court found that Gravina had materially breached the contract and the Frederiksens had properly terminated it, and it awarded Gravina a net judgment of $19,000 on its unjust enrichment claim. The court rejected the negligent supervision claim and request for attorney fees. The Court of Appeals found the trial court did not err in determining that Gravina breached the contract's material terms and the Frederiksens were entitled to terminate the contract and recover actual damages. The Frederiksens contended that it was error for the trial court to allow Gravina to

recover under an unjust enrichment theory because there was a contract. However, the Court of Appeals held that where a contract exists that does not provide explicitly for remedies with respect to a default at issue, a breaching party may recover for the other party's unjust enrichment. The Frederiksens received a benefit from installation of siding on a portion of their home. Therefore, Gravina was entitled to pursue the unjust enrichment claim. Lastly, the Frederiksens contended that the trial court erred by denying their request for attorney fees. Given the manner in which the issues were resolved here, neither party was found entitled to an award of attorney fees and costs incurred on appeal.

COVERAGE

BonBeck Parker, et al. v. Travelers Indemnity – *Tenth Circuit holds policy language permits appraisers to resolve causation disputes* - No. 20-1192 (10th Cir. 2021). The issue on appeal in this case stemmed from an insurance claim filed by Bonbeck Parker, LLC and BonBeck HL, LLC for hail damage. The Travelers acknowledged that some of the claimed damage to BonBeck's property was caused by a covered hailstorm, but argued the remaining damage was caused by uncovered events such as wear and tear. BonBeck requested an appraisal to determine how much damage occurred, but Travelers refused this request unless BonBeck agreed the appraisers would not decide whether the hailstorm in fact caused the disputed damage. When BonBeck rejected this condition, Travelers filed suit, seeking a declaration that the appraisal procedure in BonBeck's policy did not allow appraisers to decide the causation issue. The district court disagreed, ruling that the relevant policy language allowed appraisers to decide causation. After the appraisal occurred, the district court granted summary judgment to BonBeck on its breach of contract counterclaim, concluding that Travelers breached the policy's appraisal provision. Travelers appealed. Applying Colorado law, the Tenth Circuit Court of Appeals affirmed: the disputed policy provision allowed either party to request an appraisal on "the amount of loss," a phrase with an ordinary meaning in the insurance context that unambiguously encompassed causation disputes like the one here. "And contrary to Travelers' view, giving effect to this meaning aligns both with other related policy language and with the appraisal provision's purpose of avoiding costly litigation. For these reasons, the district court appropriately allowed the appraisers to resolve the parties' causation dispute and granted summary judgment for BonBeck on its breach of contract claim."

Goodwill Industries Central v. Philadelphia Indemnity – *Tenth Circuit denies COVID coverage claim* - No. 21-6045 (10th Cir. 2021). Goodwill Industries of Central Oklahoma, Inc., suspended operations of its retail stores and donations centers on March 25, 2020, to comply with state and local orders regarding the COVID-19 pandemic. After suffering losses due to the shutdown, Goodwill sued its insurer, Philadelphia Indemnity Insurance Company, under its commercial lines policy. The policy provided coverage for "loss of Business Income" when the insured must suspend its operations due to "direct physical loss of or damage to" covered property.

The district court granted Philadelphia's motion to dismiss, concluding the policy did not cover Goodwill's loss and that the policy's Virus Exclusion barred coverage. The Tenth Circuit affirmed.

Gregory v. Safeco Ins. Co. of America - *Court of Appeals declines to extend notice-prejudice rule to residential property claims* - 2022COA45 (4/21/22). The Court of Appeals considered whether Colorado's notice-prejudice rule applies to a notice-of-loss provision in a homeowners' insurance policy. This rule excuses an insured's late filing of a claim when the insurer is unable to demonstrate that its interests were prejudiced by the late notice. Concluding that the Supreme Court has not yet extended the notice-prejudice rule to first-party claims under homeowners' policies — or authorized the court of appeals to do so — the Court instead determined the older, traditional rule still applied to such policies. The Court also considered whether a provision of an insurance policy requiring an insurer to give notice within 365 days of a covered loss is invalid under section 10-4-110.8(12)(a), of the Colorado Homeowner's Reform Act of 2013. This provision provides that homeowners may still file suit against their insurer within the applicable statute of limitations notwithstanding any provision in their insurance policy that requires homeowners to file suit within a shorter time period. The division concluded that the 365-day notice provision in question does not contravene this statute as it did not effectively shorten the statute of limitations period, but rather defines a circumstance in which an insured breaches the contract and forfeits entitlement to coverage benefits for an otherwise covered loss.

Hughes v Essentia Ins. — *Court of Appeals voids policy provision limiting UM/UIM coverage* - 2022COA49 (05/05/22). Plaintiff insured two classic cars under an automobile insurance policy with Essentia Insurance Company. As a condition of this insurance, plaintiff was required to have and separately insure a "regular use vehicle." The policy explicitly excepted regular use vehicles from its UM/UIM coverage. Plaintiff was driving her regular use vehicle when she was injured in a car accident. She sought to recover UM/UIM benefits under the policy, but defendant denied coverage because she wasn't using one of the classic cars at the time of the accident. Plaintiff sued. The trial court concluded that the policy's regular use vehicle exclusion adhered to CRS § 10-4-609 because plaintiff was protected through her regular use vehicle insurance policy, and it granted summary motion. On appeal, the Court of Appeals held that under DeHerrera v. Sentry Insurance Co., 30 P.3d 167 (Colo. 2001), UM/UIM benefits cover persons injured by uninsured or underinsured motorists and can't be tied to the occupancy of a certain vehicle. Accordingly, it held plaintiff was entitled to recover UM/UIM benefits under the policy.

DAMAGES

Hodge v. Matrix Group – *Court of Appeals holds lost profit of S Corp may support lost earning claim* - 2022COA4 (01/07/22). The Court of Appeals asked to decide, as a matter of first

impression in Colorado, whether the sole owner of an S corporation may offer evidence of the corporation's lost profits to support his claim of lost earning capacity in a personal injury lawsuit. The Court concluded that when, as here, the corporation's profits are attributable to its owner's personal services rather than invested capital and the labor of others, the jury may properly consider the corporation's lost profits as evidence of its owner's loss of earning capacity. The Court further rejected the defendants' argument that the district court erred by admitting evidence of corporate profits without "a judicial finding" that the owner and the S corporation are "one and the same." Finally, the Court concluded that the district court did not abuse its discretion by denying the defendants' request to exclude evidence of lost profits as a sanction for late disclosure.

Pisano v. Manning — *Court of Appeals interprets noneconomic damages statute exception as requiring 'exceptional circumstances'* - 2022COA22 (02/17/22). A jury awarded plaintiff approximately $1.5 million in noneconomic damages incurred in connection with a traffic accident caused by defendant. The damages cap [section 13-21-102.5(3)(a)] states any award of noneconomic damages "shall not exceed" $468,010, unless the court "finds justification by clear and convincing evidence therefor," in which case the court may award up to $936,030. Plaintiff argued she was entitled that the $936,030 amount. The trial court disagreed and the COA affirmed. Plaintiff's argument was that the statute limits the trial court inquiry under the statute to determining whether the jury's award of noneconomic damages was supported by clear and convincing evidence. In rejecting that argument, the division stated that what must be supported by clear and convincing evidence is the trial court's justification for exceeding the statutory cap. In determining whether a justification exists, the court could properly consider whether plaintiff's injuries amounted to "exceptional circumstances." Here, however, the division concluded that the record supports the trial court's determination that the circumstances of the case were not exceptional.

DEFAULT JUDGMENT

Garcia v. Puerto Vallarta Sports Bar, LLC — *Court of Appeals permits correcting spelling of defaulted defendant name after default* - 2022COA17 (02/20/22) The Court of Appeals holds that (1) a court may correct the spelling of a defendant's name after entering a default judgment, and that doing so does not change the party against which the default judgment was entered; and (2) a defendant waives a challenge to a default judgment based on insufficiency of service of process by (a) waiting until after entry of default judgment to make that challenge, knowing of the case from the outset; or (b) failing to make that challenge in its initial effort to set aside the judgment.

EMPLOYMENT

Edmonds-Radford v. Southwest Airlines – *ADA claim fails due to proof that disability was determining factor in termination* - Docket: 20-1132 (/16/21). Defendant-Appellee Southwest Airlines graded its new hires based on two overarching categories of criteria: Attitude and Aptitude. By all accounts, Plaintiff-appellant Krista Edmonds-Radford had the necessary Attitude for her position as a Southwest Customer Service Agent. Unfortunately, she failed to exhibit the necessary Aptitude, and Southwest terminated her for failing to meet expectations. That termination led to this disability-based lawsuit, in which Edmonds-Radford sued Southwest for disparate treatment, failure to accommodate, and retaliation under the Americans with Disabilities Act and the Rehabilitation Act. The district court granted summary judgment in favor of Southwest on all claims, and Edmonds-Radford appealed. After review, the Tenth Circuit determined: (1) Edmonds-Radford failed to establish her prima facie case or that Southwest's proffered reason for her termination was pretextual; (2) Edmonds-Radford failed to present evidence she requested any accommodations in connection with her disability (in any event, Southwest provided all requested accommodations); and (3) because there was no proof she made any disability-based accommodation requests, Edmonds-Radford's retaliation claim based on such requests was doomed.

Johnson v. CSA — *Split decision on whether Board can arrive at a different conclusion of law utilizing hearing officer findings of fact* - 2021COA135 (11/04/21). The Career Service Personnel System established by Denver's City Charter authorizes the Career Service Authority Board to promulgate the Denver Career Service Rules (CSR) specifying the grounds for discipline and the disciplinary process for City and County of Denver employees. The court of appeals was asked to interpret the CSR governing the Board's review of a hearing officer's decision. The majority concluded that the Board has authority to (1) come to a different ultimate conclusion of law based on the same existing facts without running afoul of CSR 21-21(D) (insufficient evidence); and (2) reverse a hearing officer's decision that would establish precedent beyond the existing appeal under CSR 21-21(C) (policy-setting precedent). Under the CSR, either singularly or in combination, the division affirms the Board's reversal of the hearing officer's decision. The dissent concluded that the Board reversibly erred by misconstruing the hearing officer's evidentiary factual findings as ultimate facts that the Board could set aside. The dissent also directed attention to the need for clarity in the distinction between evidentiary facts and ultimate facts. See *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1245 (Colo. 2001) (recognizing that the distinction between evidentiary facts and ultimate conclusions of fact is not always clear).

Peterson v. Nelnet Diversified Solutions - *10th Circuit greenlight call center representatives claim for pay during time devoted to booting up work computers prior to clocking in* - Docket: 19-1348 (10/8/21). Over 300 call-center representatives (CCRs) who worked at call centers operated by Nelnet Diversified Solutions, LLC alleged Nelnet failed to pay them for time devoted to booting up their work computers and launching certain software before they clock in. The district court

concluded these activities were integral and indispensable to the CCRs' principal activities of servicing student loans by communicating and interacting with borrowers over the phone and by email and therefore constitute compensable work under the Fair Labor Standards Act (FLSA) of 1938. But it nevertheless denied the CCRs' claim, finding that the de minimis doctrine applied to excuse Nelnet's obligation to pay the CCRs for this work. After granting summary judgment to Nelnet, the district court awarded costs to Nelnet as the prevailing party. The CCRs appealed the district court's de minimis ruling, and separately appealed the district court's order awarding prevailing-party costs to Nelnet. The Tenth Circuit agreed with the district court that the CCRs' preshift activities were compensable work under the FLSA. But its application of the three-factor de minimis doctrine led it to a different result: the Tenth Circuit concluded that although the CCRs' individual and total aggregate claims were relatively small, Nelnet failed to establish the practical administrative difficulty of estimating the time at issue, which occurred with "exceeding regularity." Therefore, the district court's order awarding summary judgment to Nelnet was reversed. And because the Court reversed on the merits, Nelnet was no longer the prevailing party so the order awarding costs to Nelnet was reversed, and CCR's costs appeal was dismissed as moot.

EXPERTS

People v. Cooper – *Court gives guidelines to try and provide limits on expert testimony* - 2021 CO 69 (9/27/21). The Supreme Court tries to clarify the mess created by earlier holdings. Having waded too deeply into the tar pit of Rule 702, the Supreme Court tries to extricate itself by holding that before expert testimony is admitted into evidence, a trial court must find that it would be helpful to the jury. Whether expert testimony is helpful to the jury hinges on the "fit"—the expert testimony must fit the case. The Court held that generalized expert testimony fits a case if it has a sufficient logical connection to the factual issues to be helpful to the jury while still clearing the ever-present CRE 403 admissibility bar. In evaluating the fit of generalized expert testimony, a trial court must be mindful of the purposes for which such testimony is offered—that is, the reasons why the proponent of the evidence has asked the expert to educate the jury about certain concepts or principles. The Supreme Court held that the fit need not be perfect. Because of this, the Court stated that it is almost inevitable that parts of such testimony will not be logically connected to the case. If the generalized expert testimony's logical connection to the factual issues is sufficient to be helpful to the jury without running afoul of CRE 403, the Supreme Court was satisfied that the testimony fits the case. It did admonish everyone, though, that attorneys and trial courts to do their best to avoid introducing generalized expert testimony where the testimony has no logical connection to the case facts. *[This obviously will work well in an adversarial system. This demonstrates the need for trial attorneys on the appellate bench].* Trial courts, in turn, should exercise their discretion in deciding whether to permit all, some, or none of the proffered testimony under the fit standard articulated here. **CDLA members need to encourage Colorado to adopt changes to Rule 702 consistent with amendments proposed and nearing adoption by the federal courts.**

EVIDENCE

People v. Cooper – *Court gives guidelines to try and provide limits on expert testimony* - 2021 CO 69 (9/27/21). The Supreme Court tries to clarify the mess created by earlier holdings. Having waded too deeply into the tar pit of Rule 702, the Supreme Court tries to extricate itself by holding that before expert testimony is admitted into evidence, a trial court must find that it would be helpful to the jury. Whether expert testimony is helpful to the jury hinges on the "fit"—the expert testimony must fit the case. The Court held that generalized expert testimony fits a case if it has a sufficient logical connection to the factual issues to be helpful to the jury while still clearing the ever-present CRE 403 admissibility bar. In evaluating the fit of generalized expert testimony, a trial court must be mindful of the purposes for which such testimony is offered—that is, the reasons why the proponent of the evidence has asked the expert to educate the jury about certain concepts or principles. The Supreme Court held that the fit need not be perfect. Because of this, the Court stated that it is almost inevitable that parts of such testimony will not be logically connected to the case. If the generalized expert testimony's logical connection to the factual issues is sufficient to be helpful to the jury without running afoul of CRE 403, the Supreme Court was satisfied that the testimony fits the case. It did admonish everyone, though, that attorneys and trial courts to do their best to avoid introducing generalized expert testimony where the testimony has no logical connection to the case facts. *[This obviously will work well in an adversarial system. This demonstrates the need for trial attorneys on the appellate bench].* Trial courts, in turn, should exercise their discretion in deciding whether to permit all, some, or none of the proffered testimony under the fit standard articulated here. **CDLA members need to encourage Colorado to adopt changes to Rule 702 consistent with amendments proposed and nearing adoption by the federal courts.**

FRIVOLOUS AND GROUNDLESS

Wesley v. Newland — *Trial court can award fees against withdrawn lawyer* - 2021COA142 (11/24/21). Defendant sought an award of attorney fees under the frivolous and groundless litigation statute against both the opposing party and her lawyer who had previously withdrawn from representing her (withdrawn lawyer) after the case was dismissed for failure to prosecute. The district court awarded fees against the Plaintiff but did not address whether fees should be awarded against her withdrawn lawyer. The Court of Appeals addressed two issues: 1) whether the Colorado Rules of Civil Procedure authorize joinder of former counsel for the purposes of post-judgment proceedings in which attorney fees are sought; and 2) what a court must do to comply with the mandatory "shall allocate" language in section 13-17-102(3) when imposing an attorney fees award. The Court concluded that courts have the authority to join former counsel for the purposes of post-judgment proceedings in which attorney fees are sought. The Court also concluded that, when imposing an attorney fees award, a district court must consider the allocation of fees between the party and the party's present or former counsel and must make sufficient findings to enable meaningful appellate review.

GOVERNMENTAL IMMUNITY/IMMUNITIES

Bradley v. School District No. 1 — *Inferred request for damages satisfies statutory requirement of written notice in GIA claim* - 2021COA140 (11/18/21). Under section 24-10-109(1), a person seeking to assert a tort claim against a public entity must file a written notice within 182 days of discovering the injury that is the basis of the claim. A division of the court of appeals is asked to decide whether a claimant's written notice strictly complies with section 24-10-109(1) and *Mesa County Valley School District No. 51 v. Kelsey*, 8 P.3d 1200 (Colo. 2000), when it does not contain an explicit statement that she requests monetary damages. The Court concluded that a document constitutes written notice of a claim under section 24-10-109(1) when, as here, it reasonably and objectively can be inferred from the document as a whole that the claimant is in fact making a claim for monetary damages.

Maphis v. City of Boulder – *Tenth Circuit dismisses sidewalk deviation case* - 2022CO10 (2/22/22). The Supreme Court was asked to address the legal question of whether a sidewalk deviation constituted a "dangerous condition" under the GIA. A dangerous condition is defined as an "unreasonable risk to the health and safety of the public." A finding of a dangerous condition would waive the immunity under the GIA. After tripping and falling over a two and-a-half-inch sidewalk deviation in the City of Boulder, the plaintiff sued the City for her injuries under the GIA. The City moved to dismiss the plaintiff's suit, arguing that the sidewalk deviation did not constitute a " dangerous condition." Applying the standard set forth in *City and County of Denver v. Dennis*, 2018 CO 37, 418 P.3d 489, to the undisputed facts of this case, the Supreme Court held that the sidewalk condition did not create a chance of injury, damage, or loss which exceeds the bounds of reason.

Cisneros v. Elder – *Court finds GIA does not bar tort liability for intentional torts resulting from operation of jail* - 2022 CO 13 In this case, the Supreme Court considered whether CRS § 24-10-106(1.5)(b) of the Governmental Immunity Act waives sovereign immunity for intentional torts that result from the operation of a jail for claimants who are incarcerated but not convicted. The Court concluded that CRS § 24-10-106(1.5)(b) waives immunity both for intentional torts and for acts of negligence resulting from the operation of a jail for claimants who are incarcerated but not convicted. In reaching this determination, the Court concluded that the statutory language waiving immunity for claimants who "are incarcerated but not yet convicted" and who "can show injury due to negligence" sets a floor, not a ceiling.

INTERPLEADER

Wells Fargo Bank v. Mesh Suture, et al. – *Tenth Circuit affirms district court holdings in interpleader action* - Docket: 21-1262 (4/19/22). Plaintiff Wells Fargo Bank filed a statutory-interpleader action after facing conflicting demands for access to the checking account of Mesh Suture, Inc. Mark Schwartz, an attorney who founded Mesh Suture with Dr. Gregory Dumanian, was named as a claimant-defendant in the interpleader complaint but was later dismissed from the case after the district court determined that he had disclaimed all interest in the checking account. The district court ultimately granted summary judgment to Dr. Dumanian as the sole remaining claimant to the bank account, thereby awarding him control over the funds that remained. Schwartz appealed, arguing: (1) the district court lacked jurisdiction over the case because (a) there was not diversity of citizenship between him and Dr. Dumanian and (b) the funds in the checking account were not deposited into the court registry; (2) he did not disclaim his fiduciary interest in the checking account; and (3) the award of funds to Dr. Dumanian violated various rights of Mesh Suture. Finding no reversible error, the Tenth Circuit affirmed the district court judgment.

JURISDICTION

Hood v. American Auto Care, et al. – *Tenth Circuit finds jurisdiction in telemarketing case* - Docket: 20-1157 (10th Cir. 12/28/21). Alexander Hood, a Colorado resident, appealed the dismissal for lack of personal jurisdiction of his putative class-action claim against American Auto Care (AAC) in the United States District Court for the District of Colorado. AAC, a Florida limited liability company whose sole office was in Florida, sold vehicle service contracts that provided vehicle owners with extended warranties after the manufacturer's warranty expires. Hood's complaint alleged AAC violated the Telephone Consumer Protection Act and invaded Hood's and the putative class members' privacy by directing unwanted automated calls to their cell phones without consent. Although he was then residing in Colorado, the calls came from numbers with a Vermont area code. He had previously lived in Vermont, and his cell phone number had a Vermont area code. Hood was able to trace one such call to AAC. Although it determined that Hood had alleged sufficient facts to establish that AAC purposefully directs telemarketing at Colorado, the trial court held that the call to Hood's Vermont phone number did not arise out of, or relate to, AAC's calls to Colorado phone numbers. In light of *Ford Motor Co. v. Montana Eighth Judicial District Court,* 141 S. Ct. 1017 (2021), the Tenth Circuit determined the trial court's dismissal could not stand. "The argument regarding 'purposeful direction' ... is implicitly rejected by Ford, and the argument regarding 'arise out of or relate to' ... is explicitly rejected. ... We also determine that AAC has not shown a violation of traditional notions of fair play and substantial justice."

Laufer v. Looper, et al. – *Tenth Circuit finds ADA 'tester' did not alleged actual injury* - Docket: 21-1031 (10th Cir. 01/05/22). Deborah Laufer was qualified as disabled under the Americans with Disabilities Act and was a self-described ADA "tester." In that capacity, she visited the Elk Run Inn's online reservation system to determine whether it complied with the ADA, though she had no intention to stay there. Laufer sued Randall and Cynthia Looper, the owners of the Elk Run Inn, alleging that the online reservation system lacked information about accessibility in violation of an ADA regulation. The district court dismissed Laufer's complaint without prejudice for lack of Article III standing because she failed to allege that she suffered a concrete and particularized injury. Finding no reversible error in the district court's judgment, the Tenth Circuit affirmed dismissal.

LIMITATIONS OF ACTION

Eckard v. State Farm Mutual Automobile – *Tenth Circuit adds to the question of when is a settlement a settlement* - Docket: 21-1258 (02/11/22). This case arose from a claim for underinsured motorist benefits by Plaintiff-Appellant Melinda Eckard against her insurer, Defendant-Appellee State Farm Mutual Automobile Insurance Company. On summary judgment, the district court held that Eckard's suit was time barred by Section13-80-107.5(1)(b). The Tenth Circuit reversed, finding the district court granted summary judgment to State Farm because it incorrectly found as a matter of law that Eckard "received payment of the settlement" when her lawyer received the settlement agreement and check on October 11, 2019. It held that Eckard actually "received payment of the settlement" when she executed the settlement agreement and authorized the check on November 7, 2019. As a result, the statute did not bar Eckard's UIM claim against State Farm.

Allen, Jr., et al. v. Environmental Restoration – *Point source state's statute of limitations applies in multi-state environmental suit* - Docket: 19-2197 (05/03/22). During excavation of an inactive gold mine in southwestern Colorado, a blowout caused the release of at least three million gallons of contaminated water into Cement Creek. The EPA conceded its responsibility for the spill and its impacts. The State of New Mexico, the Navajo Nation, and the State of Utah separately filed civil actions, under the Clean Water Act, in New Mexico and Utah against the owners of the mine, the EPA, and the EPA's contractors. The United States Judicial Panel on Multidistrict Litigation centralized proceedings in New Mexico. Later, the Allen Plaintiffs (individuals who farmland or raise livestock along the Animas River or San Juan River) filed a complaint in New Mexico that included state law claims of negligence, negligence per se, and gross negligence. The district court consolidated the Allen Plaintiffs' suit, including the state law claims, into the Multidistrict Litigation. Defendant Environmental Restoration, LLC moved to dismiss the Allen Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the Allen Plaintiffs did not file their complaint within Colorado's two-year statute of limitations and therefore they failed to state a claim. The district court denied the motion to dismiss, reasoning that New Mexico's three-year statute of limitations applied to the Allen Plaintiffs' state-law

claims. The district court certified the issue for interlocutory appeal. The Tenth Circuit held that the district court had to apply the point source state's statute of limitations to state law claims preserved under the CWA. Judgment was reversed and the matter remanded for further proceedings.

RECUSAL

People in Interest of A.P. - *Supreme Court clarifies when right to relief due to judicial bias and prejudice is proper* - 2022CO24 (06/06/22). Rule 2.11(A) of Colorado's Code of Judicial Conduct requires a judge to recuse herself "in any proceeding in which the judge's impartiality might reasonably be questioned," - that is, whenever her involvement in a case might create the appearance of impropriety. Actual bias, on the other hand, exists when, in all probability, a judge will be unable to deal fairly with a party. Actual bias focuses on the judge's subjective motivations. The Code of Judicial Conduct requires judicial disqualification when a judge "has a personal bias or prejudice concerning a party or a party's lawyer." Although a judge's involvement in a case might create an appearance of impropriety warranting recusal, that alone doesn't imply that the judge was biased. Only when a judge was actually biased will the Supreme Court question the reliability of the proceeding's result. In other words, while both an appearance of impropriety and actual bias are grounds for recusal from a case, only when the judge was actually biased will the result be questioned.

TORTS

Garcia v. Bialozor - *Person who has no legal relationship with a decedent's heirs has no standing to assert claim under slayer statute* – 2022COA58. Julius Garcia found his wife Deborah Garcia face down in bed, unresponsive several hours after they had "kinky" sex. Deborah Garcia was 34 years old when she died and didn't leave a will. She was survived by Julius Garcia, her only heir, and their two children. An autopsy at the time found Deborah Garcia died from cardiac arrhythmia from a preexisting condition. Twelve years later a pathologist retained by a sister found Deborah Garcia's cause of death was pulmonary edema, a condition that can be caused by intoxication, choking and smothering. Based on the report, Deborah Garcia's father Pete DeHerrera sued Julius Garcia under Colorado's slayer statute [§ 15-11-803 C.R.S.], a law that prevents felonious killers from profiting off a victim's death. DeHerrera asked a court to find that Julius Garcia feloniously caused his daughter's death, find that Deborah Garcia's children were the only heirs to her estate and order Julius Garcia to forfeit assets that Deborah Garcia owned or had an interest in. A sister, Diana Strong later joined the lawsuit as co-petitioner; DeHerrera was later dismissed from the case and Strong took over as the only petitioner. After four years of litigation, Julius Garcia offered to settle for $500,000. His children accepted the offer. Strong said that the offer didn't address the non-monetary claim on her own behalf, a determination that Julius Garcia feloniously killed her sister. Julius Garcia filed a motion to enter final judgment in the case that was denied, with the trial court saying the slayer statute allows non-heirs to bring claims. On appeal, Julius Garcia

argued the lower court erred. The Colorado Court of Appeals agreed. It ruled that neither Strong nor DeHerrera had standing to bring the case. Since neither family member had a legal relationship to Deborah Garcia's children and since they couldn't be financially impacted by the decision, the Colorado Court of Appeals held they can't bring a claim under the slayer statute solely to get a judicial declaration of felonious murder.

Hamric v. Wilderness Expeditions, Inc. – *Tenth Circuit affirms magistrate's docket control rulings* - Docket: 20-1250 (7/26/21). Texas resident Gerald Hamric joined a church group on an outdoor recreation trip to Colorado. The church group hired Wilderness Expeditions, Inc. to arrange outdoor activities. Before the outdoor adventure commenced, WEI required each participant to complete a "Registration Form" and a "Medical Form." On the first day, WEI led the church group on a rappelling course. In attempting to complete a section of the course that required participants to rappel down an overhang, Hamric became inverted. Attempts to rescue Hamric proved unsuccessful, and he fell and died. Alicia Hamric sued WEI for negligence. WEI moved for summary judgment, asserting the Registration Form and the Medical Form contained a release of its liability for negligence. A magistrate judge first declined to grant leave to amend the complaint due to Ms. Hamric's failure to (1) sustain her burden under Federal Rule of Civil Procedure 16(b) because the deadline for amendments had passed; and (2) make out a prima facie case of willful and wanton conduct as required by Colorado law to plead a claim seeking exemplary damages. Next, the magistrate judge concluded WEI was entitled to summary judgment, holding the liability release was valid under both Colorado law and Texas law. Finding no reversible error, the Tenth Circuit affirmed the magistrate judge's order.

Garcia v. Colorado Cab Co. – *Remand decision on rescuer doctrine case* - 2021COA129 (10/28/21). Garcia sued Colorado Cab Company LLC for negligence and unjust enrichment when Glinton, a passenger in one of Colorado Cab's taxis, assaulted him, first by hitting him while they were standing outside the cab and then by running him over with the cab, which Glinton had stolen. On appeal, Colorado Cab challenged whether the district court erred in finding it owed a duty to Garcia. The Supreme Court held that Garcia was a rescuer within the meaning of the rescue doctrine, and therefore Colorado Cab's duty to its driver extended to Garcia. On remand, the Court of Appeals held that the negligent actor is liable to the rescuer only for the harm resulting from a risk that is reasonably to be expected from the rescue attempt. The Court concluded that while the cab company can be liable to the rescuer for the passenger's assault of the rescuer when the rescuer approached the cab to intervene in the passenger's assault on the driver, it cannot be liable for the passenger's subsequent use of the cab as a weapon to run down the driver after the passenger had driven away and returned. That injury was not caused by a risk — use of the cab as a weapon after stealing the cab — that was inherent in the rescue attempt.

Rudnicki v. Bianco – *Supreme Court holds unemancipated minors may recover their medical expenses* - 2021CO80 (12/13/21). The issue was who may recover damages for the medical expenses that an unemancipated child incurs prior to turning eighteen. The common law rule was that only a minor plaintiff's parents may recover tort damages for medical expenses incurred by

their unemancipated minor child. In a split decision, the Supreme Court decided that the traditional rationales for the common law rule no longer applied and that the realities of today's health care economy no longer supported the rule's retention. Accordingly, the Supreme Court abandoned the common law rule and concluded that in cases involving an unemancipated minor child, either the child or their parents may recover the child's pre-majority medical expenses but did affirm that double recovery is not permitted.

- **Business Tort**

Keybank National Association v. Williams, et al. – *Tenth Circuit affirms denial of non-compete injunction* - No. 20-1384 (2/10/22). This case is an appeal of the denial of a preliminary injunction in a business tort case. KeyBank National Association sued two of its former employees, Charles Williams and Timothy Weldon, after they left KeyBank to work for a competitor, Newmark Knight Frank. KeyBank alleged that the former employees breached their non-compete agreements and used its trade secrets and confidential information to divert business from KeyBank to Newmark. KeyBank moved for a preliminary injunction to prevent Williams and Weldon from doing business with and soliciting KeyBank's customers and misappropriating its trade secret and confidential information. The district court denied the motion, concluding KeyBank failed to show a probability of irreparable harm. KeyBank appealed that order, contending the district court's irreparable-harm determination constitutes an abuse of discretion because the court disregarded evidence that KeyBank suffered actual and unquantifiable injury in the form of diminished customer relations, goodwill and competitive standing; and the record does not support the finding that KeyBank delayed seeking relief. KeyBank also challenges the district court's rejection of the magistrate judge's recommendation to order Williams and Weldon to return or destroy confidential reports they shared with Newmark. Reviewing the denial of the prelim injunction motion, 10th Circuit Court of Appeals affirmed.

Renfro, et al. v. Champion Petfoods USA, et al. – *Tenth Circuit affirms denial of misrepresentation suit, asserting not materially misleading* - Docket: 20-1274 (02/15/22). A group of pet owners brought a class action against Champion Petfoods USA, Inc., alleging representations on Champion's packaging on its Acana and Orijen brands of dog food were false and misleading. Champion's dog food packaging contained a number of claims about the product, advertising the food as "Biologically Appropriate," "Trusted Everywhere," using "Fresh and Regional Ingredients," and containing "Ingredients We Love [From] People We Trust." The district court dismissed the claims as either unactionable puffery or overly subjective and therefore not materially misleading to a reasonable consumer. The Tenth Circuit Court of Appeals agreed, finding Plaintiffs' claims failed to allege materially false or misleading statements on Champion's packaging because the phrases failed to deceive or mislead reasonable consumers on any material fact.

Thornton, et al. v. Tyson Foods, et al. – *Court dismisses false advertising claims as pre-empted by federal law* - Docket: 20-2124 (03/11/22). Plaintiffs Robin Thornton and Michael Lucero

alleged defendants Tyson Foods, Inc., Cargill Meat Solutions, Corp., JBS USA Food Company, and National Beef Packing Company, LLC, used deceptive and misleading labels on their beef products. In particular, plaintiffs contended the "Product of the U.S.A." label on defendants' beef products was misleading and deceptive in violation of New Mexico law because the beef products did not originate from cattle born and raised in the United States. The Tenth Circuit Court of Appeals determined the federal agency tasked with ensuring the labels were not misleading or deceptive preapproved the labels at issue here. In seeking to establish that defendants' federally approved labels were nevertheless misleading and deceptive under state law, plaintiffs sought to impose labeling requirements that were different than or in addition to the federal requirements. The Tenth Circuit concluded plaintiffs' deceptive-labeling claims were expressly preempted by federal law. Further, the Court agreed with the district court that plaintiffs failed to state a claim for false advertising.

Johnson Family Law, P.C. v. Grant Bursek —*Court of Appeals addresses agreements restricting attorney departure* - 2022COA48 - (4/28/22). This case involves two issues of first impression regarding the propriety of agreements between law firms and attorneys that restrict a departing attorney's practice. First, the division holds that a financial disincentive to post-departure representation — as opposed to a direct prohibition — may violate Colo. RPC 5.6(a) if it is unreasonable under the circumstances. Second, the division holds that restrictions on practice that violate Rule 5.6(a) are necessarily void as against public policy. Applying those principles here, the division concludes that an agreement imposing on a departing associate a $1,052 fee per client that left with him violated Rule 5.6(a).

- **Economic Loss Rule**

Dream Finders Homes v. Weyerhaeuser NR —*Sophisticated buyer limited to contractual warranty claims* - 2021COA143 (12/2/21). The Court of Appeals considered whether sophisticated buyers of a defective product, who received a warranty from the manufacturer of the product, may assert tort claims based on the manufacturer's alleged misrepresentations about the product and failure to disclose the defect, even though the buyers received the remedy specified in the warranty and the warranty expressly excluded the very type of damages the buyers seek to recover through their tort claims. The Court held that the economic loss rule bars the buyers from asserting such tort claims because the manufacturer did not owe the buyers a duty of care under tort law independent of its contractual duties. The Court also held that the economic loss rule does not generally bar private rights of action under the Colorado Consumer Protection Act.

- **Privilege**

BKP v Killmer Lane Newman — *Court of Appeals restricts the litigation privilege* - 2021COA144 (12/02/21). Plaintiffs had sued, asserting that the four statements in the press conference and the statements in the press release amounted to both defamation and intentional interference with contractual relations. The attorneys asked the trial court to dismiss the claims

under C.R.C.P. 12(b)(5), arguing that the statements were not actionable as defamation because they were either (1) subject to the litigation privilege, which we describe below; (2) protected by the Noerr-Pennington doctrine, which we also describe below; or (3) opinions protected by the First Amendment. The Court of Appeals concluded that, under the facts of this case, neither the litigation privilege nor the *Noerr-Pennington* doctrine applied to shield attorneys from certain allegedly defamatory statements made during a press conference and in a press release.

- **Restitution**

People v. Arnold Martinez - *Insurer entitled to seek restitution* - 2022COA28 (03/03/22). Arnold Martinez tried to steal a $6,000 bicycle out of an open garage. The bike's owner pursued Martinez in his car and Martinez ran into the car's bumper causing damage to the vehicle. Martinez pleaded guilty to offenses in another case in exchange for prosecutors dropping charges related to the bike theft. As part of the plea, he agreed to pay restitution for damages caused by the crime. The prosecutor filed a motion for restitution for $2,393 to cover the cost to repair the car. The trial court ordered Martinez to pay the victim $500 to cover the insurance deductible and the rest to the victim's insurer, GEICO. On appeal, Martinez argued GEICO was not eligible for restitution. While case law prior to a 2000 statutory amendment specified insurance companies could be considered "victims" under restitution laws, Colorado's appellate courts hadn't conducted a statutory analysis to concretely decide if that could still be the case after the amendments. The statute's plain language, the court held, extends protections to any party that suffers loss connected to crimes.

TRIAL PRACTICE

In re Francis v. Wegener – *Court bars serial litigant from filing further lawsuits*- 2021 CO 66 (9/13/21). The Supreme Court enjoined attorney Robert A. Francis, acting individually or on behalf of a trust or some other entity, from ever again proceeding *pro se* as a proponent of a claim (i.e., as a plaintiff, third-party claimant, cross-claimant, or counter-claimant) in any present or future litigation in the state courts of Colorado. It held that, while the Colorado Constitution confers upon every person an undisputed right of access to our state courts, that right isn't absolute. A party's constitutional right of access to the courts must sometimes yield to the constitutional right of other litigants and the public to have justice administered without denial or delay. An example of this is cases when courts are called upon to curb the 'deleterious impact' that duplicative and baseless pro se litigation has on finite judicial resources. The Court noted that Francis has been abusing the judicial process for the purpose of harassing his adversaries for the better part of a decade. State courts have warned, reprimanded, and sanctioned Francis and suspended his law license failed to deter his conduct—all to no avail. Under the circumstances, the extraordinary injunction requested was granted.

Brown v. Long – *Supreme Court approves expanded litigation against employers in employee tortfeasor cases* - 2021 CO 67 (9/27/21).(9/27/21). Plaintiff's made direct negligence claims

against employer. Defendants acknowledged that it was vicariously liable, but moved to dismiss the direct claims. The Supreme Court held the claims were not barred. The plaintiff gave birth at Denver Center for Birth and Wellness ("DCBW"), where her child died during labor. She and her husband asserted that DCBW and its employee's negligence ultimately caused the death of their child. The plaintiff brought direct negligence claims against DCBW and the employee but did not assert vicarious liability. Defendant employer acknowledged that it was vicariously liable and moved to dismiss the direct claims. The trial court then dismissed the negligence claim citing *Ferrer/McHaffie*, which held that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred." The Supreme Court held the claims were not barred. While the effect on the Supreme Court apparently chastised by the Legislature's enactment of a statute reflecting the CTLA displeasure with *Ferrer* is not known, the result of this case was a holding that a plaintiff's direct negligence claims against an employer were not barred where the plaintiff does not assert vicarious liability for an employee's negligence.

Hale v. SE Colo. Power Ass'n — *Court holds that common law contract principles apply to enforcement of settlement agreements* - 2022COA36 (03/24/22). In this interlocutory appeal, a division of the court of appeals considers whether a trial court is precluded by *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993), from recognizing, and taking action with respect to, a mistake in an offer of settlement made pursuant to section 13-17-202, after the offer has been accepted but before a judgment has been entered. The division concludes that the answer is "no." Specifically, the division concludes that, pursuant to section 13-17-202(1)(a)(IV), a court need not enforce a settlement agreement as written and may instead apply common law contract principles to alter, modify, or decline to enforce the agreement.

Hunter v. SCL Health - *Court of Appeals limits information needed in certificate of review* - 2022COA41 (4/14/22). Plaintiffs sued a hospital, a physician group, nurse Scism, four other nurses, and three doctors, alleging that Hunter was injured by the negligent insertion of a catheter. Scism and the hospital filed motions to dismiss. The district court concluded that plaintiffs' certificates of review were insufficient and granted the motions. Plaintiffs argued on appeal that the district court misapplied the law pertaining to certificates of review. The Court of Appeals reversed, holding the Plaintiffs met the statutory requirements here and that the district court misapplied the law by faulting plaintiffs for failing to further describe the expert's qualifications.

VOIR DIRE

United States v. Murry - *Tenth Circuit affirms denial of request to examine prospective jurors on implicit bias* - Docket: 20-1214 (4/19/22). Three out of four defendants in consolidated cases identified as minorities, and two were illegal immigrants. They claimed the district court abused its discretion in failing to ask the potential jurors whether they harbored racist views. One defendant posited that if "America as an institution harbors racial prejudice in the context of

immigration law, it stands to reason that some members of that same institution also harbor similar views." However, the Supreme Court has long held that no constitutional presumption of juror bias existed for or against members of any particular racial or ethnic groups. Thus, the Tenth Circuit declined to create such a presumption in these cases, finding that without any substantial indication that racial or ethnic prejudice likely affected the jurors, the district court did not abuse its discretion in denying Defendants' requests to directly examine the jurors about the subject.

WORKERS' COMPENSATION

City and County of Denver v. ICAO —*Statute limits grounds for re-opening WC case* - 2021COA146 (12/02/21). In this workers' compensation caseThe Court of Appeals considers whether the reopening statute [Section 8-43-303] limits the grounds on which an award may be reopened and constrains the authority of the Director of the Division of Workers' Compensation to reopen an award that had been closed automatically for failure to prosecute. The division concluded that it does. The Court concluded that the Director's order reopening a claimant's award, after the claimant received initial benefits but failed to prosecute his claim seeking additional benefits, was proper only if the claimant satisfied the criteria in the reopening statute for reopening the award.

Salazar v. ICAO – *Court of Appeals affirms no coverage for injuries sustained by claimant* - 2022COA13 (01/20/22). James Salazar worked for Grand Valley Tree Service. In January 2020, he texted the company's owner, Nathan Ridgley, to say that he intended to see a doctor because he woke up with back pain caused by picking up logs during work. Ridgley gave Salazar a list of medical providers as required under state workers' compensation laws, and Salazar selected a doctor. Salazar's wife drove him to the doctor. On their way there, the passenger side of the Salazars' car "was T-boned by an elderly woman." Despite the accident, they made it to the medical appointment. Salazar testified that after the crash, he experienced headaches, arm tingling, shoulder pain and neck and back pain. In February 2020, Grand Valley Tree Service and its insurer, Pinnacol Assurance, challenged Salazar's workers' compensation claims, arguing that he had a documented history of pre-existing chronic back pain. The company sent Salazar to Dr. Brian Reiss for an independent medical examination. Reiss concluded Salazar didn't suffer an injury from picking up logs in January, and his pain was caused instead by his pre-existing condition. However, Reiss conceded that the car accident may have exacerbated his condition and caused him additional symptoms. Following a hearing, an administrative law judge dismissed Salazar's request for benefits, finding that Reiss' opinion was credible, and Salazar didn't sustain a work-related injury. Relying on the quasi-course of employment doctrine, Salazar argued that the car crash injuries should be covered because he was on his way to see the workers' compensation doctor. The ALJ disagreed, finding the quasi-course of employment doctrine only applies if there is first a compensable injury. Salazar appealed the decision, but the Industrial Claims Appeals Office upheld the ALJ's decision. Salazar argued before the Court of Appeals that the ICAO and ALJ misapplied the law by concluding the car accident injuries were not covered. He also argued

the ALJ and ICAO violated his right to equal protection by denying him coverage for the car accident injuries. The Court of Appeals rejected both arguments and upheld the dismissal of his claims.

Macaulay v. ICAO — *Court of Appeals holds work comp case must be re-opened before penalties can be pursued* - 2022COA40 (4/7/22). In a 2-1 decision, the Court of Appeals considered the interplay between two limitations periods set forth in the Workers' Compensation Act. The two limitation periods are the limitation period for reopening a case and the limitation period for asserting a penalty claim. The Court concluded that both limitation periods apply when a claimant whose case has closed seeks to assert a penalty claim. Under these circumstances, the claimant must reopen his or her case before the claimant may pursue a claim for penalties. Thus, where, as in this case, the limitation period for reopening the case has expired, the claim for penalties is untimely. The dissent concurred in part and dissented in part. The dissent argued that the two limitation periods operate independently and that, in this case, only the limitation period for penalty claims applied. Therefore, the claimant's penalty claims are not time-barred.

UNITED STATES SUPREME COURT DECISIONS

Gallardo v. Marstiller – *Supreme Court permits Medicaid to seek reimbursement from settlement payments allocated for future medical care* - Docket: 20-1263 (06/06/22). Gallardo suffered catastrophic injuries resulting in permanent disability when a truck struck her as she stepped off her Florida school bus. Florida's Medicaid agency paid $862,688.77 to cover Gallardo's initial medical expenses and continues to pay her medical expenses. Gallardo's suit against the truck's owner and the School Board resulted in an $800,000 settlement, with $35,367.52 designated as compensation for past medical expenses. The settlement did not specifically allocate any amount for future medical expenses. The Medicaid Act requires participating states to pay for certain individuals' medical costs and to make reasonable efforts to recoup those costs from liable third parties. Under Florida's Medicaid Third-Party Liability Act, a beneficiary who accepts medical assistance from Medicaid automatically assigns to the state any right to third-party payments for medical care. Plaintiff filed a federal suit, seeking a declaration that Florida was violating the Medicaid Act by trying to recover from portions of the settlement compensating for future medical expenses. Florida contended that the agency was entitled to recover its past medical expenses from the portion of Ms. Gallardo's settlement representing compensation for both past and future medical expenses. The Supreme Court held that the Medicaid Act permits a State to seek reimbursement from settlement amounts that are allocated for future medical expenses. The Court explained that the plain text of 42 U.S.C. § 1396k(a)(1)(A) — which broadly assigns to the state all of the beneficiary's rights to payment for medical care from any third party — resolves this case. It explained that nothing in § 1396k(a)(1)(A) limits a beneficiary's assignments to payments for past medical care already paid for by Medicaid; instead, the grant of "any rights . . . to payment

for medical care" most naturally covers not only rights to payment for past medical expenses, but also rights to payment for future medical expenses. The relevant distinction is not between past and future medical expenses, but rather between medical and nonmedical expenses.

The case involved obscure provisions of the Medicaid program, but it will be important to tort victims who obtain recoveries that cover medical expenses into the future.