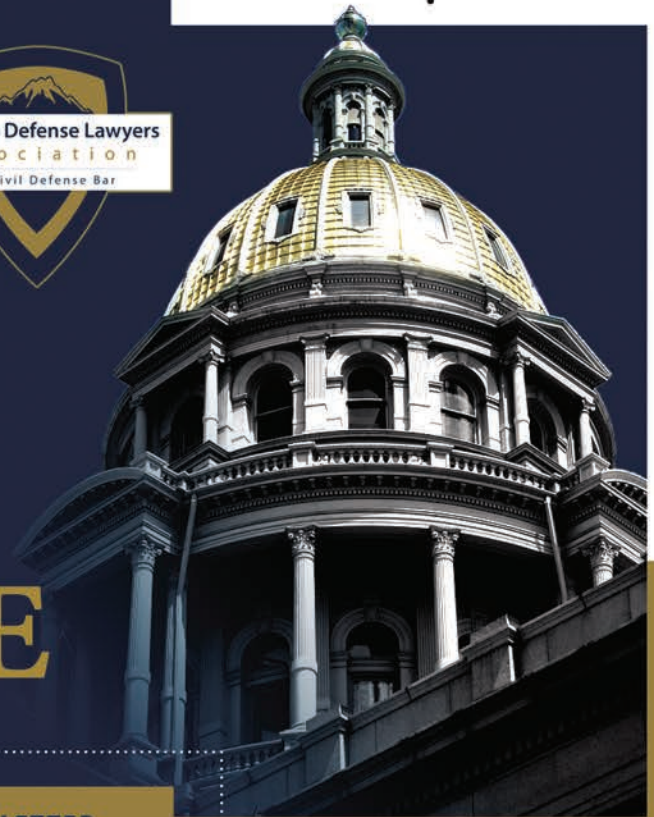


Colorado Defense Lawyers  
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## INSIDE CASE LAW UPDATE;

Court of Appeals &  
Tenth Circuit Court  
of Appeals

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THE CDLA NEWSLETTER

HIGHLIGHTING IMPORTANT ISSUES FACING TODAY'S DEFENSE ATTORNEYS

# Case Law COURT OF APPEALS

## QUICK LINKS:

[People v. McCarthy](#)

[Casey v. CO. Higher Ed. Ins. Ben.](#)

[Payan v. Nash Finch Co.](#)

[Neuromonitoring Ass. v. Centura](#)

[Rodriguez v. Ind. Claim App.](#)

[Prog. Cas. Ins. v. Moore](#)

[Robert v. Board of County Comm.](#)

[Lederman v. Frontier Fire Prot.](#)

### PEOPLE V. MCCARTHY –

*Court of Appeals determines Medicaid disability payments not recoverable as restitution statute (CA 08/16/12).* Defendant, while driving under the influence, ran a red light and struck another car, causing seriously bodily injury to two passengers in the other car. The trial court ordered that defendant pay \$417,750 to the Department for Medicaid disability benefits paid to a rehabilitation hospital on behalf of one of the victims. Defendant argued that the Department does not qualify as a “victim” for purposes of the restitution statute. Under the vehicular assault statute, a victim is a human being. The Court agreed that, because the Department has not been expressly identified by the legislature as a victim in the restitution statute, and the particular nature of the crime does not establish a right to restitution, the Department cannot qualify as a victim under the restitution statute.

**CASEY V. COLORADO HIGHER EDUCATION INSURANCE BENEFITS ALLIANCE TRUST –**

*Court of Appeals finds duties based in contract and ‘bad faith’ claims survived GIA claim (CA 08/16/12).* The Governmental Immunity Act bars any action against a public entity or its employees that lies in tort or could lie in tort regardless of the form of relief chosen by the claimant but does not apply to contract actions. The trust agreements in this case were found to be the source of the trustees’ fiduciary

duty described in the employees’ breach of contract claim. Therefore, the employees’ breach of fiduciary duty and breach of the covenant of good faith and fair dealing claims arising from the trust agreement against the trustees were found not to be barred by the GIA, but claims that sounded in tort duties were barred. Defendants also contended that the GIA bars the employees’ inverse condemnation claim. Because an inverse condemnation claim could not lie in tort, it is not barred by the GIA.

**PAYAN V. NASH FINCH CO. –**

*Court of Appeals rules on trial court determination of appropriate legal fees under Consumer Protection Act (CA 08/16/12).* In June 2008, Nash Finch implemented a misleading pricing scheme in two of its Denver metro area supermarkets. Customers were led to believe they would receive an additional 10% savings compared to regular prices, when in fact, the cashier added 10% to the price at checkout. Plaintiffs were customers at these supermarkets who did not immediately realize they had paid more than the advertised price. Plaintiffs ultimately litigated their Colorado Consumer Protection Act (CCPA) and civil theft claims at trial. Three days before trial, Nash Finch filed an admission of liability and confession of judgment for the full amount of the statutory damages sought by plaintiffs, a total of \$4,200. The trial court entered an order awarding plaintiffs’ attorney fees. The Court of Appeals held that 1) the trial court should have applied the percentage reductions to the total hours billed before applying the hourly rate multiplier; 2) a trial court retains discretion to reduce the hours billed based on block billing if the court is unable to determine whether the amount of time spent on various tasks was reasonable; 3) the trial court’s reduction of 5% for lack of complexity was not an abuse of discretion; and 4) the trial court did not err in determining reasonable hourly rates for plaintiffs’ counsel based on its view of appropriate staffing of the case. Furthermore, the trial court correctly determined that (1) the rule of proportionality could not be applied; (2) the court’s 10% reduction in the lodestar amount for lack of public importance was not an abuse of discretion, because the record supports the conclusion that plaintiffs’ suit was not a factor in inducing Nash Finch to cease its improper conduct; and (3) the court did not abuse its discretion in denying plaintiffs’ motion for discovery of Nash Finch’s billing records, given that both experts were able to produce their reports without the aid of such discovery.

**NEUROMONITORING ASSOC. V. CENTURA HEALTH CORP. –**

*Court of Appeals holds that when contract has a continuing duty to perform, new claim accrues for each breach for purposes of statute of limitations (CA 08/16/12).* On January 5, 2010, plaintiff commenced this action seeking to recover damages arising out of defendants’ alleged breaches of an agreement which became effective on July 1, 2004 and was valid for a term of one year with automatic renewals for additional one-year terms, unless otherwise terminated with proper notice. Defendants moved for summary judgment on the complaint, arguing that plaintiff’s claims were barred by the three-year limitations period because plaintiff became aware of the alleged breach in 2005. The court dismissed plaintiff’s claims. On appeal, Plaintiff contended the district court erred in applying the three-year

limitations period in CRS § 13-80-101(1)(a) rather than the six-year limitations period in CRS § 13-80-103.5(1)(a). The Court held that, because the amounts plaintiff sought were not ascertainable by reference to the agreement or by simple computation, they are not “liquidated or determinable” within the meaning of § 13-80-103.5(1)(a). Consequently, the three-year breach of contract limitations period applied to plaintiff’s action. The Court of Appeals also affirmed the trial court on the issue of equitable tolling because Plaintiff failed to present evidence indicating that defendants wrongfully impeded its ability to bring its claims, or that it was ignorant of relevant facts that prejudiced its decision whether to file the action. However, Plaintiff contended that the “continuing nature” of defendants’ conduct resulted in “repeated, successive

breaches” and that its breach of contract cause of action must be deemed timely at least as to any breaches occurring within the three years preceding the January 5, 2010 filing of the complaint. The Court agreed, finding that in circumstances where a contract contains this type of continuing duty to perform, generally a new claim accrues for each separate breach and the plaintiff may assert a claim for damages from the date of the first

breach within the period of limitation. Here, each time defendants allowed another entity to perform services at one of the designated hospitals, a new alleged contract breach occurred. Thus, for recovery based upon alleged breaches occurring in the three-year period before January 5, 2010 when it commenced this action, plaintiff’s action was timely and the district court erred in concluding otherwise.

### **RODRIGUEZ V. INDUSTRIAL CLAIM APPEALS OFFICE -**

*Admission of Liability shifts Burden of Proof for Compensable Accidental Employment Injuries (CA 08/16/12).* Rodriguez works for the City of Brighton as a special events coordinator. One morning, she fell while descending the stairs to her office. She was taken to the emergency room, where she received a CT scan and an MRI. The tests revealed unruptured brain aneurysms. Brighton initially admitted liability for Rodriguez’s disability and medical benefits. It later sought to withdraw its admission, arguing

the injuries did not arise out of her employment. An ALJ found that (1) because Brighton initially admitted liability, it bore the burden of proof under CRS § 8-43-201(1); (2) Rodriguez’s fall was not caused by her aneurysms but was “unexplained”; and (3) because her fall was unexplained, her injuries were not compensable. Brighton therefore sustained its burden of proving non-compensability and could withdraw its admission of liability. Rodriguez appealed arguing the ALJ erred in ruling her injury was not compensable. The Court of Appeals agreed. An employee may re-

cover for accidental injuries “arising out of and in the course of the employee’s employment.” It was undisputed Rodriguez was injured in the course of her employment; the question was on the “arising out of” prong. Ordinarily, the plaintiff bears the burden of proving this element. Here, the burden was shifted to the employer because of Brighton’s initial admission of liability. Consequently, the finding that the fall was unexplained was a failure of proof on Brighton’s part. Because Brighton failed to sustain its burden of proof, the ALJ erred in allowing it to withdraw its admission of liability.

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### **PROGRESSIVE CASUALTY INSURANCE CO. V. MOORE -**

*Requirement of notice under statute held not to apply to personal motor vehicle policies (CA 08/30/12).* Moore was involved in a car accident. Progressive Casualty Insurance Co. (Progressive) denied his claim for insurance benefits because his automobile insurance policy had expired months earlier. Moore contended that the trial court misapprehended the applicability of CRS § 10-4-110.5. Specifically, Moore argued that the policy had renewed automatically because Progressive had failed to comply with the statutory notice requirements. However, § 10-4-110.5 applies only to commercial automobile insurance policies, and Moore’s policy was not commercial.

## **10<sup>TH</sup> CIRCUIT**

### **ROBERT V. BOARD OF COUNTY COMMISSIONERS -**

*Tenth Circuit holds that open-ended FMLA leave is unreasonable (10th Cir. August 29, 2012).* Catherine Robert was terminated from her offender supervision officer position after being out on FMLA leave for surgery. At the time of her termination, the plaintiff was unable to perform an essential function of her job: offender site visits. A few weeks after her FMLA leave expired, she

was still unable to walk unassisted. The Tenth Circuit stated that a leave of absence can be a reasonable accommodation under the ADA, but an open-ended leave may not be reasonable. “The employee must provide the employer an estimated date when she can resume her essential duties.” A second limitation on leaves is duration. “A leave request must assure an employer that an employee can perform the essential functions of her



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position in the ‘near future.’” The court did not define a reasonable duration, but did reference an Eighth Circuit case that held six months to be unreasonable. The court mentioned the small size of the plaintiff’s department and the strain her inability to perform site visits and other du-

ties put on her co-workers. The Tenth Circuit also held Robert’s prima facie FMLA retaliation claim had been overcome by the employer’s legitimate reason for her termination: she failed to return to work with a required release at the end of her FMLA leave.

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## **LEDERMAN V. FRONTIER FIRE PROTECTION, INC. -**

*Inaccurate jury instruction necessitates reversal of Fair Labor Standards Act verdict (10th Cir. 07/11/2012).* Plaintiff sued his former employer for overtime pay under the Fair Labor Standards Act. FLSA requires employers to pay employees overtime at time-and-a-half, and employers who fail to do so are liable for the unpaid overtime plus an equal amount as liquidated damages. However, the FLSA exempts employers from paying overtime to certain kinds of employees, including outside salespeople. The employer asserted Plaintiff had been an outside salesperson rather than an employee and was not entitled to overtime pay. Following a jury trial, the jury found that plaintiff was not an outside salesperson and the employer was liable for some of the amount he sought. The employer appealed, claiming the jury instructions improperly stated the law. The challenged instruction stated that an employer seeking an exemption from the FLSA overtime requirements had the burden to prove that the employee fit “plainly and unmistakably” within the terms of the claimed exemption. The Tenth Circuit determined that the “plainly and unmistakably” language in the case law applies to a court’s finding whether the claimed exemption falls “plainly and unmistakably” within the terms of the statute, not to the employer’s burden of proof. Once a court finds the employer eligible to claim the exemption, the fact finder evaluates the disputed facts to determine whether the exemption is met. The Circuit found that the jury instruction was given in error and then held the instruction was prejudicial, necessitating reversal.

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