THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

COLORADO SUPREME COURT

N.M. v. Trujillo— *Lacking a special relationship, Supreme Court finds nonfeasance did not create a duty on dog owner* (SC 06/26/17). The parents of a child sued the respondent, a dog owner. The child had become frightened when the respondent's dogs rushed at respondent's front-yard fence. Although not touched by the fenced-in dogs, the child ran into the street and was struck and injured by a passing van. The Supreme Court determined that as a matter of law, the respondent did not owe the child a duty of care because the negligence claim against the respondent was predicated on alleged nonfeasance, or failure to act. This makes this case distinguishable from cases in which a dangerous or vicious animal attacks and directly injures someone. The petitioner was required to plead a special relationship between himself and the respondent to establish the duty of care necessary to support his negligence claim. The petitioner did not, however, plead such a special relationship. Accordingly, the court concluded that the respondent owed no duty of care to the petitioner.

Mesa County Public Library District v. Industrial Claim Appeals Office – *Unemployment administrative proceeding is not authorized to determine cause of claimant's volitional act* (SC 06/26/17). Gomez worked for the Mesa County Public Library District for almost 25 years. In 2013, she began having performance issues and was placed on two successive performance improvement plans. In September 2014, she was placed on a third PIP and told to produce a satisfactory organizational capacity report by October 7 or face additional disciplinary action, including discharge. She called in sick on that date, and again on October 9, and did not return to work again. On October 14, she submitted a doctor's note advising that she was suffering from acute stress disorder and major depressive disorder. She was granted a request to remain off work for four to six weeks. The Library director terminated her on October 20, 2014 for failing to provide the organizational capacity report. The Industrial Claim Appeals Office rejected as a matter of law the conclusion that Gomez was disqualified from receiving benefits because she was at fault for her own diagnosed mental disorders. The Supreme Court held that

QUICK LINKS

Hutchison v. Industrial Claim Appeals Office

Scott R. Larson, P.C. v. Grinnan

Sovde v. Scott, D.O.

Pacitto, Jr. v. Prignano

Owners Insurance Co. v. Dakota Station II Condominium Association, Inc.

Varsity Tutors LLC v. Industrial Claim Appeals Office

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Parker Excavating v. LaFarge West

where the Division of Unemployment Insurance determines a claimant was mentally unable to perform assigned work under section 8-73-108(4)(j) of the Colorado Employment Security Act, §§ 8-70-101 to 8-82-105, C.R.S. (2016), neither the text of section 8-73-108(4)(j) nor related case law contemplates further inquiry into the cause of the claimant's mental condition, and such an inquiry is beyond the scope of the simplified administrative proceedings to determine a claimant's eligibility for benefits. The Court concluded that the Division erred in determining that the claimant committed a volitional act to cause her mental incapacity and thus was at fault for her separation from employment and disqualified from receiving unemployment benefits.

COLORADO COURT OF APPEALS

Hutchison v. Industrial Claim Appeals Office – *Court holds that facts of case did not support apportionment in worker's compensation case.* (CA 06/01/17). Claimant Hutchison has worked as a trailer mechanic since 1990. Claimant began experiencing knee pain in 2012. In October 2014, when his symptoms worsened, claimant reported his knee pain to his employer as a work-related occupational disease. The employer contested the claim on relatedness grounds, and supported its position with an independent medical examination, which concluded that claimant had osteoarthritis and was overweight and suggested that claimant's employment was not the cause of the arthritis. An ALJ determined that one-third of claimant's injury was work-related. The Industrial Claim Appeals Office affirmed the ALJ's decision. On appeal, claimant challenged the apportionment of his benefits award. Claimant contended that his knee condition arose from repetitive kneeling and crawling necessitated by his work as a trailer mechanic, rather than from a specific incident, and therefore, it should be covered as an occupational disease. Here, because claimant's knee condition was one ongoing disease with both work- and non-work- related causes, there was no separate "previous injury" as anticipated by CRS § 8-42-104(3); it was instead one injury with multiple causes. The ICAO Panel therefore properly concluded that the CRS § 8-42-104(3) prohibition against apportionment for a previous injury did not apply. Further, the order is consistent with case law. Claimant also contended that substantial evidence does not support the ALJ's apportionment. The Court of Appeals concluded that substantial evidence supports the ALJ's apportionment findings and held that the ICAO did not err when it declined to set aside the ALJ's order on that basis.

Scott R. Larson, P.C. v. Grinnan – *Court of Appeals defines ethical duty required of referring attorney to justify fee split* (CA 6/15/17). Grinnan is a general practitioner with limited experience in personal injury cases. Grinnan's friend Kelley asked Grinnan to represent him in a personal injury case. Grinnan obtained Kelley's approval to involve Scott Larson., P.C. in the case, and Larson entered into a contingency fee agreement with the Kelley family. As relevant here, the agreement identified Grinnan as "associated counsel," stated that Grinnan would be paid a percentage of Larson's fee "not to exceed 100%," and provided that Larson was responsible for paying case expenses. Grinnan was not a signatory to the agreement. Larson brought claims against various entities and settled with one early in the case. From Larson's $333,333 fee on this settlement, he sent Grinnan a check for $50,000. After three years of litigation, the case settled. Based on the settlements, the contingent fee agreement entitled Larson to a fee of $3,216,666.67. Larson had incurred

about $300,000 in costs. Larson and Grinnan couldn't agree on how to divide the contingent fee. Grinnan entered his appearance, and the court granted his request that all attorney fees paid to Larson be placed in a restricted interest-bearing account. Following a hearing, the trial court entered a detailed written order allocating the attorney fees. The trial court declined to divide the fees in proportion to services and found that Grin nan had assumed joint responsibility for the litigation. The court divided the fees by awarding Grinnan 20% of the $333,333.34 from the first settlement and 12.5% of the $2,883,333.33 fee from the other two settlements. The court also awarded Grinnan prejudgment interest at the rate of 8% from the date the settlement checks were issued until final judgment entered on the fees allocated to him. It also awarded Larson interest on the fees placed in the restricted account less the fees awarded to Grinnan (as a wrongful withholding). The court declined to award costs, finding that neither lawyer was the prevailing party. On appeal, Larson asserted that Grinnan never assumed joint responsibility because he did not assume responsibility for the representation as a whole. The Court of Appeals found that Grinnan had assumed one of the two components of joint responsibility—financial responsibility for the case—because of Grinnan's exposure to liability for any malpractice of Larson. A remand was necessary to determine whether he also assumed ethical responsibility, the second component, on which the court had made no findings. As guidance to the trial court on remand, the court analyzed the ethical responsibility issue. It concluded that a referring lawyer must: actively monitor the progress of the case; make reasonable efforts to ensure that the firm of the lawyer to whom the case was referred has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct; and remain available to the client to discuss the case and provide independent judgment as to any concerns the client may have that the lawyer to whom the case was referred is acting in conformity with the Rules of Professional Conduct. On remand, if the court finds that Grinnan assumed ethical responsibility, the court's fee award will stand, subject to appeal by Larson. If the court finds that Grinnan did not assume ethical responsibility, he is only entitled to fees in proportion to the services he performed, with the referral fees to be reallocated to Larson, subject to appeal by Grinnan. Grinnan also contended that the trial court erred in finding a wrongful withholding. The court found no error in the trial court's award of prejudgment interest to Larson based on Grinnan's wrongful withholding.

Sovde v. Scott, D.O. – *Court affirms trial court decision to deny request to permit calling expert due to failure to cross-endorse* (CA 6/29/17) Sovde, a child, sued doctors Scott and Sarka by and through his mother. The lawsuit claimed that defendants had negligently misdiagnosed lesions on the child's head as something benign instead of manifestations of the herpes simplex virus, and if defendants had timely and properly diagnosed the lesions as products of less harmful skin, eyes, and mucous membrane disease, they could have treated the child with antibiotics, which could have prevented the onset of the more harmful central nervous system disease. The jury found in defendants' favor. On appeal, plaintiff argued that the trial court erred when it denied his requests to use the testimony of defendants' previously endorsed expert witnesses whom defendants had withdrawn. The trial court did not abuse its discretion when it permitted defendants to withdraw Dr. Reiley and Dr. Molteni as expert witnesses and not make them available at trial because they had previously been listed as "may call," not "will call," witnesses.

The lawsuit claimed that defendants had negligently misdiagnosed lesions on the child's head as something benign instead of manifestations of the herpes simplex virus, and if defendants had timely and properly diagnosed the lesions as products of less harmful skin, eyes, and mucous membrane disease, they could have treated the child with antibiotics, which could have prevented the onset of the more harmful central nervous system disease.

Further, because plaintiff did not timely endorse these witnesses or timely inform the court and defendants that he would use their depositions at trial, and the record supports the trial court's implicit decision that the testimony and depositions would have been cumulative or would have had little probative value, the trial court did not err in denying his requests. For the same reasons, the trial court properly rejected plaintiff's motion for a new trial. Plaintiff also argued that the trial court erred in excluding father's telephone conversation with a licensed medical assistant in a pediatrician's

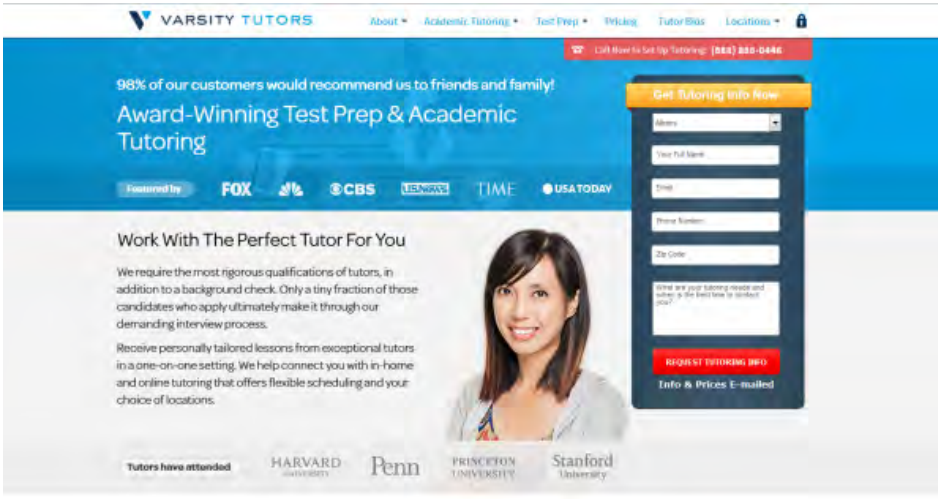
office, contending that the testimony was admissible under CRE 803(4) as statements made for purposes of medical diagnosis or treatment. Although some of father's statements fell within the ambit of CRE 803(4) because he provided them to the medical assistant to obtain a diagnosis of and treatment for the child's condition, plaintiff failed to show that excluding this testimony substantially influenced the basic fairness of the trial. Further, the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial on these grounds

Pacitto, Jr. v. Prignano – *Court of Appeals strictly enforces 90-day appeal deadline in Arbitration Act* (CA 0727/17). The Prignanos asserted multiple claims in an arbitration against Pacitto. Pacitto raised several counterclaims. The arbitration panel denied the Prignanos' claims and awarded Pacitto compensatory damages, punitive damages, and fees solely against Mr. Prignano. Many months later, when Mr. Prignano had not paid the award, Pacitto filed a combined complaint and motion to confirm the arbitration award in district court. Among other things, the Prignanos filed a motion to vacate the award and an amended answer that included a counterclaim for a declaratory judgment vacating the award. The district court order confirmed the arbitration award and found that the Prignanos filed the motion to vacate well past the 91-day deadline, thus waiving their right to object to confirmation of the award. On appeal, the Prignanos asserted that the district court erred in applying the 91-day deadline in CRS § 13-22- 223(2) and in failing to extend the deadline for filing a counterclaim for one-year pursuant to CRS § 13-80-109, when it confirmed the award. Under the Uniform Arbitration Act (UAA), a motion to vacate an arbitration award must be filed within 91 days after the movant receives notice of the award. The parties agreed that the Prignanos filed their motion to vacate and raised their declaratory judgment counterclaim well after the 91-day period for challenging arbitration awards. The more specific limitation period of CRS § 13-22 223(2) that applies only to arbitration proceedings prevails over the more general limitation period contained CRS § 13-80-109, which applies to any civil suit. The Prignanos also argued that an equitable tolling exception should be read into the UAA. The Court of Appeals rejected this argument, stating that the notice of the arbitration decision made them aware of their responsibility to challenge the decision in a permitted format and by a statutory deadline.

Owners Insurance Co. v. Dakota Station II Condominium Association, Inc. — *Court of Appeals determines appraisal was impartial per policy terms despite evidence of improper conduct* (CA 0727/17). Owners Insurance Company issued a property damage policy to Dakota Station II Condominium Association, Inc. Wind and hail storms damaged buildings owned by Dakota. The losses were combined into a single insurance claim, but there was a dispute about the total amount of damages. The parties invoked the insurance policy's appraisal provision. Each party selected an appraiser. They submitted proposed awards of different amounts and then nominated a neutral umpire as provided in the insurance policy. The final award of about $3 million was a mix of four damage estimates from Owners' appraiser, Burns, and two estimates form Dakota's appraiser, Haber. Burns refused to sign the final determination of costs. Haber and the umpire agreed and signed the award, and Owners paid Dakota. Dakota then sued Owners in federal court for breach of contract and unreasonable delay in paying insurance benefits. During discovery, Owners learned several facts about Haber that it alleged demonstrated she was not an impartial appraiser. Owners filed a petition to vacate the appraisal award under CRS § 13-22-223. Following a hearing, the trial court denied the

petition. On appeal, Owners argued that the trial court erred by not analyzing the insurance policy's appraisal dispute provision, as well as the conduct and hiring of Haber, under the Colorado Uniform Arbitration Act's standards for a neutral arbitrator in CRS § 13-22-211(2). The Court of Appeals found no error because the policy did not incorporate CUAA's standards and the parties' stipulation that CUAA applied did not specifically state whether the appraisers were to be held to the statutory standard. Owners then argued that Haber was not an "impartial appraiser" under the insurance policy. This term was not defined in the policy and has not been construed by a Colorado appellate court. The trial court interpreted it as an appraiser who applies appraisal principles with fairness, good faith, and lack of bias. The Court agreed that this was the correct reading of the policy provision and its intent and affirmed the trial court's application of this standard.

Varsity Tutors LLC v. Industrial Claim Appeals Office – *Court of Appeals determines part-time tutors were independent contractors, not employees* (CA 0727/17). Varsity Tutors LLC provided an online platform that connected tutors with students. Varsity had individual contracts with tutors, who advertised their services on Varsity's website. Students who were interested in working with particular tutors contacted Varsity. Varsity then put the tutors and students together by providing contact information. Students and tutors then contacted one another to arrange tutoring sessions. Varsity and tutors agreed to an hourly rate that Varsity would pay them for tutoring, and Varsity generally charged students about twice that rate. In 2014 the Division of Unemployment Insurance Employer Services—Integrity/Employer Audits for the Colorado Department of Labor and Employment (Division) audited Varsity's 2013 books and decided that at least 22 tutors were Varsity's employees for purposes of the Colorado Employment Security Act (CESA). The Division determined that Varsity owed $133.73 in unemployment taxes on the amounts it had paid the tutors. Varsity claimed that the tutors were independent contractors and it was thus not obligated to pay unemployment insurance taxes on wages it paid to them. A hearing officer and a panel of the Industrial Claim Appeals Office (Panel) decided the tutors were in "covered employment" and ordered Varsity to pay delinquent unemployment insurance taxes. On appeal, Varsity asserted that the tutors were independent contractors and the Panel erred in concluding that Varsity was required to pay unemployment taxes. Varsity argued that the Panel erred by not applying the totality of the circumstances test. CESA provides that a business can show that a worker is an independent contractor by proving by a preponderance of the evidence that the worker was (1) "free from control and direction in the performance of the service" under any "contract for the performance of the service" and "in fact"; and (2) "customarily engaged in an independent trade, occupation, profession, or business related to the service performed." Both the panel and the hearing officer found the first part of this test was met. The second part of the test is guided by a totality of the circumstances analysis under Softrock. Alternatively, a business can establish that its workers are independent contractors by a written document signed by the business and the worker, documenting that the business did not do nine things listed in CRS § 8-70-115(1)(c). Such a document creates a rebuttable presumption of an independent contractor relationship as long as it also contains a disclosure in specific font that the worker as an independent contractor "is not entitled to unemployment insurance benefits" unless the worker or "some other entity" provides them and the worker must "pay federal and state income tax on any moneys paid pursuant to the contract relationship." Varsity's contracts did not create a rebuttable presumption that the



tutors were independent contractors. As to the second part of the CESA test, the contracts with the tutors stated in bold, "Independent Contractor Agreement for Services." The disclosures in the contract are indicative that the tutors were independent contractors. The term "independent contractor" appears at least 16 times in the contract. The contract does not provide the tutors with training and provides minimal oversight of the tutors' work, and does not establish a curriculum or require tutors to use specific materials. Applying the Softrock totality-of-the-circumstances test, the Court of Appeals found that the undisputed evidence in the record established that Varsity satisfied its burden of proving that the tutors were independent contractors because they were customarily engaged in independent businesses in 2013 that were related to the tutoring services they were performing.

TENTH CIRCUIT COURT OF APPEALS

Ross v. University of Tulsa – *Tenth Circuit affirms dismissal of Title IX complaint - No. 16-5053* (10th Cir. 6/20/17). Plaintiff Abigail Ross was allegedly raped by a fellow student at the University of Tulsa. The alleged rape led plaintiff to sue the university for money damages under Title IX of the Education Amendments Act of 1972. The trial court granted summary judgment in favor of the University of Tulsa, and plaintiff appealed. On the first theory, the dispositive issue was whether a fact-finder could reasonably infer that an appropriate person at the university had actual notice of a substantial danger to others. On the second theory, there was a question of whether a reasonable fact-finder could characterize exclusion of prior reports of the aggressor's sexual harassment as "deliberate indifference." The Tenth Circuit concluded both theories failed as a matter of law: (1) campus-security officers were the only university employees who knew about reports that other victims had been raped, and a reasonable fact-finder could not infer that campus-security officers were appropriate persons for purposes of Title IX; and (2) there was no evidence of deliberate indifference by the University of Tulsa.

The Tenth Circuit concluded both theories failed as a matter of law: (1) campus-security officers were the only university employees who knew about reports that other victims had been raped, and a reasonable fact-finder could not infer that campus-security officers were appropriate persons for purposes of Title IX; and (2) there was no evidence of deliberate indifference by the University of Tulsa.

Parker Excavating v. LaFarge West – *Tenth Circuit affirms summary judgement on 1981 claims Docket: 16-1225* (10th Cir. 07/18/17). Parker Excavating, Inc. ("PEI") brought a civil rights claim against Lafarge West, Inc., Martin Marietta Minerals, Inc. ("MMM"), and Nick Guerra, an employee of Lafarge

and MMM. Lafarge, a construction company, was the primary contractor on a paving project for Pueblo County. PEI, a Native American-owned construction company, was a subcontractor for Lafarge. MMM replaced Lafarge as the primary contractor. PEI's participation in the project was terminated before it entered into a new subcontract with MMM. PEI alleged Lafarge retaliated against it with a letter of reprimand and a demand to sign letters of apology after PEI Vice President Greg Parker complained that County employees discriminated against PEI because of its Native American ownership. In separate orders, the district court granted summary judgment on PEI's 42 U.S.C 1981 retaliation claim to: (1) MMM and Guerra, because PEI could not show its opposition to County employees' discrimination was "protected" opposition under section 1981; and (2) Lafarge, because PEI could not show Lafarge took an adverse action against it. Finding no reversible error, the Tenth Circuit affirmed.

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