THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

COLORADO SUPREME COURT

Ravenstar, LLC v. One Ski Hill Place, LLC – *Contract with liquidated damages does not preclude claim for actual damages* (SC 09/11/17) The question addressed in this appeal was whether a liquidated damages clause in a contract was invalid because the contract gave the non-breaching party the option to choose between liquidated damages and actual damages. The Supreme Court concluded that such an option does not invalidate the clause. Instead, parties are free to contract for a damages provision that allows a non-breaching party to elect between liquidated damages and actual damages. However, such an option must be exclusive, meaning a party who elects to pursue one of the available remedies may not pursue the alternative remedy set forth in the contract.

People v. Clemens – (SC 09/11/17) A prospective juror was silent in response to questions from counsel seeking to rehabilitate responses to voir dire questioning. The Supreme Court held that the juror's silence constituted sufficient evidence sufficient to support a trial court's conclusion that the juror had been rehabilitated. It held that, considering the totality of the circumstances, the context of that silence indicated that the juror would render an impartial verdict according to the law and the evidence submitted to the jury at the trial. The Court further concluded that, applying this test, the trial court did not abuse its discretion in denying defense counsel's challenges for cause.

COLORADO COURT OF APPEALS

Klein v. Tiburon Development LLC – *Court of Appeals affirms attorney fee award* (CA 08/10/17) Following remand, the district court denied the Kleins' request for attorney fees and costs pursuant to a line of credit agreement between them and Tiburon Development LLC. The district court granted Tiburon's and Sell's (a member of Tiburon) motions for attorney fees and costs. On appeal, the Kleins contended that the district court erroneously denied their request for attorney fees pursuant to the fee-

QUICK LINKS

shifting provision of the LOC, but the Court of Appeals disagreed, holding that enforcing and awarding the Kleins their attorney fees and costs pursuant to the LOC would violate public policy because the Kleins lost the predominant and only contested part of the LOC claim, and they had only nominal success on the secondary and uncontested issue of entitlement to interest on the LOC. It would have been an abuse of discretion to conclude that the Kleins were the prevailing party on the LOC claim. Further, the Kleins were sanctioned for their conduct during the litigation and ordered to pay all of Tiburon's attorney fees. The Kleins next contended that the district court erred in awarding Sell the attorney fees he incurred because Sell failed to carry his burden to prove that the Kleins' defense to his fees motion lacked substantial justification, and the district court never found that the Kleins' defense was frivolous. An award of fees incurred in seeking fees under CRS § 13-17- 102 must be supported by a determination in the record that the sanctioned party's defense to the fees motion lacked substantial justification. Because the record in this case does not support that finding, the district court erred in including in its fee award the fees Sell incurred in pursuing his motion for fees. The Kleins further contended that the district court's award of fees to Sell unreasonably included fees Sell incurred to respond to the Kleins' CRCP 59 motion, which they asserted was not relevant to their claims against Sell. It was not an abuse of discretion for the district court to award Sell the attorney fees he incurred to respond to the Kleins' CRCP 59 motion, and the decision was supported by findings in the record.

T.D. v. Wiseman – *Court of Appeals finds abuse victim was not under a disability as defined by statute* (CA 08/10/17). T.D.'s complaint alleged she had endured 10 years of sexual and physical abuse from defendant, her former stepfather. She alleged that she was 7 years old when the abuse began and that it continued until about 1990, when she was in high school. She alleged that the abuse caused her to become dependent on drugs and alcohol, and she suffered from post-traumatic stress disorder, psychological disorders, self-mutilation, eating disorders, depression, and a cycle of abusive relationships. In August 2005, T.D. disclosed defendant's alleged abuse to the doctors who had been treating her. She attempted suicide in 2012. Thereafter she was able to maintain sobriety. T.D. filed a lawsuit in 2015 asserting assault, battery, sexual assault and battery, extreme and outrageous conduct, and false imprisonment. Defendant filed a motion for summary judgment, asserting that T.D.'s claims had accrued in 2005 when she disclosed the alleged abuse to her doctors. Consequently, her claims were time-barred by the six-year statute of limitations in § 13-80-103.7(1). T.D. argued that the record contained genuine issues of material fact concerning whether she had been a "person under disability" until 2012 because of her addictions and psychiatric disorder, so the statute would have been tolled until her disability was lifted. The trial court granted the motion for summary judgment. The Court of Appeals determined that the issue of when the claim accrued was not properly before it, and assumed it accrued at the latest in 2005. The Court then considered whether there was a factual dispute about whether the applicable statute of limitations was tolled because T.D. was a "person under disability." Under CRS 13-80-103.75(3.5)(a), a "person under disability" is a person who is (1) a minor under 18 (2) "declared mentally incompetent"; (3) "under other legal disability and who does not have a legal guardian"; or (4) "in a special relationship with the perpetrator of the assault" and "psychologically or emotionally unable to acknowledge the assault or offense and the resulting harm." T.D. was 43 when the trial court granted the summary judgment motion, so she was not a minor from 2005 to 2011, when the statute of limitations was running. The record did not contain disputed facts about whether she was mentally incompetent during the years during which the statute of limitations ran. The Court concluded that "legal disability" denotes an inability to bring a lawsuit based on a "policy of the law." No facts in the record indicated that T.D. lacked the power to timely bring her suit. Lastly, while a familial relationship can constitute a "special relationship," T.D. did not demonstrate that she was "psychologically or emotionally unable to acknowledge the assault or offense and the resulting harm."

In August 2005, T.D. disclosed defendant's alleged abuse to the doctors who had been treating her. She attempted suicide in 2012. Thereafter she was able to maintain sobriety. T.D. filed a lawsuit in 2015 asserting assault, battery, sexual assault and battery, extreme and outrageous conduct, and false imprisonment.

EnCana Oil & Gas (USA), Inc. v. Miller – *Court of Appeals holds district court retained jurisdiction over class settlement for purposes of enforcing terms* (CA 08/10/17) Beginning in 2005, a certified class of Colorado oil and gas royalty owners and EnCana Oil & Gas (USA), Inc. litigated EnCana's alleged underpayment of royalties on natural gas it produced. In 2008, EnCana and the Class entered into a settlement agreement that detailed payment of funds to settle past claims, established the methodology EnCana would use for future royalty payments, and included an arbitration clause. The district court's approved and incorporated the settlement agreement, dismissed the 2005 case with prejudice, and reserved jurisdiction to enforce the agreement. In 2016, oil and gas royalty owners, purporting to act on behalf of the Class, filed a demand for arbitration alleging EnCana had underpaid royalties owed to Class members in violation of the settlement agreement. EnCana filed a new case in district court asserting that (1) the class ceased to exist when the 2005 case was dismissed with prejudice in 2008, and (2) the 2008 settlement agreement did not authorize arbitration on a class-wide basis. The district court found that the class had not ceased to exist and the claims should be resolved in class-wide arbitration, and entered summary judgment against EnCana. On appeal, EnCana contended that the district court erred in finding that the Class continued after the case was dismissed. The Court of Appeals determined that the Class survived the 2008 dismissal because (1) compliance with the settlement agreement became part of the dismissal order, so the district court retains jurisdiction to give effect to the agreement; and (2) the agreement continues for the lives of the leases or royalty agreements covered by the settlement agreement and expressly burdens and benefits successors and assigns of the parties. The Court next rejected EnCana's contention that Class counsel failed to provide sufficient notice of the arbitration demand. EnCana then argued it was error to determine that the settlement agreement contained a contractual basis to conclude that EnCana and the Class agreed to class arbitration. EnCana asserted that because the arbitration clause is silent on class arbitration, the district court should have presumed that the parties agreed to bilateral arbitration only. The Court held that, since the settlement agreement explicitly names all members of a certified class as a party to the agreement it provided relief on a class- or subclass-wide basis.

Ruybalid v. Board of County Commissioners – *Court of Appeals affirms holding that rogue DA not entitled to attorney's fees from county* (CA 08/24/17). Ruybalid was the District Attorney for the Third Judicial District, and he admitted to serial violations of the Colorado Rules of Professional Conduct during his tenure as District Attorney. Ruybalid believed the counties should have defended him against his disciplinary actions, but the counties refused to pay for his attorney fees and costs. Ruybalid hired an attorney and entered into a settlement, admitting a pattern of discovery violations that led to the dismissal of criminal charges in several cases and stipulating that he did not diligently represent the people and engaged in conduct prejudicial to the administration of justice. After resolving the disciplinary action, Ruybalid filed a complaint for declaratory relief against the counties, seeking reimbursement of his attorney fees and costs incurred in defending the disciplinary action. The counties moved to dismiss for failure to state a claim, arguing Ruybalid had no right to fees and costs. Ruybalid countered that he had a statutory right to fees and costs, and also an equitable claim. The district court concluded that Ruybalid had failed to state a claim and had no right to fees and costs, and dismissed the complaint. Ruybalid appealed. The court of appeals noted that the American Rule generally requires parties to pay their own fees and costs. Ruybalid argued that C.R.S. § 20-1-303 required the counties to pay his attorney fees, but the court of appeals disagreed, finding nothing in the rule to require the counties to pay attorney fees or costs. The court refused to infer an exception to the American Rule not explicitly authorized by statute. The court declined to consider the attorney fees and costs incurred in defending Ruybalid's disciplinary action as "expenses necessarily incurred" in discharging a district attorney's official duties. The court also noted that Ruybalid failed to allege any facts that tended to support that the expenses incurred were for the benefit of the counties.

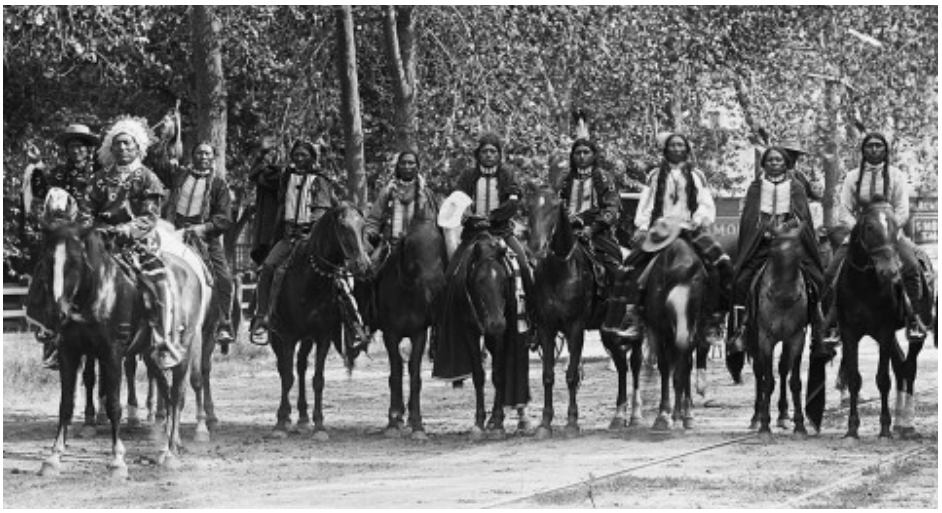
People v. Stanley – *Court of Appeals rules on interplay of liability recovery and restitution* (CA 09/07/17). Stanley's automobile insurer, Geico Indemnity Co. (Geico), entered into a "Release in Full of All Claims" with the victim and

her husband. Under the settlement, Geico paid the victim $25,000 for all claims related to and stemming from the accident in exchange for a full and final release of all claims against Stanley and Geico. Thereafter, Stanley pleaded guilty to felony vehicular assault, driving under the influence, and careless driving. The prosecution filed a motion to impose restitution and attached a report from the Crime Victim Compensation Program. It showed that the CVCP had paid the victim $30,000, the maximum amount allowable by statute, for pecuniary losses proximately caused by Stanley's criminal conduct. The Court awarded Stanley a $25,000 setoff against restitution for the amount paid by Geico, and ordered him to pay the $5,000 net amount. On appeal, the prosecution argued that Stanley should not receive a setoff for the settlement funds because the release was an unapportioned settlement that did not "earmark" the proceeds for the same expenses compensated by the CVCP, leaving open the possibility that the victim used the proceeds for losses not compensated by the CVCP. When a victim receives compensation from a civil settlement against a defendant, the defendant may request a setoff against restitution "to the extent of any money actually paid to the victim for the same damages." For purposes of a setoff, however, the court cannot allocate proceeds from an unapportioned civil settlement agreement without "specific evidence that the settlement included particular categories of loss," because in civil cases victims may recover both pecuniary losses covered by the restitution statute and other damages specifically excluded under the restitution statute. Because the information needed to determine whether a victim has been fully compensated or has received a double recovery is known only by the victim, once a defendant has shown that a civil settlement includes the same categories of losses or expenses as compensated by the CVCP and awarded as restitution, the defendant has met his burden of going forward, and the prosecution may then rebut the inference that a double recovery has occurred. (Counsel should be aware of the potential problems this holding may cause!)

TENTH CIRCUIT COURT OF APPEALS

Dahn v. Amedei - Docket: 16-1059 – (10th Cir. 8/14/17) When a state fails to protect a foster child from harm, the foster child can sue the state under the special-relationship doctrine, pursuant to 42 U.S.C. 1983. The special-relationship doctrine provides an exception to the general rule that states aren't liable for harm caused by private actors. This case was about the geographical reach of the special-relationship doctrine: whether the special relationship and its accompanying duty to protect crosses state lines. James Dahn, a foster child, sued two Colorado social workers responsible for investigating reports that he was being abused, along with others involved with his adoption. Dahn had been in Oklahoma's custody until, with Oklahoma's approval, a Colorado-based private adoption agency placed him for adoption with a foster father in Colorado. The foster father physically abused Dahn before and after adopting him. The private adoption agency was responsible for monitoring Dahn's placement. Together with Colorado, it recommended approval of his adoption by the abusive foster father. Dahn eventually escaped his abusive foster father by running away. Dahn then sued the private adoption agency, its employees, and the Colorado caseworkers who were assigned to investigate reports of abuse from officials at Dahn's public school. The district court dismissed all of Dahn's claims except a section 1983 claim against the two Colorado caseworkers and two state-law claims against the agency and its employees, concluding the special-relationship doctrine allowed Dahn to move forward with the 1983 claim, and it exercised supplemental jurisdiction over the remaining state-law claims. The Colorado caseworkers appealed. Though the Tenth Circuit condemned their efforts to protect the vulnerable child, the Court concluded, under the controlling precedents, that the Colorado caseworkers were entitled to qualified immunity, and reversed.

Becker v. Ute Indian Tribe – *Court of Appeals rules on tribal-exhaustion rule* Docket: 16-4175 (10th Cir. 8/25/17). The Ute Indian Tribe of the Uintah and Ouray Reservation appealed a preliminary injunction ordering it not to proceed with litigation in tribal court against a nonmember former contractor, Lynn Becker. The district court ruled that although the parties' dispute would ordinarily come within the tribal court's jurisdiction, their Independent Contractor Agreement (the Contract) waived the Tribe's right to litigate in that forum. The Tribe argued: (1) the tribal-exhaustion rule, which ordinarily requires a federal court to abstain from determining the jurisdiction of a tribal court until the tribal court has ruled on its own jurisdiction, deprived the district court of jurisdiction to determine the tribal court's jurisdiction; and (2) even if exhaustion was not required, the preliminary injunction was improper because the Contract did not waive the Tribe's right to litigate this dispute



in tribal court. In addition, the Tribe challenged the district court's dismissal of its claims under the federal civil-rights act, 42 U.S.C. 1983, seeking to halt state-court litigation between it and Becker. The Tenth Circuit did not agree the tribal-exhaustion rule was jurisdictional, but agreed the district court should have abstained on the issue. Although the Contract contained a waiver of the tribal-exhaustion rule, Becker could not show a likelihood of success based on the validity of the waiver; and he failed to adequately counter the Tribe's contention that the entire Contract, including the waiver, was void because it did not receive federal-government approval, as was required for contracts transferring property held in trust for the Tribe by the federal government. With respect to the Tribe's claim under 42 U.S.C. 1983, the Tenth Circuit found the Tribe had not stated a claim because it is not a "person" entitled to relief under that statute when it is seeking, as here, to vindicate only a sovereign interest. To resolve the remaining issues raised in this case, the Court adopted its decision in the companion case of Ute Indian Tribe v. Lawrence, No. 16-4154 (August 25, 2017).

Ute Indian Tribe of the Uintah v. Lawrence – *Tenth Circuit denies tribe claims of lack of jurisdiction in federal court* Docket: 16-4154 (10th Cir. 8/25/17). The contract at issue in this appeal was an Independent Contractor Agreement between the Ute Indian Tribe and Lynn Becker, a former manager in the Tribe's Energy and Minerals Department. Becker claimed the Tribe breached the Contract by failing to pay him 2% of net revenue distributed to Ute Energy Holdings, LLC from Ute Energy, LLC. After Becker filed suit in Utah state court, the Tribe filed this suit against him and Judge Barry Lawrence, the state judge presiding over Becker's suit, seeking declarations that: (1) the state court lacks subject-matter jurisdiction over the dispute; (2) the Contract was void under federal and tribal law; and (3) there was no valid waiver of the Tribe's sovereign immunity for the claims asserted in state court. The Tribe also sought a preliminary injunction ordering defendants to refrain from further action in the state court proceedings. The federal district court held that it lacked jurisdiction to consider the Tribe's challenge to the jurisdiction of the state court. The Tenth Circuit disagreed with the district court, and reversed and remanded for further proceedings. The Court held that the Tribe's claim that federal law precluded state-court jurisdiction over a claim against Indians arising on the reservation presented a federal question that sustained federal jurisdiction.

T.D. v. Patton – *Tenth Circuit denies qualified immunity in danger creation custody case* Docket: 16-1092 (10th Cir. 8/28/17). Kelcey Patton, a social worker for the Denver Department of Human Services, was one of those responsible for removing T.D., a minor at the time, from his mother's home, placing him into DDHS's custody, and recommending T.D. be placed and remain in the temporary custody of his father, Tiercel Duerson. T.D. eventually was removed from his father's home after DDHS received reports that T.D. had sexual contact with his half-brother, also Mr. Duerson's son. DDHS later determined that during T.D.'s placement with Mr. Duerson, T.D. had suffered severe physical and sexual abuse at the hands of his father. T.D. sued Patton under 42 U.S.C. 1983 for violating his right to substantive due process, relying on a "danger-creation theory," which provided that "state officials can be liable for the acts of third parties where those officials created the danger that caused the harm." Patton moved for summary judgment on the ground that she is entitled to qualified immunity. The district court denied the motion. Finding no reversible error in that decision, the Tenth Circuit affirmed.

Healy v. Cox Communications – *Court holds set-top-cable boxes are not an illegal restraint of trade* No. 15-6218 (10th Cir. 2017) Cox Cable subscribers cannot access premium cable services unless they also rent a set-top box from Cox. A class of plaintiffs in Oklahoma City sued Cox under antitrust laws, alleging Cox had illegally tied cable services to set-top-box rentals in violation of section 1 of the Sherman Act, which prohibits illegal restraints of trade. Though a jury found that Plaintiffs had proved the necessary elements to establish a tying arrangement, the district court disagreed. In granting Cox's Fed. R. Civ. P. 50(b) motion, the court determined that Plaintiffs had offered insufficient evidence for a jury to find that Cox's tying arrangement "foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes in the market for set- top boxes." After careful consideration, the Tenth Circuit ultimately agreed with the district court and affirmed.

Oldham v. O.K. Farms – *Tenth Circuit reverses trial court's sua sponte summary judgment ruling* Docket: 16-7069 (10th Cir. 9/25/17). Plaintiff Earl Oldam raised chickens for O.K. Farms since 1995. In 2014, he and O.K. entered into the chicken-growing contract at issue in this case. The contract had a three-year duration, but O.K. retained the right to terminate the contract for certain specified reasons, including "[b]reach of any term or condition of this contract," "[a]bandonment or neglect of a flock," and "[f]ailure to care for or causing damage to [O.K.'s] equipment or property." In 2016, Plaintiff discovered that one of his three chicken houses had flooded after an overnight rainstorm. Plaintiff contacted O.K. to inform them of the issue; some of the flock in the affected henhouse perished from the flood. The remaining chickens were collected by O.K. Plaintiff was paid for the work he had done in raising the surviving chickens to this point, reduced by various expenses such as the costs of catching and moving the chickens. Shortly thereafter, O.K. sent Plaintiff a letter providing him with a ninety-day notice of contract termination for breach of the terms of the contract. Plaintiff filed suit in state court, alleging that O.K. breached the contract by terminating the agreement without adequate cause. O.K. removed the action to federal court and filed a motion for summary judgment. The district court stated that it had looked at the undisputed material facts from the summary judgment pleadings and found "questions of fact galore" on all of the arguments raised by O.K. in its motion. "But," the court continued, "all that doesn't matter," because Plaintiff "didn't say come take away the chickens from the flooded henhouse. He said come take them all." The court granted O.K.'s motion for summary judgment, reasoning that because there was "nothing in the evidentiary material showing [that the chickens in the other henhouses] were in danger at all, he abandoned them" by telling O.K. to come pick them all up. In reversing the district court's judgment, the Tenth Circuit found plaintiff raised arguments that directly addressed the district court's sua sponte reasoning and that he was not provided an opportunity to make at trial, and argued he was prejudiced by the district court's entry of judgment on this basis without considering any of the contrary arguments he might have made given notice and a reasonable time to respond. The Court was persuaded that Plaintiff had shown prejudice from the trial court's sua sponte summary judgment decision.

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