COLORADO CASE LAW UPDATE

Colorado Supreme Court

LeHouillier v. Gallegos— *Supreme Court holds collectability of judgment is an element of proof for client-plaintiff* - 2019 CO 8 (SC 01/28/19). The Supreme Court held that, in an attorney malpractice action, the client-plaintiff bears the burden of proving the collectability of the underlying judgment because collectability is essential to the causation and damages elements of a client's negligence claim against the attorney. The record shows that the client-plaintiff in this case failed to prove that the underlying judgment would have been collectible. However, given the absence of a clear statement from this court regarding the plaintiff's burden to prove collectability at the time of trial, and given that the issue was not raised in this case until after client-plaintiff had presented her case-in-chief, the court reversed the judgment of the court of appeals and remanded the case for a new trial.

In re Accetta v. Brooks Towers Residences Condominium Association, Inc. – *Court holds condo association can adequately represent interests of absent unit owners and that joinder was not necessary* (SC 2/11/19). A district court held that Plaintiff had to join [as indispensable parties] the approximately 500 individual unit owners in the Brooks Tower Residences rather than proceeding solely against his condominium association and its board members. Plaintiff sought, among other things, a declaratory judgment invalidating a provision of his condominium association's declaration that provides for ownership interests to be allocated in the sole discretion of the declarant. The district court concluded that all of the Brooks Tower unit owners are indispensable parties and must be joined. The Supreme Court concluded that the condominium association can adequately represent the interests of the absent unit owners for purposes of plaintiff's declaratory judgment action and that plaintiff need not join those absent owners. The Court made the rule to show cause absolute.

Colorado Court of Appeals

Brown v. American Standard Insurance Company of Wisconsin – *Court holds that reasons fora policy cancellation must be valid to be effective* - 2019COA11 (01/24/19). American Standard had previously given written notice of cancellation on the ground that Brown did not have a valid driver's license. But Brown contested that fact and offered admissible evidence that he had a valid driver's license at the time of the cancellation and on the date of the accident. The Court held that where an insurer notifies an insured that it is cancelling an automobile insurance policy and specifies the reason for the cancellation, the validity of the cancellation turns on the accuracy of the information underlying the cancellation. Thus, where a policy cancellation was based on inaccurate information, and thus the cancellation was ineffective. The matter was remanded to determine if the stated reason for cancellation was true.

Security Credit Services, LLC v. Hulterstrom —2019COA7 (01/24/19). The division holds that a judgment creditor may obtain a judgment lien at any time during the remaining life of the judgment, but if more than six years have passed since the entry of the judgment, the creditor must first revive the judgment and record the transcript of the revived judgment.

Stiles v. Department of Corrections - 2019COA10 (CA 1/24/19). In this Colorado State Personnel Board case, the Court of Appeals addressed whether a reviewing ALJ must defer to the appointing authority's weighing of the disciplinary rule factors or whether the hearing before the ALJ is *de novo* and requires no deference to the appointing authority's findings in deciding whether an appointing authority acted arbitrarily and capriciously in disciplining a state-certified employee. The division holds that a section 24-50-125(4) hearing is a de novo hearing at which the Administrative Law Judge makes credibility, factual, and legal findings without deference to the appointing authority.

Tallman v. Aune — *2019*COA12 (CA1/24/19). A division of the court of appeals considers whether the district court erred in vacating a default judgment against the Defendant under C.R.C.P. 60(b)(3) for lack of personal service, where the judgment was twenty years old, the district court's case file had been destroyed, and the return of service was not available. The division concluded that the presumption of regularity applied to the default judgment. The district court, therefore, erred in placing the burden on the plaintiff to prove valid service. Instead, it held that the defendant had the burden to overcome the presumption that the default judgment was entered properly, including with jurisdiction.

Parks III v. Edward Dale Parrish LLC – *Laypersons can determine reasonableness of attorneys' fees in claim for fees* - 2019 COA 19. (CA 2/07/18). Parrish and Edward Dale Parrish LLC (defendants) represented plaintiff in two cases, a partition case and a dissolution case, against plaintiff's former, long-term girlfriend. Plaintiff was not satisfied with the results. After he failed to pay Parrish for his legal services, Parrish filed a notice of attorney's lien in the partition case. In response, plaintiff filed this case against defendants, and defendants counterclaimed. At the close of plaintiff's evidence, defendants moved for directed verdicts on all of his claims. The district court concluded that the breach of fiduciary duty claim was duplicative of the negligence claim and dismissed that claim. Plaintiff moved for a directed verdict on the counterclaims, which the court denied. The jury returned verdicts for defendants on all claims and counterclaims and the court denied the JNOV subsequently filed. On appeal, plaintiff first contended that the district court erred in denying his motion for directed verdict and motion for JNOV on defendants' abuse of process counterclaim. Given the lack of evidence of any improper use of process, the district court should have granted plaintiff's motion for a directed verdict or motion for JNOV on the abuse of process counterclaim. Plaintiff next contended that the district court erred in dismissing as duplicative his breach of fiduciary duty claim relating to the partition case. Here, plaintiff alleged that Parrish breached his fiduciary duty by entering into a stipulation without his consent. The same allegation underlies in part the negligence claim and implicates Parrish's exercise of professional judgment. Therefore, the district court didn't err in dismissing the breach of fiduciary duty claim. Plaintiff also contended that the district court erred in denying his motion for a directed verdict on defendants' breach of contract counterclaim. Defendants claimed that plaintiff breached a contract by failing to pay them attorney fees. Plaintiff argued that defendants had to prove the reasonableness of the fees they sought through expert testimony, and because defendants didn't present any such testimony, the claim necessarily fails. The Court held that where the breach of contract damages are unpaid attorney fees, laypersons can determine the reasonableness of fees without an expert's help. Here, Parrish testified about the services rendered, the reasonableness of

the time spent on the services, and the fees charged for the services, and the jury considered the bills to plaintiff. Thus, the jury had sufficient evidence to assess the reasonableness of the claimed fees.

Estate of Yudkin —*Common Law marriage – what is it?* 2019COA25 (CA 2/21/19). The Court of Appeals provides its interpretation of the common law marriage case, *People v. Lucero*, 747 P.2d 660 (Colo. 1987). It held that the district court's application of *Lucero* was in error when it gave more weight to the fact that the parties filed separate federal and state tax returns in finding no common law marriage. The division holds that under *Lucero,* if there is an agreement to be married and the parties cohabitate and have a reputation in the community as husband and wife, the inquiry ends there; a common law marriage has been established. Further, any actions taken (or not taken) by the parties after those essential factors are established are legally irrelevant.

Wagner v. Planned Parenthood —2019COA26 (CA 2/21/2019). This case arose out of the shooting at the Planned Parenthood facility in Colorado Springs by Robert Dear. In a 2-1 decision, the Court of Appeals held that the trial court erred in granting summary judgment in favor of Rocky Mountain Planned Parenthood, Inc, based on its conclusion that a gunman's actions were "the predomina[nt] cause" of the injuries and deaths. The division finds that plaintiffs tendered sufficient evidence to raise genuine issues of material fact whether (1) reasonable security measures were known to PPRM that would have prevented harm to the victims; and (2) PPRM was sufficiently aware of the potential for criminal conduct against its clinics to prepare for the type of offenses committed by the gunman. Based on this , the Court concluded that the trial court erred in determining as a matter of law that PPRM's "contribution [was] infinitesimal as compared to Robert Dear's shooting spree," and that "a mass shooting at PPRM, involving several weapons and improvised bombs" had such a predominant effect that it prevented PPRM's conduct from becoming a substantial factor. The dissent concludes that summary judgment was proper because the gunman's actions had a predominant effect in producing plaintiffs' injuries, thus preventing PPRM's alleged negligence from becoming a substantial factor.

10th Circuit Court of Appeals

MTI v. Employers Insurance Co. - Docket: 17-6206 (10th Cir. 1/25/2019). At issue in this appeal were commercial general liability policy exclusions that barred coverage for damage to "that particular part" of the property on which an insured is performing operations, or which must be repaired or replaced due to the insured's incorrect work. The Tenth Circuit concluded the phrase "that particular part" was susceptible to more than one reasonable construction: it could refer to the distinct component upon which an insured works or to all parts ultimately impacted by that work. The Court surmised the contract had to then be interpreted consistent with the mutual intent of the parties, with the ambiguity resolved most favorably to the insured and against the insurance carrier. The Court adopted the narrower interpretation of the phrase "that particular part," under which the exclusion extends only to the distinct components upon which work was performed. This conclusion was contrary to the district court's interpretation, and therefore reversed and remanded for further proceedings.

Kile v. United States – *Court rejects contention that conflict of interest exists between parent and disabled minor who was party to the same lawsuit.* Docket: 18-7004 (10th Cir. 2/11/19). Plaintiff Millard Lance Lemmings was born at a government-operated hospital in Ada, Oklahoma. During his birth, Lance suffered a brain injury. Lance and his parents, suing as "parents and next friends," sued Defendants Comphealth, Inc. and Comphealth Medical Staffing, Inc. for medical malpractice under the Federal Tor Claims Act. The parties settled the case on September 28, 2001. Lance's parents were simultaneously engaged in a state court proceeding regarding guardianship of Lance. On the morning of October 25, 2001, Lance's parents filed an application for an order approving the agreed settlement, attorneys' fees, and litigation costs in the state court action. The state district court appointed Lance's parents as the guardians of Lance's estate. Following that court order, Lance's parents withdrew their state court application for an order approving the settlement. Later that day, Lance's parents appeared before the federal district court for a fairness hearing regarding the settlement and represented him at the fairness hearing. The district court did not appoint a guardian *ad litem*. Appellants Barbara Lemmings and Oran Hurley, Jr. filed a motion fifteen years later seeking to intervene, in which they contended: (1) the parties presented materially inaccurate information to the district court in 2001 in order to obtain the district court's approval; (2) the district court did not have jurisdiction to approve the settlement because it did not appoint a guardian ad litem to represent Lance; and (3) a conflict of interest existed between Lance and his parents which required the appointment of a guardian ad litem. Belatedly, Appellants further sought access to the 2001 sealed fairness hearing transcript. In the motion to intervene, Appellants asserted that Lance's parents spent a large portion of the proceeds and abandoned him in 2011, leaving him in the care of his paternal grandmother, Appellant Barbara Lemmings. The state district court appointed her Lance's guardian in January 2017. After Ms. Lemmings suffered a health issue, the state court appointed Appellant Oran Hurley, Jr. as co-guardian. Appellants sought to reopen the district court action, vacate the dismissal, intervene, and rewrite the terms of the Irrevocable Governmental Trust in order to access the proceeds contained in that trust. The United States objected. The Tenth Circuit rejected Appellants' contention that Federal Rule of Civil Procedure 17 required the formal appointment of a guardian *ad litem and* rejected the contention that an inherent conflict of interest always existed where a minor was represented by a parent who was a party to the same lawsuit as the minor.

Nelson v. United States - Docket: 17-1388 (10th Cir. 2/12/19). In 2008, James Nelson was seriously injured while riding his bicycle on United States Air Force Academy land. He and his wife, Elizabeth Varney, sued the Academy under the Federal Tort Claims Act, seeking damages. The district court ruled in their favor and awarded them approximately $7 million in damages. In a previous appeal, the Tenth Circuit reversed that decision, holding that the Colorado Recreational Use Statute shielded the Academy from liability. But the Court remanded on the issue of whether an exception to the statute's liability shield applied. On remand, the district court held that an exception did apply, and reinstated its prior judgment. The Academy appealed. Finding no reversible error, the Tenth Circuit affirmed.

Other matters

As you may know, the American Law Institute re-formulated a Restatement of Law of Liability Insurance regarding liability insurance. Many of the sections are in derogation of common law and of significance to us and our clients. For example, Section 12 provides that an insurer may be held liable for the conduct of an attorney hired to represent the policyholder where the insurer did not use "reasonable care" in selecting counsel (section 12(1)) and the insured suffers harm resulting from the negligent conduct of the counsel selected by the insurer. Further, an insurer is also liable for harm resulting to a policyholder if the insurer directs counsel's negligent conduct or omission in a manner that essentially "overrides" the independent professional judgment owed by defense counsel to the policyholder (section 12(2)).

Also, Section 14(1)(a) specifically provides that counsel selected to defend the insured may not disclose "to the insurer any information of the insured that is protected by attorney–client privilege, work-product immunity, or a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured." Section 14(1)(b). Finally, under Section 14(3), an insurer's costs in defending the policyholder in the underlying action are in addition to the limits of the policy, unless the policy otherwise provides. Section 19 directs that where there is a breach of the duty to defend the insurer forfeits any control over the defense or settlement. Section 21 concerns whether an insurer may recover defense costs where a claim is against a policyholder is ultimately determined to be not covered by the policy. This section states that an insurer may not recover from the insured fees and costs paid on behalf of a policyholder even for claims that are determined to be not covered, unless it is so stated in the policy or "otherwise agreed to" by the policyholder.

Finally, Section 48 describes the damages due an insured for breach of a liability policy. Specifically, if there is a breach of the duty to defend, "all reasonable costs of the defense of a potentially covered legal action," subject to limits, deductibles or SIRs, are included as damages. "While insurers are obligated only to pay reasonable defense costs, what is reasonable in the case of a breach of defense duties is judged from the perspective of an insured forced to defend a liability action without the timely assistance of its insurer. In that circumstance, the negotiated rates that liability insurers pay their regular defense counsel are unlikely to provide a useful guide to what is reasonable." Section 48, Comment (b).

I raise this because there has been some [deserved] backlash against the new Restatement. Lawmakers in Ohio rejected the Restatement stating: "the American Law Institute's approved Restatement of the Law, Liability Insurance does not constitute the public policy of Ohio."

While its future in Colorado remains to be seen, this Restatement will be an underlying issue for years to come.