Fall 2022

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LEGAL UPDATE

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COLORADO

COLORADO SUPREME COURT FINDS THAT §13-21-101 IS AMBIGUOUS AND HOLDS PRE-JUDGMENT INTEREST RATE ENDS AND MARKET-BASED INTEREST RATE STARTS AT THE TIME THE DEBTOR FILES THE APPEAL.

Colorado Supreme Court. In 2013 Forrest Walker ("Walker") proceeded to trial against Ford Motor Company in a products liability case relative to personal injuries sustained in an accident. The jury returned a verdict in favor of Mr. Walker. Ford appealed, and the court of appeals reversed the judgement. The Colorado Supreme court affirmed the appellate court's reversal on different grounds and remanded the matter for a new trial. On remand, Walker prevailed again, obtaining a new money judgement. Colorado Revised Statute § 13-12-101 provides a pre-judgment nine percent interest rate from the date of the accident until the date of the appealed judgment (the first judgement). But, the parties disagreed as to the applicable interest rate between entry of that judgement and satisfaction of the final judgement (the second judgement).

The Supreme Court of Colorado found that section 13-21-101 is ambiguous stating, "the interplay among this trio of provisions require us to navigate a jurisprudential Bermuda Triangle – all the while ensuring that none of the provisions mysteriously disappear."

The Court held that whenever the judgement debtor appeals the judgment, the interest rate switches from nine percent to the market-based rate. "The outcome of the appeal is of no consequence; the filing of any

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appeal of the judgement by the judgement debtor triggers the shift in the interest rate." The Court further held, "the market-based post judgement interest on the sum to be paid must be calculated from the date of the appealed judgement."

Ford Motor Co. v. Walker, 2022 CO 32, 2022 Colo. LEXIS 595 (June 21, 2022).

NO COLORADO LAW OR AUTHORITY INHERENTLY GIVES ARBITRATION TRIBUNALS THE POWER TO SANCTION NON-PARTY COUNSEL.

Colorado Court of Appeals. In an arbitration between Santangelo Law Offices, P.C., ("Santangelo") and Touchstone Home Health LLC, ("Touchstone") the arbitrator sanctioned Touchstone's counsel, Robert J. Herrera ("Herrera"). Invoking C.R.C.P. 11 and section 13-17-102, the arbitrator awarded Santangelo nearly $150,000 against Herrera personally. Herrera appealed.

The appellate court addressed two issues, whether the Arbitration language of the Touchstone-Santangelo Fee Agreement personally bound Herrera and whether Herrera personally agreed to the Arbitrator's authority to impose sanctions.

As to the first issue the court held that Herrera was not bound by the Touchstone-Santangelo fee agreement finding that Herrera was not a "party" to the arbitration. The court rejected Santangelo's *Rugby United* exceptions argument, citing to *MCR of AM*., Inc. in which that court vacated sanctions against a party's attorney because the attorney was not bound by the parties' arbitration agreement.

Second, the district court found that Herrera "voluntarily agreed to the arbitrator's authority under Colorado law twice when he (1) entered his appearance as counsel in the arbitration and (2) expressly agreed at the preliminary hearing that Colorado law and Rules of Civil Procedure would apply to the arbitration proceedings." In doing so, the district court ruled that Herrera "bound not only his client but himself to the rule of the arbitrator" and "[t]herefore he (like his client) could be sanctioned" under Rule 11 or section 13-17-102.

The appellate court dismissed Santangelo's argument and the district court's ruling finding no record to support their findings. Rather, "the arbitrator's report merely memorialized that Colorado law applied to the proceedings." Herrera only agreed to application of Colorado law on his client's behalf, and, in determining the proper parties for sanctions, the arbitrator stated that sanctions apply to Herrera "by virtue of his role as counsel for Touchstone and not in his individual capacity."

The appellate court held that under Colorado law, statute, and the Colorado Uniform Arbitration Act (CUAA) there is no authority which grants an arbitrator power – either inherent to the arbitration tribunal or conferred by Rule 11, section 13-17-102, or the CUAA – to impose sanctions upon a party's counsel absent an agreement that provides otherwise. The appellate court also found, Herrera acting as counsel was not personally bound by the Arbitration agreement. The appellate court reversed and remanded.

Herrera v. Santangelo Law Offs., P.C., 2022 COA 93,2022 Colo. App. LEXIS 1173, 2022 WL 3269739 (August 11, 2022).

Utah

COURT OF APPEALS FINDS THE "PREVAILING PARTY" FOR PURPOSE OF AWARDING FEES IS BASED ON COMPARATIVE VICTORY OF THE PARTIES.

Colorado Court of Appeals. North Ridge Construction Inc. ("North Ridge) is a general contractor and Maxwell Masonry Restoration & Cleaning LLC ("Maxwell") was its subcontractor. In 2017 a disagreement ensued about how much North Ridge owed Maxwell. Maxwell filed suit against North Ridge asking for more than $250,000 in damages. North Ridge counterclaimed asking for more than $36,000 in damages. After a three-day bench trial, the court ruled in favor of both parties, it awarded Maxwell $18,536 in damages on its claim and North Ridge $16,750 on its claim.

North Ridge then requested an award for attorney's fees pursuant to the contract, and argues it was the prevailing party. The district court concluded that no party had prevailed and denied North Ridge's motions. North Ridge appealed the decision.

The Supreme Court found that the appellate court erred when it evaluated Maxwell's total judgement received to be $65,333.00. This amount represented (1) an $18,536.40 final payment that North Ridge was withholding and (2) a $46,795.60 retainage that the city was withholding. From this calculation the appellate court determined Maxwell's success rate to be 26%.

The Court held that North Ridge was the comparative victor, because the term "recovered" is "based on the amount actually awarded from the court's judgement." Therefore, Maxwell's amount actually recovered was $18,536.40, and its true success rate was 7%, compared to North Ridge's 26%. The appellate court awarded attorney's fees to North Ridge and reversed the district court's ruling.

Maxwell Masonry Restoration & Cleaning v. N. Ridge Constr. Inc., 2022 UT App 109, 2022 Utah App. LEXIS 109 (September 1, 2022).

SUPREME COURT HOLDS INSURER CAN BREACH DUTY OF GOOD FAITH AND FAIR DEALING BY DELAYING DETERMINATION OF LACK OF COVERAGE.

The Utah Supreme Court. Renato Saltz ("Saltz") is a plastic surgeon who was sued by a former patient ("Judge") for releasing her before and after photographs to a news outlet ("Fox"). At the time of the suit, Dr. Saltz had a $1,000,000 malpractice insurance policy through UMIA Insurance ("UMIA"). A month after the news broadcast, Judge sent a letter to Saltz, which he forwarded to UMIA. UMIA's counsel instructed Saltz to also submit the claim to Hartford, his general liability insurance carrier. Hartford denied coverage. In early 2009, Judge filed a civil lawsuit ("Judge Lawsuit") against Dr. Saltz and Fox.

UMIA then controlled how the Judge Lawsuit was handled and negotiated with Judge in an attempt to settle. However, during the first two years when the case was at the trial court level, and the subsequent five years on appeal, UMIA was unable to negotiate an acceptable settlement offer to Judge. Nearly eight years after the suit began, UMIA informed Dr. Saltz that it would not settle the Judge Lawsuit for policy limits and that it did not think Saltz had coverage under his UMIA Policy.

During this time, at Saltz's request, Hartford revisited its initial coverage denial. Hartford agreed to defend Saltz under a reservation of rights and to contributed half of his past defense costs.

In November 2016, UMIA filed a new lawsuit—a declaratory judgement action seeking to establish that the Judge Lawsuit was not covered under Saltz's policy with UMIA. Saltz asserted counterclaims against UMIA, contending in the alternative that he had coverage under the policy through principles of waiver and estoppel. Saltz also claimed that UMIA had breached the covenants of good faith and fair dealings, in which he sought compensatory and punitive damages.

Several weeks later, UMIA moved for summary judgment on its declaratory judgement claim, asserting that the Judge Lawsuit was not covered under the plain language of its policy with Saltz. The district court agreed, leaving only Saltz's counterclaims for breach of the duty of good faith and associated damages and his claims for coverage under the UMIA policy under theories of waiver and promissory estoppel.

The parties mediated both cases in June 2017. UMIA informed the mediator that it would not offer more the $15,000.00 in any settlement offer. This settlement offer was the lowest since the beginning of the first lawsuit. Ultimately, UMIA left the negotiations. Hartford and Satlz settled the Judge lawsuit for $1,000,000.00 in total, each contributing to $500,000.00.

The suit between UMIA and Saltz's proceeded. UMIA and Saltz filed various pretrial motions. UMIA moved to preclude Saltz from introducing into evidence actions UMIA tooks during the 2017 settlement negotiations. UMIA also moved for summary judgment on Satlz's punitive damage claim. The district court denied UMIA's motion to exclude the 2017 settlement negotiations but ruled in favor of UMIA's motion to dismiss Saltz's punitive damages claim.

The case went to trial in August 2019. The jury found for Saltz on his claims. It found that UMIA was estopped from denying coverage and required to reimburse Saltz the full amount he paid during the 2017 settlements ($500,000.00). The jury also found that UMIA had breached its covenant of good faith and fair dealings, causing Saltz $500,000.00 in damages and causing him to incur attorney's fees. UMIA renewed its motion for judgement as a matter of law. UMIA claimed that Saltz had failed to establish a basis for promissory estoppel. UMIA contended that Saltz had failed to demonstrate that he was prejudiced by UMIA's eight-year delay in questioning coverage. The district court denied UMIA's motion and confirmed the jury award. UMIA appealed.

The Utah Supreme Court affirmed the district court's denial of UMIA's renewed motion for judgement as a matter of law on Saltz's promissory estoppel claim, holding that UMIA's eight-year delay in questioning coverage deprived him of an opportunity to settle the Judge Lawsuit. The Court reasoned that if UMIA would have sent a reservation of rights letter and filed for declaratory judgement action earlier, it would have motived both parties to settled quicker and forgo incurring additional expenses. Therefore, UMIA's action directly prejudiced Saltz.

The Court further held that UMIA failed to carry its burden of persuasion to show the district court improperly admitted evidence from the 2017 settlement. The Supreme court reversed the dismissal of Saltz's request for punitive damages. The Court concluded that Saltz was entitled to an award of his attorney's fees on appeal holding that from UMIA's actions a reasonable jury could infer that UMIA's sudden unwillingness to contribute meaningfully to settlement so close to trial was the product of meaningful indifference toward Saltz's rights as its insured.

UMIA Ins., Inc. v. Saltz,
2022 UT 21, 2022 Utah LEXIS 53
(June 9, 2022).

SUPREME COURT HOLDS THAT §78B-2-108 IS NOT TOLLED WHEN AN INCAPACITATED PERSON HAS A LEGAL GUARDIAN OR POWER OF ATTORNEY

The Supreme Court of Utah. John Zilleruelo ("Zilleruelo") became incapacitated in 2013 following a motor vehicle accident. Four years, seven months and twelve days after the collision, Zillerulo filed suit against Commodity Transporters, Inc. ("Commodity"). Commodity filed a motion for summary judgement claiming that the statute of limitations had run under Section 78B-2-108. Commodity argued that Zillerulo was not incapacitated because his mother was granted a power of attorney over Zillerulo in 2002. The trial court granted defendant's motion for summary judgement.

The Supreme Court rejected the trial courts ruling stating, "[w]e interpret the Tolling statute to mean what it says: a statute of limitations for causes of action unrelated to the recovery of real property will not run '[d]uring the time that an individual is underage or mentally incompetent.'" The Court held that the existence of a legal guardian or power of attorney has no impact on whether the statute is tolled during the period of incompetency. The Supreme Court reversed the trial court's ruling and remanded.

Zilleruelo v. Commodity Transporters, Inc. 2022 UT 1, 2022 Utah LEXIS 1 (January 20, 2022).

Wyoming

SUPREME COURT HOLDS A THIRD-PARTY ADMINISTRATOR CAN BE LIABLE TO PARTY PARTICIPANTS IF IT EXCEEDS ITS SCOPE AND ASSUMES THE ROLES OF INSURER.

The Supreme Court of Wyoming. David Peterson ("Mr. Peterson") began working for Memorial Hospital ("Hospital") in February 2013 and became insured under the Hospital's Health Benefit Plain ("Plan") in August of 2013. The Plan was drafted by Meritain Health ("Meritain"). The Plan describes Meritain as the "Third-Party Administrator" and that the plan will be "administered" by the Hospital and that the Hospital "has retained the services of the Third-Party Administrator [Meritain] to provide certain claims processing and other ministerial services."

In October 2013, Mr. Peterson was diagnosed with congestive heart failure and cardiomyopathy. In November 2013, Mr. Peterson was hospitalized and received treatment, including an implanted defibrillator. Mr. Peterson incurred $247,934.74 in medical bills.

Mr. Peterson submitted his medical bills to Meritain. Meritain paid some of the bill but denied coverage for $207,423.67 "determining these charges related to a pre-existing condition, which the Plan excludes from coverage."

Mr. Peterson filed suit which he sought to recover under the theories of breach of Plan contract, breach of Administrative Services Agreement (ASA) between the Hospital and Meritain, and breach of the covenant of good faith and fair dealing. The district court granted summary judgement in favor of Meritain, holding that, "lacking privity of contract, Mr. Peterson had no cause of action for breach of contract against a third-party administrator." Mr. Peterson had "no cognizable claim under the ASA as he was not an intended third-party beneficiary as a matter of law." Without a contract, "Mr. Peterson could not assert a cause of action for bad faith against Meritain." Mr. Peterson appealed.

The Supreme Court of Wyoming held that, "so long as Meritain was acting with authority, Mr. Peterson's claims would be against the Hospital, not Meritain." However, here Meritain's scope of authority under the Plan was to be "ministerial" or "administrative," and "Mr. Peterson was required to submit his claim to Meritain." Meritain "determined whether claims would be approved or denied." Meritain "paid approved claims and notified claimants of denied claims." Meritain decided two levels of appeal, "with no apparent input or approval from the Hospital." Therefore, Meritain exceeded the scope of its authority and the district court erred in granting summary judgement as to this claim.

Regarding Peterson's claim that he was a third-party beneficiary of the contract, the Court held that the Plan, as a whole, and the circumstances surrounding its execution, created a question of fact as to whether the Hospital and Meritain intended to benefit Plan Participants.

In considering whether a plan participant can sue third-party administrators in bad faith the Court first reviewed the Wyoming case *Long*. However, the Court held that "*Long* leaves unanswered questions, and the Court did not establish a framework for determining when a third-party administrator could be liable for bad faith." The Court then considered the out of state cases of *Wolf, Cary and Wathor*, holding that, in a situation where a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval and denial of claims, and bears some of the financial risk of loss for the claims, the third-party administrator can be liable for bad faith. Therefore, there were genuine issues of material fact precluding summary judgement on Peterson's claim for breach of the covenant of good faith and fair dealings. The Supreme Court reversed and remanded the lower courts granting of summary judgement on Mr. Peterson's claims.

Peterson v. Meritain Health, Inc., 2022 WY 54, 2022 Wyo. LEXIS 51 (April 20, 2022).

Supreme Court Holds a Person's Ownership in Multiple Companies Does Not Automatically Create a Joint Venture.

The Supreme Court of Wyoming. LaShawn Weir ("Weir") was injured when she fell from Sunrise Shopping Center's attic to the floor below. Weir sued several entities, some with overlapping ownership: the Shopping Center's owner, various property management companies, a roofing contractor, and a staffing company that provided janitorial services. Wier settled with all defendants except Expert Training. The district court granted summary judgment in favor of Expert Training, finding that Expert Training was not engaged in a joint venture and owed no duty to Ms. Weir.

Casper Sunrise is owned by NLV Partners. Two of its members, Charles Hawley and Steve Resnick, were also partners in Property MGMT and are partners in PM Real Estate Management. In 2004 when Casper Sunrise acquired the Shopping Center, it hired Standard Parking Corporation to provide property management. Susan Hawley (Mr. Hawley's wife) worked for Standard Parking, and she undertook the management of the Shopping Center. Dissatisfied with Standard Parking, Casper Sunrise's investors decided to hire Expert Training to provide janitorial services for the shopping center under Standard Parking. Expert Training was owned by Mr. and Mrs. Hawley. At the time of this accident PM Real Estate Management was managing the property with Expert Training responsible for janitorial and maintenance services.

Weir alleged that "Expert Training, Casper Sunrise, Property MGMT and PM Real Estate were engaged in a joint enterprise and, as a result, Expert Training is jointly liable for the negligent acts and omissions of other members of the joint enterprise leading to her accident." Weir argued that a reasonable inference from the undisputed facts demonstrated "a significant intertwined and effectively co-dependent relationship amongst Casper Sunrise, Expert Training, Property MGMT and PM Real Estate" precluding summary judgement on her joint enterprises claim.

The Court held, common ownership of an individual between two companies does not establish that one entity itself has the right of control over another enterprise. There must be a showing that Expert Training exercised control over the other entities. The Supreme Court affirmed Expert Training's motion for summary judgement.

Weir v. Expert Training, LLC, 2022 WY 44, 2022 Wyo. LEXIS 44 (April 5, 2022).

Supreme Court Holds Computer Generated WiFi Records are Admissible Under the Business Records Hearsay Exception.

The Supreme Court of Wyoming. Following a jury trial Jonothan Tyson Blair ("Blair") was convicted of burglary, theft, and property destruction. At trial, the district court admitted WiFi records showing only one electronic device–Blair's Apple iPhone-connection to the business's password protected WiFi network on the night of the burglary. Blair appealed, stating that the district court erred by admitting those records under the business records exception to the hearsay rule.

Mr. Blair argued the WiFi documents admitted were not admissible under the business records exception because they were not kept in the course of a regularly conducted business activity nor was it the regular practice to keep such documents. The Court reasoned that Blair's argument "misses the mark because the relevant question is not whether it was

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Sweetwater Technology's regular practice to create the documents that were introduced as exhibits. The relevant question is whether Sweetwater Technology kept the data reflected in those documents as a matter of regular practice."

The Supreme Court held that WiFi network report is admissible under the business records hearsay exception citing to *Potamkin Cadillac Corp:* "A business record may include data stored electronically on computers and later printed for presentation in court, so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice." The Supreme court affirmed the trial court's ruling.

Blair v. State,
2022 WY 121, 2022 Wyo. LEXIS 121
(September 28, 2022).

Texas

THE SUPREME COURT HOLDS AN INDIVIDUAL HAS NO DUTY TO OTHERS WHEN TOLD TO "STEP BACK."

The Supreme Court of Texas. Plaintiff Cassie Landrum ("Cassie") brought a wrongful death action after her father Jeffery Landrum ("Landrum") was crushed by a movable storage unit. Before Landrum's death, he had asked Dawn Hancock (3 Aces co-owner) to help him push a unit "about a foot." Dawn did so. After, Landrum instructed Dawn to "Step Back." Moments later, Dawn heard the unit crash as it fell off the trailer, crushing Landrum. Dawn used a nearby excavator and managed to lift the unit off Landrum. However, Landrum died at the scene from his injuries.

3 Ace's filed a motion for summary judgement stating Dawn owed no duty to Landrum. The trial court granted 3 Ace's motion for summary judgement. The court of appeals reversed in part, reasoning Dawn "insert[ed] herself in the unloading procedure, [she] undertook a duty to protect Landrum from dangers that an ordinarily prudent person could foresee were likely to result of the situation." Thus, the appellate court also held that "[a] fact issue remains as to whether Dawn … failed to continue to render Landrum assistance." Dawn appealed.

On the appeal to the Supreme Court of Texas, Cassie argued that once Dawn joined in the unloading procedure, she unreasonably removed her voluntary assistance. Cassie contended, "the use of practical, common experience should have clued [Dawn] in that attempting to lower the unit down on one's own was manifestly unsafe." Cassie argued that Dawn should have expressed that concern, was not free to disregard her duty at her choosing, and failed to continue rendering the assistance voluntarily assumed.

The Supreme Court of Texas was unpersuaded by Cassie's arguments. The Court referencing *Kuentz* found any duty owed by Dawn, ended when Landrum told her to step away while he finished. The Court reversed the appellate court's ruling and rendered a judgement for 3 Aces.

Three Aces Towing v. Cassie Landrum,
2022 Tex. LEXIS 875
(September 23, 2022).

COURT OF APPEALS HOLDS A PARTY FORGOES ITS ARBITRATION RIGHT UNDER A CONTRACT WHEN IT SUBSTANTIALLY INVOKES THE JUDICIAL PROCESS.

Court of Appeals of Texas, Fifth District, Dallas. On March 26, 2019, Velocity Investments, LLC ("Velocity") filed suit against Simeon Green ("Green"), seeking to recover an unpaid balance. Velocity served initial discovery requests with its petition, including its Request for Disclosures, Request for Production, Request for Admission, and First Set of Interrogatories. Green filed a general denial on August 12, 2019. Green did not answer Velocity's discovery requests.

The trial court set the case for a bench trial on April 27, 2020. A week before the trial date, Velocity filed a motion for continuance to give the parties additional time to complete settlement negotiations. The trial court heard the motion and Velocity withdrew the motion during the hearing.

After the hearing on Velocity's motion, Green filed a motion to dismiss, or in the alternative, to stay the proceedings pending arbitration and to compel arbitration. The trial court heard the motion on the day of the trial before the parties presented their cases. Velocity conceded the credit agreement included an arbitration clause but argued it was "just far too late" for Green to move to compel arbitration. The trial court agreed, stating the motion was "untimely" and denied the motion.

The trial court awarded Velocity $36,000 in damages. Green appealed the trial court's denial of his motion to compel arbitration. In his appeal, Green argued that the arbitration provisions should have been enforced under the plain terms of the Federal Arbitration Act ("FAA"). Green further contended that he did not substantially invoke the judicial process.

The court held that Green did substantially invoke the judicial process before seeking to compel arbitration because, "Green allowed all deadlines to pass, engaged in pretrial settlement negotiations and only sought arbitration when he realized, on the eve of trial, that the case would be tried immediately." The Court called Green's motion to compel arbitration a "Hail Mary" attempt to avoid going to trial.

The Court then considered whether Velocity would be prejudiced if the

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court would order the parties to be compelled to arbitration. The Court observed, "Green had failed to respond to discovery, which provided Velocity the opportunity to invoke deemed admissions and obtain judgement in its favor quickly and efficiently." Therefore, the Court held that compelling a party to arbitration on the eve of trial when one party did not comply with any discovery would prejudice the non-moving party through delay and damage to its legal position. The Court affirmed the trial court's denial of Green's motion to compel arbitration.

Green v. Velocity Invs., LLC,
2022 Tex. App. LEXIS 6404,
2022 WL 3655232
(August 25, 2022).