COLORADO
MUNICIPAL
LEAGUE

303 831 6411 / 866 578 0936
303 860 8175
www.cml.org
1144 Sherman St., Denver, CO 80203

2021-2022 Survey of Local Government Law

September 23, 2022

Robert Sheesley, General Counsel
Colorado Municipal League
rsheesley@cml.org

This outline contains a review of selected appellate decisions of interest to municipal attorneys from the Colorado Supreme Court and Court of Appeals, the Tenth Circuit Court of Appeals, and the United States Supreme Court, reported during the period October 22, 2021, through September 16, 2022.

1. Criminal Justice
2. Employment
3. First Amendment
4. Governmental Immunity
5. Open Records
6. Police Civil Liability
7. Taxation and Finance
8. Zoning & Land Use
9. Miscellaneous Topics

Appendix: CML Amicus Participation 2021-2022

1. Criminal Justice

Broken tail lamps must be very broken
McBride v. People, 511 P.3d 613 (Colo. 2022)

Mesa County sheriff's deputies found drugs and a handgun after stopping a vehicle for a broken tail lamp that had been covered with red tape but still emitted some white light. The trial court denied a motion to suppress despite the lack of proof that the red light was not visible from 500 feet as required by C.R.S. § 42-4-206(1). The Colorado Supreme Court reversed and held that that statute's plain language unambiguously required only that red light be visible from 500 feet, not that only red light be visible. In doing so, the Court rejected the Court of Appeals' interpretation that "red" means "only red" (an interpretation that the dissent felt was reasonable and supported finding that the statute was at least ambiguous). The conviction was not supported by evidence that the red light was not visible from 500 feet.

Suspect did not request attorney through "logistical" question
People v. Trujillo-Tucson, 511 P.3d 621 (Colo. 2022)

After a break in an interrogation upon arrival at the police station, a suspect was casually conversing with the officer patting him down and asked if he would get a phone call. The officer said "yeah" as the suspect continued, "to my lawyer." Once the interrogation resumed, the suspect made incriminating statements

The Colorado Supreme Court held that the suspect's question was not an unambiguous and unequivocal request for counsel, under the totality of the circumstances. As a result, he had not invoked his 5th Amendment right to counsel in a custodial interrogation. The majority found that a reasonable officer would have viewed the question as "a logistical one" and not a request for counsel, given the casual context of the conversation with an officer who was not the primary detective. The majority found it significant that the suspect professed familiarity with the criminal justice system and was aware that he could directly request counsel.

DUI testing restrictions in expressed consent statute do not restrict search warrants
People v. Raider, --- P.3d ---, 2022 WL 4127813 (Colo. 2022)

Under Colorado's expressed consent statute (C.R.S. § 42-4-1301.1), Colorado drivers are deemed to consent to blood or breath tests and are required to cooperate with testing if officers who have probable cause to believe the driver had committed various DUI-related offenses. The statute, however, prohibits the physical restraint of any person to obtain a specimen except when there is probable cause to believe the person has committed certain offenses. Reversing a panel of the Court of Appeals, the Colorado Supreme Court held that the statute's restrictions do not apply to searches conducted pursuant to a warrant. The court reasoned that the statute's silence with respect to such searches reflected the statute's limited scope, because other statutes (in Title 16) addressed the use of search warrants and consent was immaterial when police have a warrant.

Removing police baton does not constitute disarming a peace officer
People v. Tomaske, --- P.3d ---, 2022 WL 1573059 (Colo. App. 2022)

In Colorado, the crime of "disarming a peace officer" is committed when a person knowingly removes a "firearm or self-defense electronic control device, direct-contact stun device, or other similar device" of a peace officer acting under his official authority. C.R.S. § 18-8-116(1). The Colorado Court of Appeals interpreted what is not a "similar device" that a person can take away from a peace officer before violating C.R.S. § 18-8-116(1).

In a scuffle with a Montrose police officer, a defendant removed the officer's baton (and tried to get his sidearm). The court determined that a police baton was not similar to an "electronic control device" or "direct-contact stun device." The court rejected the state's argument that "similar device" included any weapon carried by a police officer in the course of their duties, including the baton. Therefore, the defendant's removal of the baton during a scuffle did not qualify as a crime under that statute. The court also rejected the defendant's appeal of the trial court's rulings on the application of the force-against-intruders statute (C.R.S. § 18-1-704.5) against the police and affirmed the defendant's other conviction for attempting to disarm the officer by removing his firearm.

Confession suppressed over *Miranda* confusion
People v. Newton, --- P.3d ---, 2022 WL 1788608 (Colo. App. 2022)

During the interrogation of a murder suspect, officers properly read the suspect his *Miranda* rights. The suspect indicated that he could not afford an attorney and made other statements indicating that he did not understand he was entitled to have an attorney present. After the officers suggested that the only way to have an attorney in the interrogation would be to pay for one, the suspect agreed to proceed without an attorney, ultimately confessing to the murder.

The Colorado Court of Appeals held that the confession should have been suppressed because the suspect made it clear that he was indigent but desired an attorney. The officers negated the *Miranda* warning by affirmatively misleading him about his right to counsel. As a result, the suspect's waiver was neither knowing nor intelligent.

Backpack search in school justified by "Safety Plan" for student
People in Interest of J.G., --- P.3d ---, 2022 WL 2165523 (Colo. App. 2022)

In school searches, reasonableness depends on the justification for and scope of the search. While ordinarily the search is justified by reasonable suspicion that the search will reveal evidence of violation of the law or school rules, the Colorado Court of Appeals held that a substantially diminished expectation of privacy for a particular student justified the search that, in this case, uncovered a handgun in a backpack. The high school student previously had been adjudicated delinquent for several offenses, including possession of a handgun. The student's school, with input from the student's parent and

the guardian ad litem, then developed a “Safety Plan” for the student pursuant to the district’s policy. The plan’s requirement to search the student’s bags led to the diminished expectation of privacy.

A consensual conversation becomes custodial
People v. Eugene, --- P.3d ---, 2022 WL 3971183 (Colo. App. 2022)

After being in a road rage incident, a man was questioned outside his home by police without a *Miranda* advisement for somewhere between and 11 and 27 minutes. During the questioning, the man was separated from his wife and was not permitted to use the bathroom. The officers used accusatory tones and falsely stated that there was video of the incident Video of the questioning was admitted at his trial. Based on the video, however, the Colorado Court of appeals held that the man was in custody by the twenty-second minute of the interaction and would not have felt free to leave. As a result, the video should have been suppressed.

Only human beings are susceptible to crime of identity theft
People v. Rodriguez-Morelos, --- P.3d ---, 2022 WL 4241680 (Colo. App. 2022)

A person commits identify theft by knowingly using the “personal identifying information” (that can identify a “specific individual”) or “financial identifying information” of another (natural person or business entity) without permission or authority with the intent to obtain money. C.R.S. § 18-5-902(1)(a). The defendant in this case was charged with identity theft for using the tax identification number and name of a non-profit without its permission to get people to take classes from him. The Colorado Court of Appeals held that, because “personal identifying information” is defined specifically in reference to a “specific individual,” identity theft “personal identifying information . . . of another” could not arise from the use of an entity’s information. The crime could arise from using the entity’s “financial identifying information,” but, in this case, the defendant’s use of the information did not induce students to pay him.

2. Employment

Emotional distress damages not available under Rehabilitation Act
Cummings v. Premier Rehab Keller, 142 S.Ct. 1562 (2022)

Denied an ASL interpreter to assist in her receipt of physical therapy services, a deaf and blind person sued her provider for discrimination under the Rehabilitation Act of 1973 and the Patient Protection and Affordable Care Act (of 2010). The district court determined that the plaintiff suffered only emotional damages, and that such damages were not available as remedies against federal funding recipients under those laws. The statutes (and Title VI of the Civil rights Act of 1964 and Title IX of the Education Amendments of 1972) had been passed pursuant to the Spending Clause, which authorizes Congress to fix the terms on which it disburses federal money.

Without clear expression of available remedies, the Supreme Court extended Spending Clause precedent that analogized to contract law to determine whether a funding recipient had notice that they could be liable for certain conduct and subject to certain remedies. The Court held that because emotional distress damages would generally not be available under contract law, they would not be implicitly available remedies under statutes enacted pursuant to the Spending Clause.

Reviewing body's view of ultimate facts overturns hearing officer's decision
Johnson v. Department of Safety for the City and County of Denver, 503 P.3d 918 (Colo. App. Nov. 4, 2021) (cert. denied Aug. 15, 2022)

This decision affirmed a review board's disciplinary decision based on its view of the ultimate facts of the case that differed from the conclusions of the administrative hearing officer. The discipline arose from an incident where deputies were dealing with an inmate who was experiencing a psychotic episode, vomiting, suffering from obstructed breathing, and exhibiting other dire health warnings. The inmate died nine days after being transported to the hospital. A Denver hearing officer conducted fact finding and recommended that the supervisor not be disciplined.

Reviewing the decision, the career service board came to different ultimate factual conclusions, using the same evidence, and recommended discipline. The Colorado Court of Appeals held that the board did not abuse its discretion because bodies reviewing administrative decisions have authority to make "ultimate conclusions of fact" that may differ from the hearing officer. The board also did not abuse its discretion by discounting testimony from the supervisor's peer who was not present for the entire incident and who offered testimony as to ultimate conclusions such as whether the supervisor performed his duties properly.

Summary judgment struggles for discrimination claims

- *Hermann v. Salt Lake City Corporation*, 21 F.4th 666 (10th Cir. 2021)

  A Utah court clerk sued her employer for failing to accommodate PTSD developed from an abusive marriage, in addition to disability discrimination and retaliation claims. The clerk claimed that her PTSD was exacerbated by having to work in a courtroom during domestic violence cases. Requested accommodations including removal from domestic violence cases, leave, and reassignment to another position and supervisor. During the same period, she received a performance related suspension and was later terminated for failing to return to work. The district court found that none of the requested accommodations was plausibly reasonable and granted summary judgment on all claims.

  Reversing as to two potential accommodations, the Tenth Circuit criticized the characterization of the requests in a manner that was unfavorable to the plaintiff. Despite not responding to all questions in the interactive process, the plaintiff was able to establish that the city knew that reassignment within her current role to

avoid domestic violence cases was not feasible and that plaintiff's social worker recommended avoiding all domestic violence work. The district court erred by viewing the requests for reassignment and a new supervisor too narrowly and in the city's favor.

Regarding the request for leave, the district court relied on the social worker's lack of a clear end date to find that the requested accommodation was not reasonable. The Tenth Circuit disagreed, distinguishing similar cases of chronic impairments in which a request for a finite amount leave without an end date for the illness was held to not be reasonable. The district court should have construed the evidence of a vague timeline for treatment more favorably to plaintiff.

The Tenth Circuit did not reverse the district court's remaining holdings. The city's notice of termination for job abandonment "for medical reasons" was seen as benign and not direct evidence of discriminatory animus. Further, the termination was not seen as retaliatory because plaintiff had not provided a medical release authorizing her return.

- *Ford v. Jackson National Life Insurance Company*, 45 F.4th ---, 2022 WL 3589672 (10th Cir. 2022)

  An insurance salesperson sued her employer after years of alleged pervasive sexual and racial harassment. The district court granted summary judgment in favor of the employer. Although it found the plaintiff failed to establish a case of discrimination or retaliation arising from some actions, the Tenth Circuit Court of Appeals held that the claims for retaliation, hostile work environment, and constructive discharge should have survived. Significantly, the plaintiff showed evidence of pretext supporting her retaliation claim through an executive's comments that the plaintiff couldn't be promoted because she was "causing far too much problems." On the other hand, some evidence of hostility was properly disregarded because the employer promptly responded to a complaint by firing two employees, holding an office-wide training, and issuing a personal apology.

Jury's finding of pretext for age discrimination upheld
Stroup v. United Airlines, Inc., 26 F.4th 1147 (10th Cir. Feb. 28, 2022)

United Airlines failed to avoid a jury verdict finding willful violation of the Age Discrimination and Employment Act against two older flight attendants. Under the limited appellate standard of review for such matters, the 10th Circuit upheld the denial of the airline's post-trial motion because there was sufficient evidence that the airline's stated non-discriminatory reasons for discharging the flight attendants were pretextual. The airline's conflicting explanations, disparate disciplinary treatment, and failure to follow its de facto progressive disciplinary policy supported both the finding of pretext and willfulness (which was also supported by the decision-maker's actions with knowledge of the law).

3. First Amendment

Verbal censure of an elected official does not violate the First Amendment
Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

In a limited but valuable decision, a unanimous United States Supreme Court rejected a First Amendment claim arising from an elected board's purely verbal censure of one of its members. Wilson, an elected member of a community college system's board, chose to engage with his peers through direct and vocal disagreement as well as more indirect, aggressive means – charging the board with ethics violations in the media, arranging robocalls to other trustees' constituents, surveillance of another board member by a private investigator, and lawsuits against the board. After first reprimanding Wilson, the board adopted a resolution that coupled a censure with penalties, including declaring him ineligible for board officer positions and restricting funds normally otherwise available to him for board-related travel and work.

While the Fifth Circuit felt that Wilson could assert an actionable First Amendment claim under 42 U.S.C. § 1983, the Supreme Court surprisingly all agreed on historical practices and recognized that "elected bodies in this country have long exercised the power to censure their members." The Court reasoned that the censure was not materially adverse, as required to sustain a First Amendment retaliation claim, because the subject of the action was an elected official (who must be able to take criticism and keep speaking) and because the alleged retaliation was, itself, a form of speech by the rest of the board.

The Fifth Circuit also determined that other board punishments or restrictions did not constitute First Amendment retaliation because he had no entitlement to those privileges. The Supreme Court expressly did not review these holdings, leaving that question for another day.

Boston's government speech argument flounders on unfortunate flag facts
Shurtleff v. City of Boston, Massachusetts, 142 S.Ct. 1583 (2022)

After allowing 50 flags of groups, causes, and even a private bank to fly in on a city-owned pole over 12 years during events in a public plaza, the City of Boston denied a request to fly a Christian flag in connection with an event there. The United States Supreme Court determined that Boston's flag program did not constitute government speech that would have allowed the city more tightly restrict what flags were flown. Even though Boston normally flew a government flag on the pole, Boston created a forum for expressing private speakers' views by regularly allowing third party flags to be flown during events. The city did not actively control the content or meaning of flags allowed to be flown. As a result, Boston's refusal to permit the Christian flag was impermissible viewpoint discrimination.

Public school coach's on-field prayer protected by First Amendment
Kennedy v. Bremerton School District, 142 S.Ct 2407 (2022)

The Court held that a public school district violated the Free Exercise clause of the First Amendment by disciplining a football coach for what the majority viewed as a quiet and personal post-game prayer. The majority adopted (or confirmed) a view of the Establishment clause that relies on historical interpretation. The apparent disagreement between the justices about the basic facts and the viability of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (at least before the decision) make understanding and applying this decision very difficult.

Non-sectarian school voucher program more restrictive than necessary
Carson v. Makin, 142 S.Ct. 1987 (2022)

The Court invalidated Maine's tuition assistance payments for private, nonsectarian schools in areas without a public school as violating the Free Exercise Clause of the First Amendment. The majority viewed the program as establishing a stricter separation of church and State than the Constitution required and penalizing the free exercise of religion by denying generally available benefits based on a religious character.

Strict scrutiny does not apply to location-based, content neutral sign regulations
City of Austin, Texas v. Reagan National Advertising of Austin, LLC, 142 S.Ct. 1464 (2022)

The City of Austin, TX, prohibited the installation of new off-premises signs and the conversion of existing off-premises signs to digital form. An outdoor advertising company with pre-existing off-premises signs challenged the regulation and, on appeal, the Fifth Circuit announced a rule that would find a regulation to not be content neutral if its application required reading the sign at issue. Rejecting this overly restrictive and extreme view of its 2014 decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the United States Supreme Court held that strict scrutiny would not apply because the city's regulation was location-based and facially content-neutral.

10th Circuit recognizes right to record officers performing duties in public
Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022)

The Tenth Circuit formally recognized the First Amendment right to record police officers performing their official duties in public as "squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power." A bystander "YouTube journalist" alleged that he was filming a DUI stop in 2019 when a Lakewood police agent arrived on scene. The agent is alleged to have physically blocked his view and shined a flashlight into his camera; the officer allegedly then drove his car toward one of the men filming.

On the agent's motion to dismiss, the district court held that the plaintiff had stated a claim for First Amendment violations based on prior restraint and retaliation, but that the officer was entitled to immunity because the complaint failed to show a violation of

clearly established law. The district court considered the lack of any directly on-point 10th Circuit or Supreme Court cases and the lack of recognition of the right to record in the 10th Circuit. The district court distinguished analogous caselaw as relating to the detainment, arrest, or prosecution of an individual for filming, unlike the interaction in this case.

The Tenth Circuit reversed the finding of qualified immunity and held that every element of the First Amendment retaliation claim alleged a constitutional violation under clearly established law. The court held that the right to film police performing their duties in public was protected First Amendment activity, relying on "well-established First Amendment principles," analogous 10th Circuit precedent, and precedent from other circuits. The agent's conduct of standing in front of the camera and shining a flashlight into it alone would chill a person of ordinary firmness from continuing to film, but the agent also directed violence at the plaintiff. Finally, the court held that the protected activity substantially motivated the officer's actions. Relying on similar reasoning other than First Amendment principles, the court held that each of these elements was clearly established at the time of the incident.

Panhandling ordinance not narrowly tailored for failure to consider alternatives
Brewer v. City of Albuquerque, 18 F.4th 1205 (10th Cir. 2021)

In 2017, the City of Albuquerque enacted an ordinance to regulate pedestrians in and about roadways. The ordinance included four elements: (1) a prohibition on standing in roadways; (2) a prohibition against standing on certain medians; (3) a restriction on standing too close to freeway ramps; and (4) restrictions on any physical interaction between pedestrians and vehicle occupants in the travel lanes of a roadway. In a 110-page opinion, the Tenth Circuit panel exhaustively analyzed the city's content-neutral ordinance under intermediate scrutiny before invalidating all but the first restriction. The court's decision focused on whether the ordinance was narrowly tailored to the government's significant interests.

First, the city was unable to show (either on the record at the time the ordinance was adopted, or during the litigation) that there was a sufficient "fit" between the purported public safety rationale for the ordinance and the degree to which the ordinance impaired the speech rights of panhandlers and solicitors. Second, the city was unable to show that it "seriously considered" less restrictive measures that would mitigate the ordinance's "substantial burdens" on speech and thus satisfy the "narrow tailoring" requirement. The city was not required to implement the least restrictive means, but had to at least consider them.

Scope of harassment law reduced on First Amendment grounds
People v. Moreno, 506 P.3d 849 (Colo. 2022)

Section 18-9-111(1)(e), C.R.S. prohibited communications intended to harass, annoy or alarm a person. In 2015, the statute was amended to ensure that social media was included in the types of communications. The Colorado Supreme Court invalidated that

portion of the statute as unconstitutionally restricting protected speech. The Court recognized that much legitimate communication could be covered by the statute, like negative restaurant reviews or raising public issues, and that legitimate communication can be intended to alarm or provoke. The decision leaves other parts, like intent to harass through true threats or fighting words, intact.

4. Governmental Immunity

Known hazardous sidewalk deviation did not present unreasonable risk of injury
Maphis v. City of Boulder, 504 P.3d 287 (Colo. 2022)

Boulder's sidewalk maintenance program relies on both reactive and proactive components. The proactive component involved regular identification of areas in need of repair, planning, and a public engagement process over a 1-2 year period. A deviation of greater than three quarters of an inch is defined as a "hazard" that is unsafe as "a potential tripping hazard." The plaintiff tripped on a 2.5 inch deviation on a sidewalk on a residential street that the city had identified just weeks earlier. The trial court held that the deviation, with a color that made it difficult to detect, constituted an unreasonable risk of harm and was within the CGIA's immunity waiver under C.R.S. § 24-10-106(1)(d)(1).

A narrowly-divided Colorado Supreme Court reversed, holing that the deviation was not a "dangerous condition" under the CGIA despite the plaintiff's severe injuries and the city's knowledge of the deviation that deemed to be a hazard. Importantly, the majority recognized that "no municipal sidewalk system is perfectly hazard-free at all times" and that ignoring the realities that municipalities face in maintaining roads and sidewalks "would significantly increase — not reduce — potential burdens on taxpayers." The decision and robust dissent suggest that, under different facts, the legal conclusion as to whether a dangerous condition existed might have been different.

Immunity waived for condition created by parking structure resurfacing project
Stickle v. County of Jefferson, - P.3D -, 2022 WL 2840038 (Colo. App. 2022)

Jefferson County's Courts and Administration Building is served by a two-story, detached parking structure. Plaintiff broke her arm after stumbling on a step down from a walkway to the parking lot surface that were the same shade of gray (and delineated by a yellow curb marking). Although the step down itself was part of the original design and construction, the new uniform color and condition of a "curb illusion" was established during a maintenance project in 2017 in which the county installed a new surface material to preserve the structure and prevent damage from water and deicing material.

Construing the immunity waiver under C.R.S. § 24-10-106(1)(c), the Colorado Court of Appeals held that the parking garage was a "public building" under the CGIA. Further, the court held that the condition was not excluded from the definition of "dangerous condition" as being attributable solely to the design. Instead, the court viewed the choice

of surface material as at least partially an act of maintenance, installed as part of a "Maintenance Plan" and intended to protect against decline or failure.

Lights and sirens required during entire pursuit required to maintain immunity
Giron v. Hice (Town of Olathe), --- P.3d ---, 2022 WL 2976942 (Colo. App. 2022)

In pursuit of a speeding car, a Town of Olathe police officer struck a van and the van's two occupants died. The officer exceeded the speed limit, reaching a speed of 103 mph, but chose not to activate his siren and only activated his emergency lights for the last 5-10 seconds of the 36-second pursuit. Considering the interplay of C.R.S. § 42-4-108(2-3) and C.R.S. § 24-10-106(1)(a), the Colorado Court of Appeals held that an officer is not entitled to immunity "when he does not activate his emergency lights or sirens for the entire time he exceeds the speed limit and is in pursuit of an actual or suspected violator of the law." Further, the officer's operation of the vehicle in this manner and the fact of the collision was sufficient to establish causation for the immunity analysis. The plaintiff did not have to establish that the injuries were caused by the failure to use emergency lights and sirens.

Immunity waived for failure to warn of wet, recently mopped stairs
Galef v. University of Colorado, - P.3d -, 2022 WL 3093716 (Colo. App. 2022)

After a student slipped on a recently-mopped dormitory staircase, he claimed that his injuries were caused by the university's "unreasonable failure to exercise reasonable care with respect to a wet, slippery stairs," including failing to put of "wet floor" signs or failing to warn of their condition. The trial court held that neither the stairs nor the failure to warn of their condition constituted a "dangerous condition" under the CGIA and dismissed the suit. Limiting his complaint's allegation of a dangerous condition to the failure to warn of the hazardous wet condition, the Colorado Court of Appeals held that such an omission can be a "dangerous condition" if not solely attributable to inadequate design and if the duty to warn is within the duty of maintenance. Here, the stairs were designed to be dry and mopping was an act of maintenance (to keep the stairs in the "same clean condition as they were originally designed and constructed"). The failure to warn of the hazard the university created through the maintenance activity was a dangerous condition. Finally, the court held that, under *Maphis*, the stairs created an unreasonable risk of injury.

Negligence is only the CGIA's floor for jail operations
Cisneros v. Elder, 506 P.3d 828 (Colo. 2022)

After being arrested on misdemeanor charges, Saul Cisneros posted bond but was not released from the El Paso County jail after being placed on a U.S. Immigration and Customs Enforcement hold. Cisneros sued the sheriff for false imprisonment and the trial court refused to dismiss the claim under the CGIA. The Colorado Court of Appeals reversed, holding that the alleged injury did not arise from the operation of the jail and that the CGIA only waived immunity for negligence causing injury to an incarcerated person who has not been convicted. The Colorado Supreme Court unanimously held that the immunity waiver for the operation of jails also included intentional torts that injured

incarcerated persons not yet convicted of a crime, despite the limited reference to acts of negligence in C.R.S. § 24-10-106(1.5)(b). The Colorado Court of Appeals later concluded, in *Cisneros v. Elder*, 22CA106 (September 15, 2022) that the sheriff was engaged in the operation of a jail under the CGIA when detaining a person for four months after posting bond for federal immigration purposes.

Statute of limitations tolled during period of legal disability of unrepresented person
Mohammadi v. Kinslow, - P.3d -, 2022 WL 4100277 (Colo. App. 2022)

A "person under a [legal] disability" without a legal representative when a cause of action accrues is entitled to bring suit with the later of the applicable statute of limitations or two years after the removal of the disability. C.R.S. § 13-81-103(1)(c). A 16-year-old cyclist was struck by a car on November 6, 2015. The cyclist turned 18 on January 1, 2017, and filed a lawsuit against the driver on December 30, 2019 (over four years after the incident and nearly three years after the removal of her legal disability). A trial court held that a personal injury claim was barred by the statute of limitations. The Colorado Court of Appeals held, in *Mohammadi v. Kinslow*, that the plain language of the statute supported the trial court's ruling, but Colorado Supreme Court precedent required the construction that the limitations period was tolled until the removal of the legal disability. The termination of the disability before the expiration of the statute of limitations did not change the result.

Malicious prosecution claim can arise if prosecution ends without conviction
Thompson v. Clark, 142 S.Ct. 1332 (2022)

A malicious prosecution claim under 42 U.S.C. § 1983 requires, among other thing, that the plaintiff show that they obtained a "favorable termination" of the underlying criminal prosecution. The United States Supreme Court held that a plaintiff need only show that the prosecution ended without a conviction and need not prove some indication of their innocence, as the Second Circuit (and Tenth Circuit) required. This decision abrogates the Tenth Circuit rule announced in *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016). The court, however, did not address whether malice was a required element in addition to probable cause. *See Moses-El v. City & County of Denver*, 2022 WL 1741944 at *8, n.15 (10th Cir. May 31, 2022).

5. Open Records

District must provide third-party documents based on contractual right of access
Leonard v Interquest North Business Improvement District, - P.3d -, 2022 WL 2720780 (Colo. App. July 14, 2022)

A business improvement district denied a request for records in the possession of a third party, a private developer that constructed improvements on behalf of the district. The district reimbursed the developer and acquired the improvements (and certain construction-related documentation) using public funds. The district court believed it did not have authority to order the district to obtain records from a third-party. The Colorado

Court of Appeals disagreed and required the district to obtain the developer's contracts and payment records related to the work. Construing C.R.S. § 24-72-202(6)(a)(I), the court viewed those records as being used for a public purpose and held that they were "made, maintained, or kept" by the district because the district had a contractual right to condition payment on the receipt of the documents. The court saw the bargained-for contractual provision as directing the third party to maintain to records for the district.

6. Police Civil Liability

Peace officer's employer not subject to deprivation of rights action
Ditirro v. Sando, - P.3d -, 2022 WL 34524862022 (Colo. App. August 18, 2022)

Alleging that he was deprived of his rights by the Colorado State Patrol in a traffic stop in 2018, Vincent Ditirro filed suit under C.R.S. § 13-21-131, enacted through SB20-217 in 2020, against the troopers and CSP. Ditirro also claimed that unnamed Commerce City and the Adams County Sheriff personnel were involved.

In the first reported decision under the new law, the Colorado Court of Appeals has confirmed that SB20-217's cause of action for a deprivation of rights lies only against a peace officer and not directly against their employer. The court held that the plain language of C.R.S. § 13-21-131 only authorized an action against a "peace officer." The court noted that the employer might have an indemnity obligation and could potentially be sued later in connection with that obligation, after a judgment against the peace officer is rendered.

In another first, the court held that new exceptions for attorney's fees awards for dismissed tort claims did not apply and, even if it did, the complaint did not meet the pleading requirements for the exception. HB22-1272 amended C.R.S. § 13-17-201 except for suits brought for certain express purposes if such purposes are pleaded in the complaint.

The court did not consider whether Ditirro properly pled a claim under SB20-217 based on conduct in 2018. In an earlier unpublished decision, *Casper v. Olson*, 21CA75 (April 5, 2022), however, another division of the Court of Appeals held that SB20-217's remedies were not retroactive and did not create a private cause of action for a pattern and practice claim.

Failure to provide *Miranda* warnings does not support § 1983 claim
Vega v. Tekoh, 142 S.Ct. 2095 (2022)

Tekoh admitted to committing a sexual assault after questioning by a sheriff's deputy during which he was not informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). After his acquittal on the assault charges, the plaintiff sued under 42 U.S.C. § 1983 claiming that the failure to provide the *Miranda* warning violated the Fifth Amendment. The United States Supreme Court held that a failure to provide a suspect's

Miranda warnings did not, in itself, violate the 5th Amendment and that the prophylactic rule could not alone support a Section 1983 claim.

Officers denied immunity

- *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (see First Amendment, above)

- *Wilkins v. City of Tulsa*, 33 F.4th 1265 (10th Cir. 2022)

  After encountering a suspect asleep in his parked but running vehicle, Tulsa, Oklahoma officers were alleged to have handcuffed the suspect, forced him to the ground, held him there, and then pepper sprayed him without warning. All charges were dismissed and the defendant sued under 42 U.S.C. § 1983. The district court granted summary judgment to the officers, finding that the takedown and pepper spray was not excessive due to the suspect's continued resistance (as claimed by the officers). Body camera evidence did not support the officers' claims that the suspect was attempting to stand or grab their hands. The Tenth Circuit reversed, holding that, without video evidence contradicting the plaintiff's facts, a jury could find that the use of pepper spray was not reasonable especially given the minor offense involved, the lack of immediate threat from the prone suspect without access to a weapon, and the lack of resistance. The court held that the officers' actions violated clearly established law. Municipal liability was not resolved because the district court only addressed the threshold showing of an underlying constitutional violation by officer.

- *Finch v. Rapp*, 38 F.4th 1234 (10th Cir. 2022)

  Video game players placed an emergency call falsely claiming that a Wichita man was holding a hostage in his home. Responding officers surrounded the home and, when the man emerged, shouting. One officer shot and killed the resident within 10 seconds of him coming out of the home. The officer claimed the resident was lowering his hands and raising his sweatshirt as if to grab something from his waistband. The Tenth Circuit held that the officer was not entitled to qualify immunity because that the law clearly established that it would be a violation of the Fourth Amendment for "an officer, even when responding to a dangerous reported situation, [to] shoot an unarmed and unthreatening suspect."

- *McWilliams v. DiNapoli*, 40 F.4th 1118 (10th Cir. 2022)

  A trespasser refused to leave a marina at the manager's request and had a verbal altercation with the responding police officer. Instead of advising the man that he was under arrest and giving him an opportunity to submit peacefully, the officer was alleged to have punched and tackled the man and put him in a chokehold. Relying on the district court's factual determinations, the Tenth Circuit held that the force was excessive, given that the man was suspected of a minor crime, posed no substantial threat, and had been incited by the officer hitting a cigarette

from his hand. Despite the lack of a case directly on point, the court held that it was clearly established that the officer should have ordered the plaintiff to submit to arrest or used minimal force while doing so, before using greater force.

- *Simpson v. Little*, 16 F.4th 1353 (10th Cir. 2021)

  An officer attempted to stop the driver of an SUV that had been mistakenly reported as stolen in connection with an attempted assault. When the driver did not stop and attempted to pass the officer, who was shouting commands with his gun drawn, the officer fired and killed the driver. After the driver's mother sued under 42 U.S.C. § 1983, the district court denied a motion for summary judgment based on qualified immunity. The court found that a reasonable jury could conclude that the driver posed no immediate threat and that the use of deadly force was objectively unreasonable. The Tenth Circuit held that it lacked jurisdiction to revisit the district court's factual determinations in the interlocutory appeal in the absence of evidence that the record blatantly contradicts the court's analysis or that a legal error was committed. In addition, the court held that the law was clearly established that lethal force could not be used against drivers who do not pose immediate threats, regardless of differences in speeds or the duration of a chase.

Qualified immunity found

- *City of Tahlequah, Oklahoma v. Bond*, 142 S.Ct. 9 (2021)

  In a per curiam opinion, the United States Supreme Court overruled a denial of qualified immunity by a panel of the Tenth Circuit. The panel had faulted officers for escalating the danger of a citizen encounter when they resorted to deadly force after slowly and cautiously approaching an agitated man who then brandished a hammer as if he was about to throw it at the officers. The high court faulted the Tenth Circuit for its failure to identify a single Tenth Circuit precedent resembling the facts in the instant case that would have put the officers on notice that their use of force was unjustified and unconstitutional.

- *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4 (2021)

  In a per curiam opinion, the United States Supreme Court reversed a denial of qualified immunity by the Ninth Circuit. Apprehending a man with knife in his pocket after a domestic disturbance call, the arresting officer briefly placed his knee on the suspects back near the pocket with the knife. The lower court failed to adduce a single circuit precedent clearly establishing that the minimal use of force in the case constituted a Fourth Amendment violation. The case relied on by the Ninth Circuit involved a non-violent complaint and an unarmed suspect and deliberate, unnecessary acts by the officer.

- *Lewis v. City of Edmund*, 21-6081 (10th Cir. 2022)

  Arriving to a domestic violence call, police searched for the suspect who had fled, in the nude, on foot before police arrived. Officers assisting in the search located the suspect and followed him after he attempted to flee into a house by breaking in through a glass door. Inside, officers attempted to subdue the suspect with tasers, without effect, and a physical struggle ensued. As the suspect advanced toward one officer moving his arms in a windmill motion, the officer shot the suspect when he was more than 1-2 feet away. The district court held that a reasonable jury could find that the suspect stopped swinging his arms after the officer fired once, he no longer posted a threat after the officer at that point and the next three shots were an excessive use of force.

  The Tenth Circuit Court of Appeals reversed, holding that the law was not clearly established that under the specific circumstances every reasonable official would believe the officer's actions to be an excessive use of force. The officer did not challenge whether the facts alleged a constitutional violation. The court distinguished cases in which an officer's reckless conduct created the need to use deadly force or the suspect had already been subdued before deadly force was used. Here, the officer had good reason to believe the suspect had injured his fellow officer, that attempts to use less lethal force had failed, and the suspect continued to advance even after the first shot. The Tenth Circuit noted the Supreme Court's admonition in *City of Tahlequah v. Bond*.

- *Heard v. Dulayev*, 29 F.4th 1195 (10th Cir. 2022)

  After engaging in a fight "behind some bushes," the defendant emerged from said bushes in a crawl as directed by a police officer but rose to his feet and advanced on the officer, who deployed his Taser after several warnings. The district court denied summary judgment for the officer, finding that the defendant showed no aggression, was not trying to fight, and was not given a reasonable opportunity to surrender peacefully. The 10th Circuit reversed, finding that the record demonstrated the defendant's awareness of the Taser, understood the officer's commands, and had sufficient time to surrender. The Court found that the use of the Taser on an assault suspect who continued to advance to an officer at close proximity, after repeated warnings and orders to stop, did not violate a clearly established constitutional right. The Court declined to exercise pendent jurisdiction over Denver's appeal of the denial of its motion for summary judgment.

- *Estate of Dillon Taylor v. Salt Lake City*, 16 F.4th 744 (10th Cir. 2021) (petition for cert. pending)

  Responding to a 911 caller who said someone had "flashed a gun" and described the suspects, officers confronted three young men and asked them to stop. Two of the men complied, and the third walked away, stuck his hands inside the waistband of his pants and appeared to be fishing around for an object inside his

pants, verbally taunted the officers, turned to face the officers while still walking backward, then suddenly lifted his shirt with his left hand while rapidly withdrawing his right hand from his waist band as if he might be drawing a weapon, whereupon the officer shot him dead. No weapon was found on the young man. In a split decision, the Tenth Circuit found the shooting to be objectively reasonable under the *Graham v. Connor*, 490 U.S. 386 (1989) standard and held that the officer did not violate the decedent's constitutional rights. The immediate threat posed to officers controlled the case's outcome, despite the low-level crime and lack of resistance. In a footnote, the court touched on the role race and ethnicity may have played in the case. The court also held that the exclusionary rule does not apply in § 1983 cases.

7. Taxation and Finance

Dismissal of constitutional challenge to TABOR on alternate, merits basis
Kerr v. Polis (Kerr IV), 20 F.4th 686 (10th Cir. 2021)

After rehearing *en banc*, the Tenth Circuit affirmed the dismissal without prejudice of the 2011 lawsuit challenging TABOR as a violation of the Guarantee Clause of the U.S. Constitution and the Enabling Act authorizing Colorado's statehood. Although the plaintiffs had standing, the district court dismissed the claims of the remaining plaintiffs (school districts and political subdivisions) for lack of subject matter jurisdiction based on the plaintiffs' failure to establish "political subdivision standing," or the ability of subordinate entities to sue their parent states.

The Tenth Circuit, however, viewed the question as an inquiry to the merits and not one of jurisdiction or standing. The court affirmed the dismissal because plaintiffs had "not identified any constitutional or statutory provisions that authorize them to bring the present cause of action." In doing so, the court adopted standards for determining whether a political subdivision has stated a claim against its parent state: (1) the claim cannot rest on a substantive constitutional provision; and (2) if the claim relies on a federal statute, Congress must have specifically intended to create a cause of action for the political subdivision (such as by directing its protections to them).

FAMLI statute's wage premium does not violate TABOR
Chronos Builders, LLC v. Department of Labor and Employment, Division of Family and Medical Leave Insurance, 512 P.2d 101 (Colo. 2022)

In 2019, Colorado voters approved the Family and Medical Leave Insurance Act, which created an enterprise funded by premium collected by the state to fund a paid leave program. The premium was based on an employee's taxable wages. Chronos Builder's claimed that the premium constituted an unconstitutional "added tax or surcharge" on income under Section 8(a) of TABOR (Colo. Const. art. X, § 20) and that the premium did not tax income "at one rate." Section 8(a) provides, in part: "Any income tax law change . . . shall also require all taxable net income to be taxed at one rate . . . with no added tax or surcharge."

The Colorado Supreme Court upheld the dismissal of the claim for failure to state a claim because FAMLI did not change income tax law and was not an added tax or surcharge. The court held that Section 8(a) "only precludes added taxes and tax-like surcharges to taxable net income in connection with a change to income tax law." Further, although a wage premium could be held unconstitutional as a tax, Chronos Builders conceded that the FAMLI premium was a fee and the court distinguished the premium as such. The court also declined to address the standard of review when addressing the constitutionality of an initiated statute.

Tax assessment rule held contrary to Urban Renewal Law
Aurora Urban Renewal Authority v. Kaiser, 507 P.3d 1033 (Colo. App. 2022)

Tax increment financing creates revenue to fund urban renewal projects under the Urban Renewal Law, C.R.S. §§ 31-25-101 *et seq.* After a base property tax value is established at the beginning of a project, reassessments in later years hopefully reflect an increase in assessed value. Revenues from those increases above the base are allocated to the project. Aurora's Urban Renewal Authority and a project's metropolitan districts and developer sued to challenge the Colorado Property Tax Administrator's standards for the calculation of the base and increment.

The district court granted summary judgment against the plaintiffs on both standing and merits grounds. The Colorado Court of Appeals reversed and held that all parties had standing and that, except in one respect, the administrator's rules were contrary to law. The court rejected the plaintiff's claim that the URL's requirement to proportionately adjust valuations at the time of a "general reassessment of taxable property valuations in any county" was limited to changes in the statewide general assessment rate. The court held, however, that the direct and indirect effects of the creation of the urban renewal plan itself had to be allocated differently. As a result, the administrator's Reference Library distinction between these direct and indirect was contrary to the URL and void as a matter of law.

Regarding standing, the court held that, for a declaratory judgment, the developer and districts alleged an injury in fact arising from the minimization of potential revenue caused by the administrator's rules and that they had legally protected interests as "integral participants" in the urban renewal process. Further, the districts and URA had standing because the separate entities were not "subordinate" to the administrator or county assessor.

Finally, the court held that the plaintiff's failure to seek timely review of the administrative rule, pursuant to C.R.S. § 24-4-106(4), did not require dismissal. The claims were not at issue when the rule was made in 2016 and the case involved a question of statutory interpretation.

Taxpayers have standing to sue enterprise funded by taxpayer funds
Nash v. Mikesell, 507 P.3d 94 (Colo. App. 2021)

The Teller County jail is run through the Teller County Facilities Corporation, an enterprise under Colo. Const. Art. 10, Sec. 20(2)(d) of the Colorado Constitution and C.R.S. § 24-77-102(3). Teller County used the county's general fund revenue, including tax dollars, to pay the corporation to run the facility. The jail is staffed by regular deputies who, when assigned to the jail, were paid by the corporation and were considered employees of the corporation. When assigned to the jail, the deputies performed duties pursuant to a "287(g) agreement" with U.S. Customs and Immigration Enforcement by which local law enforcement performs federal immigration functions, such as detaining persons on administrative warrants despite having no basis for the detention under Colorado law. The sheriff's cooperation under the 287(g) agreement was challenged in light of HB19-1124 (C.R.S. §§ 24-76.6-101 *et seq*.), which prohibited many of the acts required under the 287(g) agreement.

Challenging plaintiff's standing as taxpayers, the sheriff argued that taxpayer funds were not used to pay the deputies in the performance of 287(g) functions because, when assigned to the jail, they were paid through funds that the county and other governments paid to the enterprise, not by taxes. The district court accepted the sheriff's argument and viewed the corporation as not being funded directly by taxpayer dollars. On appeal, the distinction was characterized as one of "form over substance" because the enterprise was "financially supported by the [county] general fund" to achieve its public purpose that the county was statutorily obligated to fund. The court of appeals ultimately determined that the enterprise's corporate form was irrelevant to the taxpayer standing question. The reliance on taxpayer funds, even if paid to the enterprise as fees by the taxing entity, was sufficient to establish standing as those funds were allegedly being used in an unconstitutional manner.

8. Zoning & Land Use

Campaign donations can disqualify elected officials in quasi-judicial matters
No Laporte Gravel v. Board of County Commissioners of Larimer County, 507 P.3d 1053 (Colo. App. 2022)

Between 2008 and 2016, a 2-term incumbent Larimer County commissioner accepted campaign contributions from stockholders of a mining operator. For the 2016 election, their combined $4,100 in contributions made up 7.65% of the total amount raised by the commissioner and 5.44% of the total spent. The commissioner won re-election and the operator shortly thereafter submitted a land use application. The commissioners conducted a public hearing and approved the application by a 2-1 vote 2 years later. Neighborhood opponents challenged the decision in court, including asserting that the county code provision allowing commissioners to determine their own conflicts of interest was unconstitutional as applied in this case and on its face.

On appeal from the trial court's decision granting judgment for the county on the as-applied claim, the Colorado Court of Appeals held that *Caperton* applied to quasi-jducial proceedings. The court required a due process analysis in such circumstances that would consider whether the contributions created "constitutionally impermissible risk fo actual bias." The analysis considered, among other things, the temporal connection between the donation and the decision, the size of the donation (compared to the candidate's and their competitor's total donations), and the apparent effect of the contributions. The court rejected any concern that First Amendment rights of campaign contributors and candidates would be impacted, given the limited application of *Caperton*'s rule. In this case, however, recusal was not required because the contributions were "in raw and proportionate terms, a far cry from the contributions in *Caperton* . . . ."

The court also found that the board abused its discretion in its application of the county code. One criterion for this application was that it meet any other criteria for particular uses. The board erred by finding that no additional criteria existed, but that error was remedied by implicit findings that the application satisfied another "catch-all" criteria.

Centerline presumption conveys mineral interests if possessed by grantor
Great Northern Properties, LLLP v. Extraction Oil and Gas, Inc., --- P.3d ---, 2022 WL 4241843 (Colo. App. 2022)

A common law "centerline presumption" provides that, unless the conveyance shows a contrary intent, the conveyance of land abutting a right-of-way conveys title to the center of the right-of-way. The presumption requires that a grantor conveys property abutting a right-of-way, owns the land underlying the right-of-way at the time of conveyance, and does not retain ownership of any property abutting the right-of-way. This case answers whether the mineral interests under right-of-way are also conveyed according to the presumption.

In 1974, a developer dedicated right-of-way across its land to the City of Greeley; the right-of-way became known as 11th Street. After the dedication, but before the city's acceptance, the developer conveyed two parcels abutting the right-of-way to different grantees. The conveyances did not mention the right-of-way or mineral interests. The next year, the developer conveyed its third and final parcel in the same manner. In 2019, the developer conveyed any interests it had in the minerals under the right-of-way to Great Northern Properties; Extraction Oil and Gas had oil and gas leases from all abutting parcel owners and had a right to produce from beneath 11th Street. Extraction sought a determination that it owed royalties to the abutting property owners, not Great Northern Properties. The trial court agreed with Extraction.

The Colorado Court of Appeals affirmed, holding that, when the centerline presumption applies, "it applies to *all interests* the grantor possesses in the property underlying the right-of-way, including mineral interest." The court relied on the law's presumptions that a grantor conveys their entire interest and that severance of a mineral estate requires a clear reservation. In this case, the presumption applied because the developer conveyed

the property abutting the street, owned the property underlying the street, and conveyed all of his property; none of the conveyances showed a contrary intent.

Most significantly, the court held that the statutory dedication did not sever the mineral estate from the abutting properties, although it did sever the mineral estate horizontally from the municipality's surface interest. The statutory dedication only granted a "fee interest" in the right-of-way and so much the ground beneath it as required for ordinary use of a street and did not convey the mineral estate to the owner. The abutting property owner held a reversionary interest in what rights have vested in the municipality.

Hearsay exceptions allow admission of comparable sales in condemnation action
CORE Electric Cooperative v. Freund Investments, LLC, - P.3d -, 2022 WL 2070289 (Colo. App. 2022)

In action to condemn an easement on agricultural property, the trial court limited the testimony of the owner's appraiser who averaged the results of two valuation methods (the sales comparison approach and subdivision development method). The Court of Appeals affirmed the exclusion of testimony by the landowner's appraiser that determined present value based on the prospective value of a hypothetical future subdivision of unplatted agricultural property. In addition, although harmless, the trial court erred by limiting testimony on comparable sales for which the appraiser did not verify sales prices with a buyer strictly in accordance with C.R.S. § 38-1-118 because the public records hearsay exception under CRE 803(8) could apply.

9. Miscellaneous Topics

Century-old firearm licensing requirement violated Second Amendment
New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. (2022)

The State of New York required a license for carrying a firearm outside of their home. Obtaining a license required proving to a hearing officer that the applicant had a special need. In a 6-3 decision, the United States Supreme Court established (or confirmed) a single-step test for evaluating firearm regulations under the Second Amendment. The majority rejected the means-end scrutiny that lower federal courts had established to evaluate laws following *District of Columbia v. Heller*, 554 U.S. 570 (2008). If the Second Amendment's plain text covers the regulated conduct, the majority held that the government's regulation could only be justified if "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." In the majority's view, the American tradition did not include such limits on public carry of firearms used for self-defense or restricting the right to citizens demonstrating a special need.

Prior settlement precluded action claims relating to homeless encampments
Denver Homeless Out Loud v. Denver, Colorado, 32 F.4th 1259 (10th Cir. 2022)

In 2019, the City and County of Denver settled a class action lawsuit relating to sweeps of encampments of persons experiencing homelessness and agreed to follow certain protocols in future enforcement actions. Additional sweeps conducted in 2020 led to a new class action and claims under 42 U.S.C. § 1983. The federal district court issued a preliminary injunction, but a panel of the Tenth Circuit *sua sponte* identified the preclusive effect of the prior settlement on the current claims because they alleged the same customs and practices and involved the same class plaintiffs. As a result, the plaintiffs failed to establish a reasonable likelihood of success on the merits and the preliminary injunction was reversed.

Weld County challenge to air quality rulemaking fails for lack of standing
Weld County Board of County Commissioners v. Ryan, 511 P.3d 663 (Colo. App. 2022)

Following the passage of Senate Bill 19-181, the Colorado Air Quality Control Commission revised its regulations to address volatile organic compounds emitted from oil and gas operations. Weld County challenged the commission's procedures and its apparent lack of concern for the impact to its economy and land use powers. On appeal from the dismissal of the suit for lack of jurisdiction, the Colorado Court of Appeals affirmed based on the rule from *Martin v. District Court*, 550 P.2d 864, 866 (1976) that a subordinate agency cannot obtain judicial review of a superior agency without an explicit statutory authorization. The court found the county to be a subordinate agency in the context of air quality because any local regulations were required to be as stringent as the commission's. Without an express right to seek review, the court lacked jurisdiction over the challenge.

Malicious prosecution claims cannot arise from non-quasi-judicial proceedings
Salazar v. Public Trust Institute, --- P.3d ---, 2022 WL 4241948 (Colo. App. 2022)

Staiert and the Public Trust Institute filed administrative complaints against Salazar with both the Secretary of State and the Independent Ethics Commission. After the complaints were dismissed, Salazar filed a malicious prosecution action. The trial court denied a special motion to dismiss under the Anti-SLAPP statute, C.R.S. § 13-20-1101(3)(a).

The Colorado Court of Appeals reversed as to the Secretary of State proceedings because it held those administrative proceedings were insufficient to support a malicious prosecution claim. A malicious prosecution claim requires a "prior action" that is traditionally a judicial proceeding. That concept had been extended to judicially enforced arbitration proceedings. The Court of Appeals relied on out-of-state cases to determine that quasi-judicial proceedings could be a "prior action." Because the Secretary of State action was dismissed during the investigation phase, before formal proceedings or a hearing, the proceedings were not quasi-judicial.

Otherwise, the dismissal would have been affirmed because the appellate court rejected the claim that truthful statements always negate a malicious prosecution claim; here, the defendant's knowledge of the law and whether a legal basis existed was relevant. Further, the court rejected defendant's First Amendment claims because they had not preserved

arguments about the failure to plead actual malice. Salazar also met the pleading standard for avoiding immunity for exercising the right to petition, as set forth in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984), which the court held applied. The court also determined that de novo review for Anti-SLAPP motions to dismiss to determine if the plaintiff established a reasonable likelihood (or probability) of prevailing.

Appendix: CML Amicus Participation 2021-2022

https://www.cml.org/home/advocacy-legal/Amicus-curiae

***DePietro v. Coldiron,* 2022CA740 & 2022CA815.** The Colorado Court of Appeals will consider whether Section 204(3)(a) of the Colorado Open Records Act requires that public record subject to the attorney-client privilege or the deliberative process privilege must be disclosed to a third party who is discussed in those records as a "person in interest."

Salazar v. Kulmann and City of Thornton, 2022SC135. The Colorado Supreme Court will consider whether Colorado's constitutional term limits provision (Art. XVIII, § 11(1)) distinguishes between the offices of councilmember and mayor in the City of Thornton in calculating term restrictions and whether a partial term of office counts towards term limits. Oral argument is scheduled for October 18.

***Brown v. Walker Commercial, Inc.,* 2021SC390.** The Colorado Supreme Court is reviewing the Court of Appeal's holding that that a plaintiff can seek relief from the 28-day deadline for filing a C.R.C.P. 106(a)(4) complaint based on excusable neglect under C.R.C.P. 6(b). If so, the Court will also decide the appropriate standard for analyzing excusable neglect. The court heard oral argument in June 2022. CML also participated in the Court of Appeals case (*Walker Commercial Inc. v. Brown,* 492 P.3d 1045 (Colo. App. 2021)).

***Board of County Commissioners of Larimer County v. Thompson Area Against Stroh Quarry,* 2021CA1897.** The Court will address whether and when campaign contributions to a local elected official should ever disqualify the official from voting on a quasi-judicial matter involving the contributor. CML participated in an earlier appeal in this case dismissed by the Court of Appeals due to a lack of a final, appealable order (*Board of County Commissioners of Larimer County v. Thompson Area Against Stroh Quarry*, 2021 WL 1876762 (Colo. App. 2021)). Oral argument is scheduled for November 15.

***Maphis v. City of Boulder,* 504 P.3d 287, 2022 WL 521907 (Colo. 2022).** Plaintiff sued the City of Boulder after tripping and falling on an uneven concrete sidewalk. The Colorado Supreme Court held that this sidewalk deviation did not constitute an unreasonable risk to the health and safety of the public under the facts of the case, affirming the City's entitlement to immunity under the Colorado Governmental Immunity Act.

Aurora Urban Renewal Authority v. Kaiser, 507 P.3d 1033, 2022 WL 67850 (Colo. App. 2022). The Arapahoe Urban Renewal Authority ("AURA") brought an action to challenge the Arapahoe County Assessor's methodology for calculating incremental property tax

revenue for urban renewal projects. The Court of Appeals held that AURA had standing to file this case and that the Assessor's Reference Library, which "proportionately" allocated the indirect changes in property value caused by the existence of an urban renewal plan, violated Colorado's Urban Renewal Law. The State Property Tax Administrator and Arapahoe County Assessor have filed a petition for certiorari with the Colorado Supreme Court to review the substantive issues.

No Laporte Gravel Corporation v. Board of County Commissioners of Larimer County, 507 P.3d 1053, 2022 WL 67856 (Colo. App. 2022). The Court of Appeals held, as a matter of first impression, that campaign contributions can disqualify an elected official from serving as a decisionmaker in quasi-judicial proceedings when the facts are "rare," "exceptional," and "extreme." Relying on *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009), the Court agreed that the amount and timing of campaign contributions can implicate due process concerns. In this case, the Court found in favor of the County, holding recusal was not required because the facts were not rare, exceptional, or extreme.