

THE “RELATION BACK” DOCTRINE: WHEN THE WRONG PARTY IS SUED AND THE STATUTE OF LIMITATIONS HAS EXPIRED

Pleadings are often amended to substitute parties. When this happens, the claim against the new party may be time-barred by an applicable statute of limitations (“SOL”). If the SOL has run, however, the “relation back” doctrine may keep the asserting party’s claim alive.

In certain situations, Colorado’s Rules of Civil Procedure allow a substitute party to be added to the case—even after the SOL has run—if the claim against the party arose out of the same transaction or occurrence set forth in the original pleading. *See* C.R.C.P. 15(c). Then, the date of an amendment may “relate back” to the original filing date before the expiration of the SOL.

What are the key facts to look for? The Colorado Supreme Court has explained that the requirements of the relation back doctrine are essentially

notice requirements. *See, e.g., City of Thornton v. City of Ft. Collins*, 830 P.2d 915, 922 (Colo. 1992). The party to be added must have had *actual knowledge of the lawsuit* before the SOL expired, *or have learned of it afterwards within a period measured by a “reasonable” time allowed for service of process.* *Dillingham v. Greeley Publ’g Co.*, 701 P.2d 27, 32 (Colo. 1985).

What is a “reasonable” time? Unfortunately, the Supreme Court has provided little guidance. The Court has made clear that learning of a lawsuit one day after the SOL has run is definitely within a reasonable time. In *Dillingham*, plaintiff Robert Dillingham alleged that a newspaper libeled him on March 28, 1980, and filed a complaint three days before the applicable SOL was to expire one year later.

The plaintiff inadvertently

named an incorrect publishing company in the complaint. Plaintiff moved to amend his complaint on September 8, 1981, to include the correct company. However, the trial court held that the amendment did not “relate back” to the date of the original complaint: the Colorado Rules of Civil Procedure’s “notice” required that the party have actual knowledge of the lawsuit, which “must be accomplished prior to the running of the statute [of limitations].”

Although the correct company had been aware of a *potential* claim, the correct company did not have the requisite notice because it only discovered the lawsuit when one of its reporters was performing a routine and cursory review of court filings—one day after the SOL had expired. The plaintiff also

(Continued on page 4)

ACT QUICKLY WHEN YOUR INSURED IS DEFAULTED

Recently, we had an insurance client who requested that we file a motion to set aside a default entered against its insured. After the insured was served with the plaintiff’s complaint and notified its broker of the claim, the insurance broker failed to pass this information on to the insurance carrier.

The carrier was not made aware of

the claim until after default was entered against the insured, although a default judgment had not yet been entered by the court. Thanks in part to the quick actions of the carrier, we were successful in getting the default set aside.

Colorado courts may set aside a de-

(Continued on page 2)

INSIDE THIS ISSUE:

| | |
|--|---|
| EMPLOYMENT CORNER: COURT SETS RETALIATION STANDARD | 2 |
| RECENT COLORADO CASE SUMMARIES | 3 |
| INTRODUCING A NEW ASSOCIATE TO WR&H | 4 |

EMPLOYMENT CORNER: SUPREME COURT SETS RETALIATION STANDARD

In *Burlington Northern & Santa Fe Railway, Co. v. White*, 126 S. Ct. 2405 (2006), the United States Supreme Court adopted a broader standard for retaliation cases brought under Title VII.

The Court reasoned that the anti-discrimination provision, by its terms, seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. On the other hand, the anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering

(through retaliation) with an employee's efforts to secure or advance enforcement of the Title VII basic guarantees.

Thus, the substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.

The Court recognized that employers can effectively retaliate against an employee by taking actions not directly related to her employment or by causing harm outside the workplace.

Accordingly, the Court held that the anti-retaliation provision, unlike the substantive anti-discrimination pro-

(Continued on page 3)

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DEFAULT JUDGMENTS: ACT QUICKLY WHEN YOUR INSURED GETS DEFAULTED

(Continued from page 1)

fault for "good cause shown" pursuant to C.R.C.P. 55(c). In application, this standard is comparable to the standard for setting aside default judgments, although in the case of a default only, the standard is more flexibly applied and liberally construed.

Judgment by default is considered a serious and drastic remedy by Colorado courts. In setting aside a default, a defendant must show: (1) excusable neglect causing the default, (2) a meritorious defense to the plaintiff's claims, and (3) relief from the default would be equitable.

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First, we were able to show that the insurance broker had procedures in place to forward notices of claims to the carrier, but in this isolated case there was an unintentional failure in that system.

Second, we demonstrated that the insured had a meritorious defense which, if proven, would alter any default judgment entered. In our case, the plaintiff had signed an exculpatory agreement wherein she "waived and released" the defendant from all claims or liabilities arising from her participation in the insured's recreational event.

Third, the court considered equitable factors, such as the timeliness of the motion to set aside the default, reliance by the plaintiff on the default order, and the manner in which the plaintiff's case might be damaged by lost evidence or passage of time. In our case, we were

able to get the motion submitted within three weeks of when the answer was due and only four days after the entry of default.

After getting the default set aside, we answered the complaint and later moved for summary judgment based on the exculpatory agreement. The court granted the motion and dismissed the case.

Thus, because the carrier acted quickly in getting the file to our office, not only were we able to get the default set aside, but we were subsequently able to get the case dismissed entirely.

If your office encounters a situation where a default or default judgment has been entered against your insured, it is imperative that you move with all due speed to get the default set aside.

Andrew D. Peterson

RECENT COLORADO COURT CASE SUMMARIES

McClintic v. Hesse, 2006 Colo. App. LEXIS 1280 (Colo. App. 2006) (Personal Injury—Sole Negligence—Motion for Directed Verdict—“Sudden Emergency” Standard).

As discussed in our last edition of *The WR&H Update*, Colorado courts have recognized the legal defense of sudden emergency. The court of appeals recently adopted the standard for determining what constitutes negligence in a two-car, rear-end accident precipitated by animals on the roadway.

This doctrine provides that a person who, through no fault of her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises the degree of care that a reasonably careful person would have exercised under similar circumstances.

The court of appeals held that the defendant met that standard by her actions under the circumstances. The court of appeals also disagreed with plaintiff's claims that defendant breached her duty not to drive

excessively slow, citing the exception to the statute that allows slow driving when necessary for the safe operation of a vehicle.

Ken Caryl Ranch Master Ass'n v. Granite State Insurance Co., 2006 Colo. App. LEXIS 1283 (Colo. App. 2006) (Automatic Policy Renewal—Policy Extension—Failure to Provide Timely Notice).

The court of appeals interpreted CRS § 10-14-110.5(1) relating to notice of intent to unilaterally increase a premium or decrease coverage benefits of a commercial liability insurance policy.

The trial court concluded that timely or adequate notice of the terms, conditions, and premium of the new insurance policy is all that must be given before the expiration of an existing insurance policy. However, the court of appeals concluded that more is required.

Specifically, the insurer either must provide timely notice of the expiration of the policy or affirmatively extend, at a pro-rated premium, the

existing policy for 45 days. If it does neither, then the policy is deemed to automatically renew under the same terms and conditions.

Edge Telecom, Inc. v. Sterling Bank, 2006 Colo. App. LEXIS 1288 (Colo. App. 2006) (Forum Selection Clause—Unfair or Unreasonable).

The court of appeals determined the appropriate mechanism to enforce a forum selection clause, since no Colorado rule of civil procedure adequately addresses the enforcement of forum selection clauses. A forum selection clause is a provision in a contract which provides the venue or location for the resolution of any disputes.

The trial court must address the motion at the outset of the proceedings. A party opposing the motion must demonstrate by a preponderance of the evidence that the clause is unfair or unreasonable, or was fraudulently induced. The trial court may hold an evidentiary hearing and make requisite factual findings.

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RETALIATION STANDARD: “MATERIALLY ADVERSE” ACTS

(Continued from page 2)

vision found in Title VII, is not limited to discriminatory actions that affect the terms and conditions of employment. In other words, the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.

The Court also emphasized that Title VII is not a general civility code for the American workplace. The Court stated that an employee's decision to report discriminatory behavior cannot immunize that employee from petty slights or minor annoyances that often take place at work and that all employees experience.

Rather, the Court found that the

anti-retaliation provision seeks to prevent employer interference with “unfettered access” to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely to deter victims of discrimination from complaining.

Therefore, the Court adopted a relaxed standard for Title VII retaliation.

(Continued on page 4)



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**WOOD, RIS & HAMES,
P.C. IS PLEASED TO
INTRODUCE A NEW
ASSOCIATE:**

◆ **Travis T. Murtha**
graduated from the
Vermont Law School
in May 2005.



THE WR&H UPDATE

THE RETALIATION STANDARD

(Continued from page 3)

tion claims. The Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse,” which in the retaliation context “means it well might have dissuaded a reasonable

worker from making or supporting a charge of discrimination.”

This standard reinforces the importance of avoiding retaliation against employees who voice complaints. It also underscores the danger and difficulty of such claims.

Andrew D. Peterson

THE RELATION BACK DOCTRINE

(Continued from page 1)

did not serve the correct company until after the SOL had expired.

Upon review, the Colorado Supreme Court held that “notice within the period provided by law for commencing the action specified in C.R.C.P. 15(c) includes the reasonable time allowed for service of process.” *Id.* at 32. The Court reasoned that this rule observes “the policy that technical errors not affecting the substantial rights of the parties should be disregarded.” *Id.*

Moreover, “The purpose of the statute of limitations in promoting justice, discouraging unnecessary delay, and forestalling the prosecution of stale claims ... is not defeated by allowing the substitution of a party within a reasonable period of time.” *Id.*

Because the correct company had “notice” of the lawsuit within one day of the SOL’s expiration, the court concluded that “notice was received within the reasonable period of time allowed for

service of process.” Therefore, plaintiff’s action against the correct company was not barred by the SOL.

Conversely, the Federal District Court in Colorado has said that a period of four months is too long. In *O’Quinn v. Wedco Tech., Inc.*, 752 F. Supp. 984, 984-85 (D. Colo. 1990), the plaintiff was injured on May 18, 1985. The applicable SOL required her to file suit within three years, and she did so against a “Doe Corporation” on May 16, 1988.

Although the court in *O’Quinn* applied a Federal Rule of Civil Procedure, the court “conclude[d] that the result would be the same applying either [the federal or Colorado version of the] rule.” *Id.* at 985.

The correct company did not receive notice of her suit until September 23, 1988. The court held that, “Without deciding how long a reasonable time for service of process [beyond a SOL] is under *Dillingham*, I conclude that more than four months is beyond a reasonable time.” *Id.* at 986.

The WR&H Update contains summaries of legal developments, legislation and features. Wood, Ris, & Hames, P.C., makes every effort to print reliable and accurate summaries. Nevertheless, space restrictions prevent us from identifying every feature of a legal development or legislative enactment and the reader should consult with original, unedited materials and consult legal counsel before a decision is made in reliance upon matters discussed herein.

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