Significant Professional Negligence Cases and Developments during the Past Year - A Review and Some Observations

By Francis V. Cristiano, Esq.

Supreme Court Decisions

There were three Supreme Court decisions rendered this past year that addressed medical, legal, and other professional negligence issues.

Warden v. Exempla, Inc. – The Scope of Rebuttal Testimony under Rule 26(a)(2)(C)(III), as well as Todd Criteria Applied to Expert Witness Disclosures

Warden v. Exempla, Inc.[1] written by Justice Rice, dealt with significant issues regarding the always challenging issue of the proper scope of rebuttal testimony, as contemplated by subsection (III) to Rule 26(a)(2)(C), as well as to the possible application of sanctions pursuant to Rule 37(c)(1) for late expert witness disclosures, and the necessary overlay of the "substantially justified or harmless" standards of *Todd v. Bear Valley Vill. Apts*.[2]

The facts in *Warden* were profound. Noah Warden, a minor, was born with severe brain damage. He was born on December 22, 2008. After nine hours of labor, he was delivered by emergency cesarean section. At birth, his umbilical cord was wrapped around his neck. He was unresponsive and had no heartbeat. After several minutes of resuscitation efforts, Exempla personnel restored Noah's heartbeat and placed him on a ventilator. The Wardens maintained that Noah was injured by a preventable intrapartum event, i.e., Exempla's failure to properly monitor data generated by the fetal monitoring strip during Noah's birth and react appropriately. Exempla, on the other hand, contended that Noah's injuries occurred days, or possibly weeks before his birth, and relied upon the analysis of a "placental pathologist," Dr. Weslie Tyson, who examined Noah's umbilical cord shortly after birth and contended that he found significant abnormalities, all suggesting that Noah's oxygen deprivation took place well before his mother's labor.

The Wardens made initial expert disclosures under Rule 26(a)(2), which included the disclosure of two experts, Drs. Cokely and Wilson. Dr. Cokely maintained that the doctors and nurses charged with Noah's care could have prevented his injuries by proper fetal monitoring. Dr. Wilson's opinions concerned the cost of rehabilitation care costs Noah required. The Wardens also disclosed Jeffrey Opp who created a financial analysis concerning the parents' expected costs in light of Noah's condition. Opp assumed Noah would live for over 70 years, pursuant to the Colorado statutory mortality tables and did not consider the effect of Noah's medical condition on his life expectancy.

After deposing the Wardens' experts, Exempla disclosed its own experts. Among other things, they opined that Noah's condition at birth was not the consequence of intrapartum events, but instead significantly pre-existed his labor and delivery based upon Dr. Tyson's study of Noah's umbilical cord shortly after his birth. Exempla's experts' conclusions rested in large part, on a 2003 American College of Obstetricians and Gynecologists study titled, *Neonatal Encephalopathy and Cerebral Palsy: Defining the Pathogenesis and Pathophysiology* ("NEACP"). The NEACP report outlined four essential criteria for finding that deficits of this sort were caused by intrapartum events, which Exempla's experts contended were not satisfied in Noah's case. Instead, they concluded that Noah's umbilical gas values belied the Wardens' allegations that Noah's injuries occurred during labor. Exempla also endorsed two experts to testify concerning Noah's shortened life expectancy.

In response, the Wardens endorsed four new rebuttal experts, including Dr. Shott, a biostatistician, who questioned the validity of the NEACP criteria and their testing methods, concluding that the report was "junk science," not worthy of consideration. Among other things, Dr. Shott pointed

out that he had reviewed all 72 articles cited by the report, believed that they did not rely upon "properly performed studies," and set "arbitrary cutoff values" based upon statistically insignificant sample sizes.

In addition to Dr. Shott's testimony, the Wardens' rebuttal disclosures included expanding Dr. Cokely's and Dr. Wilson's testimony to address Noah's life expectancy.

Exempla moved to strike these supplemental expert witness disclosures, contending lack of timeliness. The magistrate granted the motion. The Wardens moved for an expedited review of the magistrate's order, and on May 7, 2012, the trial court affirmed such. The Colorado Supreme Court granted the Wardens' subsequent C.A.R. 21 petition. Somewhere during this process the trial date was continued to February 2013.

The Supreme Court determined that the trial court had abused its discretion in striking the three experts, finding Dr. Shott's anticipated testimony to be within the definition of proper rebuttal evidence. And although not finding Drs. Cokely's and Wilson's testimony concerning Noah's life expectancy to have been proper rebuttal testimony, the Court found the striking of their endorsement was improper based upon a *Todd* analysis, which the Supreme Court applied to the Rule 26(a)(2) expert witness disclosures, largely because the trial date had been continued.

The Supreme Court's analysis of the proper scope of rebuttal testimony was significant and instructive with regard to an area of law that in many minds is oftentimes misunderstood or misapplied by trial courts. The essence of the defendant's contentions and the trial court's reasoning were that Dr. Shott's testimony concerning the NEACP study tended to support the Wardens' case-in-chief, and thus because of such, was not properly categorized as "rebuttal testimony."

The Supreme Court, however, found this reasoning flawed. At the outset, it noted that Dr. Shott's testimony "specifically refuted the defense's experts' theory of causation and therefore constituted a proper rebuttal disclosure under Rule 26(a)(2)(C)(III)." In this regard, the Court noted that his testimony was "intended to contradict or rebut evidence on the same subject matter identified by another party [in a prior disclosure]."[3] With regard to the argument that the testimony, as well, supported the Wardens' case in chief, the court noted with regard to rebuttal testimony that

> "[i]n Colorado, rebuttal evidence 'may take a variety of forms, including any competent evidence which explains, refutes, counteracts, or disproves the evidence put on by the other party, even if the rebuttal evidence also tends to support the party's case-in-chief.'. . . Thus, **Colorado evidentiary rules afford a party presenting rebuttal evidence significant leeway so long as the evidence rebuts some portion of an opposing party's claim**."[4]

As explained by the court, "Dr. Shott's testimony attacked the NEACP report relied upon by Exempla's experts [and thus] refuted the theory underlying Exempla's causation analysis. **That it concomitantly helped the Wardens' case-in-chief does not mean that it was an improper rebuttal disclosure**."[5] Thus, the trial court had abused its discretion in striking his endorsement.

With regard to Dr. Cokely's and Dr. Wilson's testimony regarding Noah's life expectancy, however, the court noted that such "likely should have been included in the Wardens' initial disclosures because it went directly to the damages element of their negligence claim." Nevertheless, it concluded that "the trial court abused its discretion when it struck the life expectancy testimony because Exempla was not harmed by the late disclosure,"[6] based upon a Rule 37(c)(1) and *Todd* analysis. In doing such, the court emphasized that the trial date had been continued to February 2013, and thus the supplemental disclosures to Dr. Cokely's and Dr. Wilson's testimony had been made approximately 16 months prior to such on October 17, 2011. Thus, it rectified a misconception held by some courts that they can per se hold parties to disclosure deadlines established with regard to an original trial date without a *Todd* analysis, even though the trial date has been continued to a point where the disclosures are effectively given well prior to the new trial date.

In more detail, in reviewing the five factors from *Todd*,[7] the court noted that "[t]hree of the five factors required trial courts consider the timing of the errant disclosures vis-à-vis the trial." Thus, in *Todd* "the late disclosure was harmless in large part because of an unrelated 'continuance [gave the potentially-prejudiced defendant] more time to prepare its case.'"[8] Thus, the court noted, "in light of the advanced trial date of this case, considering the specific *Todd* factors, the Wardens' late disclosure was harmless. The trial was continued to February, 2013; and, as in *Todd*, the continuance was unrelated to the defective disclosures."[9] In reviewing the other considerations of *Todd*, the court noted with regard to the issue of prejudice, that "any prejudice to Exempla is slight when compared to the importance of this testimony to the Wardens' negligence claim."[10] With regard to the "surprise" factor the court noted that since the "disclosure addresses Exempla's experts' life expectancy

testimony . . . the surprise suffered by Exempla only concerns the evidence's impact on Exempla's defense; this is not the type of surprise warranting sanctions under Rule 37."[11] The court concluded as well that the "trial disruption" factor of *Todd* was not implicated as well "because the trial is still months away."[12] Finally, the court noted, "nothing in the record indicates that the Wardens acted in bad faith or delayed these expert disclosures to gain a tactical advantage."[13]

All of this is clearly important and significant guidance to trial attorneys confronted with motions to strike expert witness disclosures.

Concerning the App. for Underground Water Rights – legal negligence – the right of a sued attorney to intervene in subsequent proceedings affecting his former client's damages

Concerning the Application for Underground Water Rights[14] addressed an intriguing issue – the right of a sued attorney to intervene in a subsequent action that will have a direct impact on his former client's damages, and thus the client's damage claim against the attorney.

In this case, the Cherokee Metropolitan District ("Cherokee") was a governmental body responsible for providing water to its landowners and residents. Cherokee negotiated an agreement with a water management district, which granted to it conditional water rights and wells which Cherokee utilized. Pursuant to the stipulation, Cherokee had two years from the date the wells were put to beneficial use to apply to make its conditional rights to the wells absolute. On April 28, 2006, Cherokee put Well 17 to beneficial use, but did not apply to make the conditional rights absolute until at least April 30, 2008. Because Cherokee did not file timely applications, the water court held that Cherokee had abandoned its rights to Wells 14-17. At that point, Cherokee sued its attorneys, Felt, Monson & Culichia, LLC ("FMC"), for legal negligence, claiming the value of the lost water rights as its damages.

In an initial appeal, although the Supreme Court affirmed the trial court's ruling that Cherokee had abandoned the portion of its conditional rights that it failed to make absolute by failing to timely file its application for such, it interpreted the water court's ruling to mean that Cherokee had "abandoned only the portions of the conditional rights to Wells 14-17 for which it had untimely filed to make absolute."[15] The Supreme Court, therefore, remanded the matter back to the water court to determine the remaining question of "whether Cherokee should receive a finding of reasonable diligence for the remaining conditional portions or whether the stipulated decree mandates that those amounts should be considered abandoned."[16]

Given that the water court's determinations in that regard would significantly impact FMC's interest in reducing its potential exposure in the legal negligence claim by Cherokee, FMC moved to intervene in the underlying water case pursuant to C.R.C.P. 24(a) and (b). No party opposed the motion. The trial court, however, issued its order stating: "Intervention is denied. *See Stone v. Satriana*, 41 P.3d 705 (Colo. 2002) and *People ex. Rel. Dunbar v. South Platte Water Conservancy District*, 139 Colo. 503, 343 P.2d 812 (1959)." The appeal to the Supreme Court by FMC followed, with FMC seeking reversal of the water court's order denying intervention. In a divided, 4 to 3 decision, with Justice Eid writing for the majority, the court determined that the water court had not abused its discretion in denying such. Justice Marquez, on the other hand, wrote for the minority, which was of the opinion that it had.

At the outset, the majority determined that there was no mandatory intervention pursuant to C.R.C.P. 24 (a) because "we find that FMC's interest [was] adequately represented by existing parties." At best, this seems to be a debatable proposition. The commitment of a sued attorney to limit his or her damage exposure in a legal negligence claim would seem to far exceed that of his former client who stands to recover either from the results of the continuing litigation or from the legal negligence claim and typically shows little preference concerning the source of the recovered funds. The majority, however, adopted a "compelling showing" standard regarding whether the applicant's interest were not being "adequately represented." In this regard, the majority emphasized, for example, "even though two parties may have different motivations for an interest, the interest may nevertheless be identical,"[17] "there is no indication that Cherokee [sought] to settle the matter to FMC's detriment,"[18] nor did "FMC claim that Cherokee [had] failed to initiate litigation to protect their common interest or to appeal an adverse ruling in order to mitigate damages."[19] Thus, it concluded, there was no compelling argument showing that the applicant's interest was not being represented by the existing parties.

With regard to permissive intervention as contemplated by C.R.C.P. 24(b), the majority opined that the trial court was within its discretion to deny such because consistent with the trial court's reference to the case law in its order, FMC was seeking to "join the suit very late in the proceedings."[20]

Justice Marquez, however, writing on behalf of a three-person minority was of the opinion that the trial court

had erred in denying FMC's motion to intervene as a matter of right under C.R.C.P. 24(a). She stated that the burden of showing that the representation was inadequate "should be treated as minimal," citing the U.S. Supreme Court decision of *Trbovich v. United Mine Workers of Am.*[21] She stated in conclusion that "[a]t a minimum, under the circumstances presented here, there are reasonable doubts about whether Cherokee will adequately represent FMC's interest."[22]

However, even though the majority did not conclude that the trial court had abused its discretion in allowing this type of intervention, this should not be construed to establish a rule that intervention in these types of circumstances is improper per se. To the contrary, it suggests that an opposite decision by the water court would also not have been improper and was within the discretion of the trial court to grant such. Attorneys, who find themselves defendants in legal negligence actions, where the underlying proceedings continue that might have a bearing on their ultimate liability, might wish to consider this.

Gibbons v. Ludlow – Damage Criteria for Legal Negligence and Broker Negligence Claims Involving Underlying Sales Transactions

Gibbons v. Ludlow[23] involved an underlying real estate transaction where the sellers had retained a transactional real estate broker and an attorney to assist them with the sale. The total contractual purchase price for the property was $6,550,073.40. When the sellers reviewed the drafted settlement statement one week before closing, they were surprised to learn that the purchaser would receive a $1,615,909.95 credit against the purchase price at closing for infrastructure costs. They contended they had not been advised of this by their attorneys or their real estate agent who brokered the deal, but were forced to close on the property regardless, because of their contractual obligation. They then brought an action against their attorneys and the involved transactional real estate broker for essentially the $1,615,909.95 credit, claiming that their attorneys and the broker caused them to have to sell the property $1.6 million less than what it was worth.

At the trial court level, after substantial discovery, the court granted the defendants' motion for summary judgment. The court based this upon defendants' contentions plaintiffs could not sustain their claim against the attorneys of the broker for lack of provable causation, unless they brought forward proof that the original sellers would have paid the extra money or that they could have sold the property to another identifiable person or entity for $6.6 million.

The sellers appealed to the court of appeals, and in a split decision, the court of appeals reversed the trial court, and held that there was a sufficient prima facie evidence of causation based upon three unconsummated deals and testimony from the purchaser's president that there was other interest in the property at the listed price.[24] There was also evidence that the sellers had received a market analysis, which concluded the market value of the property in "as is," condition was $6,600,000. Somewhat surprisingly, upon certiorari review, the Supreme Court disagreed and reversed the court of appeals' decision.

Based upon the well-known proposition, "the fact of damages cannot be based solely on speculation, guesses, or estimates," and that damages must be "established beyond a mere possibility or speculation,"[25] the Supreme Court established a seemingly per se rule that "[i]n cases involving an alleged unfavorable transaction, a plaintiff must show that he would have obtained a more favorable result in the underlying transaction but for the professional's negligence." Moreover, in the majority's opinion, this must come in the form of one or two ways: "(1) by proving that he would have been able to obtain a better deal in the underlying transaction – the 'better deal' scenario; or (2) that he would have been better off by walking away from the deal – the 'no deal' scenario."[26]

With regard to the "better deal" application, the majority eliminated this as a possibility in the case at bar, because the parties did not dispute that the seller would not have purchased the property at the contracted price of $6,597,215.50 without the infrastructure credit provision. Thus, the Supreme Court concluded, "as a matter of law, the sellers [had] not established the fact of damages for causation under the 'better deal' theory."[27]

With regard to the "no deal" application, even though the plaintiffs offered an appraisal or "market analysis" which showed a $6.6 million value of the property, this was deemed to be insufficient, because the "sellers [did] not present any evidence that such a buyer was available or that the property could have garnered $6.6 million," elaborating that "the sellers [did] not offer for example, any expert testimony regarding the market conditions in the area at the time of the sale, or comparable sales in the area at the time, or any other evidence regarding the likelihood of a sale at a higher price than that paid by [the purchaser]."[28]

Justice Coats, and the rest of the minority, however, disagreed with the majority's holding. He opined that at the outset, the majority "simply misreads the allegations of the sellers' complaint. Rather than seeking $1.6 m[illion] in lost profits from a

negligently handled real estate transaction, the sellers seek damages for having to part with an asset, against their will, due to the negligence of the broker."[29] He further opined that:

> [E]ven if lost profits were the only kind of injury possible from real estate broker malpractice, to make a survival of a motion for summary judgment contingent on the production of evidence of lost profits from another prospective sale equaling the claimed damages is not only unrealistic but an unjustified departure from existing law. Unlike the examples of speculative, remote or imaginary evidence of future profits relied upon by the majority, a hypothetical market for real property based on sales of more or less comparable properties constitutes a sufficient measure of damages for a multitude of legal purposes. Furthermore, while it may be necessary to demonstrate a genuine dispute about the cause of injury, surviving a motion for summary judgment has never been contingent upon producing evidence of the precise amount of claimed damages.[30]

Court of Appeals' Decisions

There were two significant court of appeals' decisions rendered concerning medical negligence.

Harner v. Chapman – The Saga of the Misunderstood Doctrine of Res Ipsa Loquitur

Harner v. Chapman,[31] involving medical negligence issues, addressed again the issue of whether res ipsa loquitur shifts the burden of proof or merely the burden of coming forward with evidence as described with regard to presumptions in general in CRE 301.

Likely, because of its effect, there seemingly is no other doctrine, which raises the ire of defendants more than res ipsa loquitur. Res ipsa is founded on the simple concept that where one party is likely in control of an instrumentality that causes an accident or injury - and the injury suffered is not the type that typically occurs in the absence of negligence - logic has it that presumptively the individual in charge of the instrumentality was negligent, absent further evidentiary explanation satisfactory to the trier of fact that overcomes the presumption. In medical negligence cases, where the patient is oftentimes unconscious at the time of injury and certainly at a distinct disadvantage in terms of access to relevant evidence, the doctrine becomes much more significant. Perhaps because of this, defendants resist it all the more, oftentimes making it out to be something much more complicated and inflexible than it is.

In 1944, in the well-known case of *Ybarra v. Spangard,*[32] the California Supreme Court well-described the quandary of res ipsa loquitur in medical cases as follows:

> There is, however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. **The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied.** If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."[33]

Thus, in *Ybarra* the court held the doctrine applicable even though the plaintiff could only identify a group of persons who had control over the possible instrumentalities that may have caused his injuries. As set forth by the court:

> We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.[34]

Although there was some uncertainty about the effects of what was sometimes referred to as an "inference" of negligence, versus a "presumption" of negligence was resolved by the Colorado Supreme Court in 1958, in a scholarly and memorable decision written by Justice Frantz, *Weiss v. Axler,*[35] well worth reading by anyone interested in understanding the doctrine. At the outset, the court explained the origins and purpose of the doctrine by referring to language in the 1863 seminal case, *Byrne v. Boadle* as follows:

> A landmark case in the development of res ipsa loquitur was *Byrne v. Boadle*, 2 H. & C. 722,

159 Eng. Rep. 299 (1863). The opinion was written by the celebrated Chief Baron Pollock. A barrel fell from a window in the defendant's warehouse and injured plaintiff. In the course of the opinion, Pollock stated that "the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are facts inconsistent with negligence, it is for the defendant to prove them."[36]

The court continued with this discussion as follows:

Sir Frederick Pollock in his great work, "The Law of Torts," (12th ed.), in discussing *Byrne v. Boadle*, clearly outlines the function of res ipsa loquitur in these words: "Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."[37]

Most importantly, in dealing with the "inference" versus "presumption" issue, Justice Frantz, after having briefly discussed a 1931 Colorado decision, *Clune v. Mercereau*,[38] where the court determined that the doctrine was destroyed by the plaintiff merely calling the defendant for cross-examination, and with Justice Frantz (as he stated) "paradoxically . . . moving backward . . . to return to the doctrine's earliest meaning and utility," wrote as follows:

Such resolution [of the issue] is a judicial function; and since the court decides as a matter of law the existence of prob able negligence making a prima facie case, the presumption is truly one of law. Hence, to speak of 'inferring negligence' in a res ipsa loquitur case is to misuse the term. Inferring is a fact-finding function, whether trial is to court or jury, and involves the discretion of the trier of the facts whether to accept or reject the inference. Not so as to the presumption of negligence in a case where res ipsa loquitur is applicable; there it is conclusive as a matter of law unless the evidence given in explanation by the defendant destroys the presumption.

The process of inferring relates to facts and their weight. A presumption of law cannot be weighed; its effect is static; in one case, it cannot be said to have less weight than in another. A presumption has force; evidence, weight. Judges and text-writers have inveighed against the notion that presumptions can be weighed as evidence.

The doctrine of res ipsa loquitur creates a compulsive presumption of negligence, which continues to exist until the defendant has satisfied the court or jury, whichever is to find the fact, by a preponderance of the evidence that he was not negligent. If he has thus satisfied the trier of the facts, he has destroyed the presumption. **Thus, the sole question in a res ipsa loquitur case is: has the defendant overcome the prima facie case of negligence against him by establishing by evidence satisfactory to the jury that he was not negligent?**

The defendant's explanation does not per se destroy the presumption; the conviction of the jury (or the court in a trial to it) that the explanation exonerates the defendant dissipates the presumption.[39]

Thus, in a case perhaps written for the ages by Justice Franz, the well-defined rule was pronounced, "[o]nce the presumption of negligence arises the burden shifts to the defendant to overcome the presumption, and to establish affirmatively that no negligence existed on his part."[40] That is, it shifts the burden of proof and not merely the burden of coming forward.

In 1979, however, C.R.E. 301 was passed, which provided in pertinent part:

[A] presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Thus, despite the compelling logic of Justice Frantz in *Weiss v. Axler*, the rule created uncertainty with regard to the effect of res ipsa loquitur. In the case of *Stone's Farm Supply, Inc. v. Deacon*,[41] decided 12 years after CRE 301 was adopted, the Colorado Supreme Court seemingly answered the question: "Res ipsa loquitur allows an inference of breach of duty and causation and requires the defendant to prove by a preponderance of the evidence that he was not negligent."[42] Later, Justice Martinez concurred in *Kendrick v. Pippin*,[43] noting, as well, that res ipsa loquitur was "merely a presumption that shifts the burden to the defendant to prove that he or she was not negligent."[44]

For one reason or another, however, the Supreme Court Committee on Civil Jury Instructions was not convinced. They referred to the language of *Deacon* to have perhaps only been dicta, giving alternative versions of the instruction and stating, "[t]he Committee does not take any position as to whether the statements by the Supreme Court regarding res ipsa loquitur in Deacon were intended to except the doctrine of res ipsa loquitur from the operation of Rule 301 or whether the statements were only dicta and Rule 301 governs the doctrine."[45] Thus, opponents of the doctrine could argue with some support from the Committee that it merely shifted the burden of moving forward as described by the Supreme Court in 1931 in *Clune v. Mercereau,* and not by the Supreme Court's pronouncement 27 years later, in *Weiss v. Axler.*

This finally came to a head in 2009 in the court of appeals' decision *Ochoa v. Vered*.[46] Judge Webb repeated the *Deacon* language and concluded that "we are not persuaded that the res ipsa loquitur instruction improperly shifted the burden of disproving negligence to Dr. Vered by his reliance on CRE 301," and that "any tension between *Deacon* and CRE 301 must be resolved by our Supreme Court."

This, however, still did not resolve the issue and in *Harner*, which was tried well after *Ochoa*, the trial judge was still not persuaded to follow what by that time had been the unequivocal direction of at least a division of the court of appeals, and refused to instruct the jury that the doctrine shifted the burden of proof. Following an unfavorable jury verdict, Harner appealed. In a well-written decision by Judge Gabriel, the court of appeals agreed with Harner and ruled that the trial court had erred in not instructing the jury that the doctrine shifted the burden of proof, and not simply the burden of going forward. It concluded, as well, that the error was not harmless and ordered a new trial. In doing so, it fully recognized the defendant's C.R.E. 301 arguments, but allowed the precedents of *Deacon* and *Weiss* to stand in light of the language in *Deacon*, as well as in *Ochoa*, as well as based upon the concept that the "court of appeals is not at liberty to disregard a rule announced in a prior Supreme Court case absent 'some clear indication' that the Supreme Court had overruled its prior case."[47] In light of the uncertainty, however, the court of appeals urged the Supreme Court to review the issue stating, "we respectfully urge that court to take up that issue in this case." [48]

On September 9, 2013 that request was answered by the Supreme Court, which granted certiorari with regard to the issue of "whether the court of appeals erred in holding, based upon *Weiss v. Axler* that res ipsa loquitur shifts the burden of proof to the defendant despite the adoption of CRE 301,

which provides that 'a presumption. . . does not shift. . . the burden of proof.'"[49] . . . And the story continues.

Marcellot v. Exempla – Psychiatric Personnel and Facilities' Immunity for Failure to Warn or Protect against a Mental Health Patient's Violent Behavior

Marcellot v. Exempla, Inc.[50] dealt with the immunity established under §13-21-117, C.R.S. for a psychiatric or professional facility failing to warn against a mental health patient's violent behavior. Section 117 essentially provides immunity from liability for such facilities' failure to warn against a mental health patient's violent behavior in their facility except for their duty to respond to "serious threat[s] of imminent physical violence against specific person or persons," by timely making efforts to notify the person threatened as well as notify the "appropriate law enforcement agencies" concerning such, with the exception to the statute involving the negligent release of a mental health patient or the negligent failure to initiate involuntary 72-hour treatment for a patient that "appears to be an imminent danger to others."

In *Marcellot* the plaintiff contended that she had asked a direct question to the staff at this psychiatric facility whether there were any patients who presented special risks to her safety or to that of her students, and they advised that there were none. Plaintiff argued that the immunity of § 117 did not apply to false information given by the facility in response to a direct question. She contended as well that the Premises Liability Act at §13-21-115, C.R.S., which included a landowner's duty to warn an invitee such as herself of dangers of which he was aware, overrides 13-21-117.

The trial court, however, disagreed and dismissed the action based upon Exempla's C.R.C.P. 12(b)(5) motion to dismiss, and the court of appeals agreed. Thus, §13-21-117, which provides this type of immunity, is in full force and effect. The only possible exception to a psychiatric health care worker or facility's failure to warn are the exceptions set forth in the statute itself. This includes an obligation to timely warn the individual of "imminent threats," as well as to advise appropriate law enforcement agencies, as well as possible liability for failing to initiate an involuntary 72-hour treatment and evaluation program for an individual who appears to be an imminent danger to others. ▲▲▲

Francis V. "Frank" Cristiano is a long time CTLA member and member of its Board since 2003. His offices are in the Denver Technological Center, and his practice emphasizes professional negligence, serious personal injury and business torts. He is Trial Talk's professional negligence editor. He is available at 303-407-1777.

Endnotes:

[1] *Warden v. Exempla, Inc*, 291 P.3d. 30 (2012).

[2] *Todd v. Bear Valley Vill. Apts.,* 980 P.2d 973 (Colo. 1999). Justice Rice wrote this opinion as well as the *Warden* opinion.

[3] *Warden*, 291 P.3d. at 34.

[4] *Id*. at 35 (emphasis added).

[5] *Id.* at 36 (emphasis added).

[6] *Id.*

[7] *Id*. at 37.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Concerning the App. for Underground Water Rights*, 304 P.3d 1167 (Colo. 2013).

[15] *Id.* at 1169.

[16] *Id.*

[17] *Id.* at 1171.

[18] *Id.* at 1172.

[19] *Id.*

[20] *Id.* at 1174.

[21] *Trbovich v. United Mine Workers of Am*., 92 S.Ct. 630, n. 10 (1972).

[22] *Underground Water Rights*, 304 P.3d 1167, 1176.

[23] *Gibbons v. Ludlow*, 304 P.3d 239 (Colo. 2013).

[24] *Ludlow v. Gibbons*, No. 10 CA 1719, P.3rd ___ (Colo. App. 2011).

[25] *Gibbons*, 304 P.3rd 239 at 246.

[26] *Id.* at 245.

[27] *Id.*

[28] *Id.* at 248.

[29] *Id.* at 249.

[30] *Id.* at 250 (citations omitted).

[31] *Harner v. Chapman*, 2012 COA 218 (Colo. App. 2012).

[32] *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944).

[33] *Id*. at 489-490, *citing* 9 WIGMORE, EVID. §2509 at 382 (3d Ed.) (emphasis added).

[34] *Id*. at 494.

[35] *Weiss v. Axler*, 328 P.2d 88, 92 (1958).

[36] *Id*. at 96.

[37] *Id*. at 96-97.

[38] *Clune v. Mercereau*, 1 P.2d 101 (1931)

[39] *Weiss*, 328 P.2d at 96-97 (citations omitted).

[40] *Id*. at 92

[41] *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1114 n.10 (Colo. 1991).

[42] *Id*. at 1114 n. 10.

[43] *Kendrick v. Pippin,* 252 P.3d 1052 (Colo. 2011).

[44] *Harner v. Chapman*, 2012 COA 218 ¶19 (Colo. App. 2012).

[45] C.J.I.- Civ. 9:17, n. 3.

[46] *Ochoa v. Vered*, 212 P.3d 963, 970 (Colo.App. 2009).

[47] *Harner*, 2012 COA 218 at ¶20.

[48] *Id*.

[49] *Harner v. Chapman*, cert. granted, 13 SC 72 (Sept. 9, 2013).

[50] *Marcellot v. Exempla, Inc.*, 2012 COA 200 (Nov. 8, 2012).