



## BOULDER COUNTY BAR NEWSLETTER

# MARCH 2013

### **MONKEY MIND OR CAT'S PAW – THE STATUS OF SUBORDINATE BIAS LIABILITY IN EMPLOYMENT DISCRIMINATION LAW** **By HUGH PIXLER**

In the fable of *The Monkey and the Cat*, as told by the seventeenth century French writer Jean de la Fontaine, Bertrand the Monkey convinces Raton the Cat to reach into a fire and pull out roasting chestnuts, promising him his share of the booty. Instead, as Raton pulls the chestnuts out of the fire, burning his paw in the process, Bertrand gobbles them up. They are interrupted when a maid enters the room, and Raton gets nothing.<sup>1</sup> Since 1990, when the term “cat’s paw” was introduced into employment law jurisprudence by Judge Posner of the Seventh Circuit, it has been used to describe a situation in which a biased subordinate supervisor can be shown to have used a higher-level supervisor, with decisionmaking authority, as a conduit for his discriminatory intent.<sup>2</sup> An unlawful adverse action is inflicted upon an employee by an unwitting, but innocent decisionmaker, yet the act is attributable to the employer for purposes of asserting liability for

discrimination.<sup>3</sup> An example would be a scenario in which an employee with some supervisory authority, motivated by racial bias, falsely reports to his supervisor that a subordinate cheated on his time card. The higher-level supervisor, believing he has no reason to doubt the report, terminates the subordinate’s employment.

Although there are notable exceptions, in order to establish liability in most cases of intentional discrimination, or disparate treatment, a plaintiff must show that an unlawful reason (“protected class characteristic”) was “a motivating factor” for the adverse employment action upon which she brought her complaint.<sup>4</sup> The Cat’s Paw doctrine is really just a mechanism used to evaluate the extent to which unlawful motive may have caused the adverse action. Not sur-

*(continued on page 8)*

### **MEDIATING RESIDENTIAL CONSTRUCTION DISPUTES** **By JOHN TWEEDY**

There are many variations on the stormy topic of residential contracting gone wrong. But the common theme for lawyers, whether representing homeowners or construction professionals, is a case that is factually dense, procedurally complex, and emotionally charged. As a result, these disputes can sometimes cost as much – or more – to litigate as the amount in controversy. It’s the kind of case that lawyers and clients would love to see resolved in mediation, before the dispute sinks into a welter of fees and frustration.

And yet, early mediation often fails to resolve homeowner construction disputes – precisely because of that same mix of factual density, procedural complexity, and emotional voltage. Lawyers hoping to succeed in mediation can maximize their odds of getting to resolution by bringing five things to the mediation table: 1) a clear project accounting; 2) a reasonable expert report; 3) a handle on the relevant legal

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## CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing [lynne@boulder-bar.org](mailto:lynne@boulder-bar.org), or pay online with a credit card at [www.boulder-bar.org/calendar](http://www.boulder-bar.org/calendar).

Friday, March 1  
Availability of Legal Services (Ethics)  
Ethical Considerations when Providing  
Unbundled Legal Services  
to Low Income Clients  
Presenter: Adam Espinosa from the  
Disciplinary Counsel's Office  
Noon at West side of the  
DAs Conference Room  
1 Ethics CLE - \$20, \$10 New/Young Lawyers  
Brownbag Lunch

Tuesday, March 5  
Family Law Section  
Divorce and the Diminished  
Capacity Client  
Presenter: Chris Radeff  
Noon in the Jury Assembly Room  
1 CLE \$20, \$10 New/Young Lawyers  
Brownbag Lunch

Wednesday, March 6  
Boulder Interdisciplinary Committee  
All Day Annual Conference  
with COAFCC & MDIC  
Presenter: Scott Peppet, JD  
A Spice of Life Event Center  
11:30 to 12:00 Networking,  
Noon to 1:15 Lunch  
RSVP the Friday prior to the meeting.  
720-232-4573  
1 CLE and lunch \$20 for member  
s, \$25 for non-members

Monday, March 11  
The Colorado Judiciary  
Presenter: Supreme Court Justice Bender  
Noon in the Jury Assembly Room  
1 CLE \$20, \$10 New/Young Lawyers

Wednesday, March 13  
In-House Counsel  
Open Source Software: Your  
Client Is Using it, Now What?  
Presenter: Jilayne Lovejoy  
Noon at Caplan & Earnest  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Wednesday, March 13  
Criminal/Civil Law Sections  
Navigating the Civil Case  
through Criminal Waters  
Presenters: John Pineau  
John Pineau will discuss his experiences  
about pursuing a civil case while a criminal  
case was active. Learn about the hurdles of  
obtaining discovery, police reports,  
and other challenges  
Noon at East DAs Conference Room  
1 CLE \$20, \$10 new/young lawyers  
Brownbag Lunch

Wednesday, March 13  
Solo/Small Firm Happy Hour  
5 PM @ Conor O'Neill's

Thursday, March 14  
Intellectual Property  
Trade Secret Litigation  
Presenter: Jack Tanner, Fairfield & Woods  
Noon at Hutchinson Black and Cook  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Tuesday, March 19  
Business Law  
Business Appraisals and  
Medical Business Appraisals  
Presenter: Jason Ruchaber of  
Healthcare Appraisers  
Noon at Hutchinson Black and Cook  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Tuesday, March 19  
Elder Law/Probate Sections  
Practical Solutions to Elder Financial  
Abuse and Fiduciary Theft  
Presenter: Tom Rodriguez and  
Courtney Smith  
Noon at Caplan & Earnest  
1 CLE \$20, \$10 New/Young Lawyers  
\$11 Lunch

Wednesday, March 20  
Real Estate section  
War Stories from the Front  
Lines of Title Practice  
Presenters: Chuck Wiitala &  
Bill Gumbart, Fidelity National Title  
Noon at Bryan Cave HRO  
1 CLE \$20, \$10 new/young lawyers  
Lunch \$11

Thursday, March 21  
Paralegal Section  
A Guide to Mental Health Hearings  
Presenter: Mark T. Doherty, Assistant  
County Attorney  
Noon at Caplan & Earnest  
1 CLE \$20, \$10 new/young lawyers

Thursday, March 21  
Bankruptcy  
Monthly Roundtable Luncheon  
Noon at Agave Bistro  
RSVP [Sarah@boulder-bar.org](mailto:Sarah@boulder-bar.org)

Friday, March 22  
Immigration Section  
Monthly Roundtable  
8:30 a.m. at Broadway Suites  
3rd floor conference room

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# A TRIBUTE TO JAMES W. BUCHANAN

BY FRANK DUBOFSKY

The Boulder Bar Association board of directors decided on January 9, 2013, to award the Boulder Bar Association's Award of Merit posthumously to James W. Buchanan. He died on November 23, 2012.

Jim had deep Boulder roots. He graduated from Boulder High School and played on his high school football team. There is an often-told story that Jim was caught holding in the state championship game, which resulted in a Boulder High touchdown being called back. The touchdown would have won the championship for Boulder High. When the coach told Jim that his hold had cost Boulder High the game, Jim responded, "Coach, I've been holding like that all season – that's what got us to the championship game."

Jim received his bachelor's degree from the University of Colorado. As a native Coloradan, it is not surprising that he was an outdoorsman who loved to fly fish and hunt and otherwise traipse around Colorado, Kansas, Nebraska and Arizona.

His law degree was from the University of Michigan, and he served as a Navy JAG attorney before returning to Boulder. Jim was a long-time trial lawyer and partner in Hutchinson, Hill, Black and Cook. He then founded Buchanan, Gray, Purvis and Schuetze, where he practiced for nearly ten years.

In our opinion, Jim was the best trial lawyer of his time. He was smart, thorough, focused and determined. While Jim did a fair amount of business litigation at the Hutchinson firm, he loved representing injured plaintiffs in personal injury cases. He did an extraordinary job as the lead counsel on the Vail gondola crash case. Jim won numerous difficult and complex cases by rarely leaving a stone unturned or an issue undeveloped.

Jim was a member of the American College of Trial Lawyers and the International Society of Barristers. He served as a member of the Colorado Supreme Court's grievance committee.

Jim was extremely generous. He mentored many young attorneys and was always willing to help make the legal profession better. Simply put, Jim Buchanan was a great human being and lawyer. He is survived by his wife, Jan, and four sons and their families.

During the Centennial Celebration for the Boulder County Bar Association, the past presidents each chose a decade to write about as the legal community grew in Boulder County. These were fascinating, colorful and very interesting. We have included the decade of the 40's written by Jim in 2007.

## Boulder County Bar Association During The War Years -The decade of the 1940s.

The long dark shadow of World War II darkened the first half of the 1940s. Several of the younger members of the Boulder County Bar volunteered for military service, leaving the legal needs of Boulder County in the capable hands of the older and more experienced members. While there were many uncertainties and accommodations during those war years, two invariables carried on as before: 1) The presidency was rotated, so that in April of each even numbered year someone from Boulder would be selected to serve as president, and in April of each odd numbered year someone from either Longmont or Louisville would be elected. 2) The office of secretary was not rotated. The ever loyal and dependable Rudolph Johnson of Boulder continued to serve as the perennial scrivener of the association.

The decade opened with affable, and hence popular, Ed Affolter of Louisville serving as president of the association. One gets the impression Ed's health was uncertain, for starting in the mid 1940s the minutes of the association meetings are replete with reports on the state of his being, and whether he was well enough to attend the meeting. The next few presidents in succession following Ed Affolter were Frank Moorhead of Boulder (1940-1941); Theodore "Ted"

*(continued on page 10)*

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## CONSTRUCTION DISPUTES *(continued from page 1)*

procedure; and 4) an aggressive approach to insurance; and 5) an appraisal of the client's emotional needs.

*1. Project Accounting.* Any well-run residential construction project involves a system for budgeting project costs and tracking expenditures. Conversely, a common denominator for projects gone wrong is that the project accounting has either run off the rails or never existed to begin with. Thus, the lawyer who assembles the clearest, most accurate project accounting will command the high ground in any mediation where project dollars are at stake. Such an accounting will necessarily identify areas where owner and contractor disagree, where payments may have been misapplied, and where cost overruns occurred. In essence, a good project accounting serves as a "reality principle" on which meaningful settlement conversations can be based. Without it, the mediation will likely be frustrated by the parties' inability to find a common financial frame of reference.

In practice, however, this advice is easier given than taken, because the parties may lack sufficient information to compile such an accounting without access to the files of the adversary. There are two ways to address this problem. First, counsel can insist on an exchange of project information ten days prior to mediation. Owner and Contractor can agree to exchange emails, bank statements, timecards, materials receipts and other job records that will allow the parties and counsel to create an accounting. If a Contractor refuses, the Owner can point out that a Contractor is required to maintain a separate accounting for every construction project, pursuant to § 38-22-127(4), C.R.S. If an Owner

is the recalcitrant party, the Contractor can rely on provisions in the construction contract requiring the Owner to furnish project-related information on request (if the contract has such language).

*2. Expert Reports.* The other basic "reality principle" in construction defect cases is the expert report. Parties without experts are likely to disagree fundamentally over whether certain workmanship is defective at all. Even with experts involved, there is likely to be disagreement over the extent, severity, and cost to repair a claimed defect. However, the differences between the competing expert reports will at least provide a basis for identifying specific disagreements, and a dollar figure in dispute, as to the defects. These parameters create the basis for a bargaining range, and for the evaluation of possible compromise.

In small disputes, it may not be cost-effective to obtain a full-blown expert report. However, at a minimum, an estimate from an independent contractor, engineer, or other construction professional will nevertheless be important to substantiate any claims of defective construction – or to rebut such claims – and to provide evidence of costs.

*3. Procedural Context.* Construction defects are subject to early notice and inspection requirements under the Construction Defect Action Reform Act ("CDARA"), § 13-20-801 *et seq.*, C.R.S.<sup>2</sup> Unpaid contractors and subcontractors' lien and disburser rights are subject to early notice and recording requirements of the Mechanics Lien Law, § 38-22-101, *et seq.*, C.R.S., and the Disburser's Statute, § 38-22-126, C.R.S. Claims against architects and other licensed professionals are subject to a Certificate of Review, pur-

suant to §13-20-602, C.R.S. If these procedures and deadlines are not attended to before mediation, a party may find itself unable to bargain effectively, even if a case is well shy of any statute of limitation.

*4. Insurance Issues.* The law of insurance coverage for residential construction defects is contested and evolving. See, e.g., *TCD, Inc. v. American Family Mutual Insurance Co.*, 2012 WL 1231964 (Colo. App. 2012). Both homeowners and contractors have an interest in making sure that insurers are notified, that adjusters have an opportunity to inspect claimed defects, and that policy periods and possible exclusions are identified before mediation occurs. If these issues are not addressed in advance, the mediation is likely to be missing a key participant – the informed insurance adjuster.

*5. The Parties' Emotional Needs.* Lawyers should be alert to common patterns of emotional distress in residential construction that can derail an otherwise reasonable settlement discussion. Homeowners, especially those in remodel cases, are likely to have approached the original construction project with excitement and a deep emotional investment in beautifying their personal space. Contractors, in turn, often invest a sense of craft – indeed, artistry -- in their work. The initially-shared emotional bond between owner and contractor can cause them to neglect formal safeguards, such as complete contracts and other construction documents. After the project goes awry, personal betrayal and distrust on both sides bites sharply; the Owner may experience shoddy construction as an almost bodily sense of violation, while the Contractor

*(continued on page 12)*

## PRESIDENT'S PAGE

BY KEITH COLLINS



that time four of my peers have taken their own lives.

Now, in the doldrums of winter with the depressing gray skies and cold bitter winds, I thought it timely to remind us all that there are those among us who may be suffering and in need.

It probably does not come as a surprise that the legal profession has one of the highest rates of suicide above any other profession. In fact, behind cancer and heart disease, suicide is

the third leading cause of death for lawyers. Lawyers are six times more likely to die by suicide than the general population. Six-times more likely, that is a frightening statistic.

What can we do to prevent another tragedy among us? First, we must learn to recognize the signs of someone who is at risk, to take those signs seriously, and to take action.

There are many possible warning

*(continued on page 7)*

### Surviving Our Profession

*"Looking at suicide—the sheer numbers, the pain leading up to it, and the suffering left behind—is harrowing. For every moment of exuberance in the science, or in the success of governments, there is a matching and terrible reality of the deaths themselves: the young deaths, the violent deaths, the unnecessary deaths "*

- Kay Redfield Jamison, *Night Falls Fast: Understanding Suicide*

A few years ago I was mentoring a bright young star in our legal community. He was a likeable, ambitious attorney, fresh out of law school. He and two good friends started a practice dedicated to making a difference. His heart was in the right place. He was not in it for the money, or a fancy office. He was in it to help those in need, and to make a meaningful difference in the lives of others. He was fun to be around, a pleasure to mentor.

Sadly, it was over before it ever really began. This young man, this rising star, took his own life one evening. Unfortunately, most of you reading this have been personally touched by the loss of an attorney in our community who took their own life. I have only been practicing law for thirteen years and during



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## PRO BONO PAGE

### Pro Bono Referrals

Fourteen cases were referred during the month of January. Thank you to the following attorneys:

Christina Ebner  
Mary Louise Edwards  
Leanne Hamilton  
Judson Hite  
Kurt Hofgard  
Gary Merenstein  
Roseann Murray  
Gabriella Stockmayer  
Leonard Tanis  
John Taussig  
Bruce Wiener

Thank you to the following mediators who accepted a pro bono referral in January:

Michael Morphew  
Beverly Nelson

### Pro Se Program Volunteers

Evan Branigan  
Mary Louise Edwards  
Leanne Hamilton  
John Hoelle  
Lauren Ivison  
Tucker Katz  
Michelle Stoll

### BCAP Volunteers

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project in January:

Paul Bierbaum  
Christina Ebner  
John Layman

**Pro Bono Corner**  
Interested in a Pro Bono case?  
Please call Erika at 303-449-2197.  
CLE credits available for  
pro bono service.

<b>Boulder County Bar Association Professionalism Committee On-Call Schedule</b>		
March 4	Bruce Fest	303.494.5600
March 11	Mark Langston	303.440.9684
March 18	Lee Strickler	303.443.6690
March 25	Trip DeMuth	303.447.7775



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## PRESIDENT'S PAGE *(continued from page 5)*

signs for suicide, too many to really cover in this article. However, there are two broad categories of symptoms to watch for: depression and substance dependency.

John Hopkins University completed a study of more than 100 occupations and found that lawyers are three-times more likely to suffer from depression than any other profession studied. In another alarming study by the North Carolina Bar Association, it found that 26% of its bar exhibited symptoms of clinical depression and nearly 12% said they contemplated suicide at least once each month. Although many of us are susceptible to feeling blue once in a while, it is those of us who appear to be suffering from prolonged depression that we need to reach out to.

Often found with those suffering from depression, is substance abuse, particularly alcohol. Again, the results of studies show the sad reality of the legal profession. A study by the National Institute on Alcohol and Alcohol Abuse found that alcohol dependency, among lawyers, is as high as 20%, double what it is for the general population. It also found that alcohol was used in 30% of completed suicides and 50% of lawyer

discipline cases. It can be difficult to recognize the signs of dependency because alcohol is a legal and socially accepted.

What do you do if you have a friend or colleague who is showing signs of clinical depression or struggling with a chemical dependency? The following suggestions are from the lawyer assistance program of North Carolina:

- Never be afraid to ask about suicide
- Encourage your friend to talk
- Avoid giving advice or trying to argue – it discourages opening up
- Encourage your friend to reach out, to call his/her personal physician or therapist
- Offer hope, care, and understanding
- If threat is imminent call 911, and stay with your friend
- See your own counselor – supporting and intervening with a suicidal friend is very stressful
- You may always call a lawyer assistance program for assistance.

In Colorado, we are fortunate to have two wonderful lawyer assistance programs: Colorado Lawyers Assistance Program and Colorado Lawyers Helping Lawyers. The

Colorado Lawyers Assistance Program was created in 2011, by the Colorado Supreme Court's adoption of Rule 254. The website can be found at [www.coloradolap.org](http://www.coloradolap.org) Colorado Lawyers Helping Lawyers is a peer assisted program and can be found at [www.clhl.org](http://www.clhl.org) These programs not only help with suicide prevention, but also can assist with a wide-variety of services and support for lawyers in need. Additionally, both of these programs are confidential and exempt from reporting to the Office of Attorney Regulations Counsel.

I recognize my article this month is not entertaining. I make no apologies. Suicide is one of those tragic topics that only seems to be discussed after the fact. The odds are that each one of us probably knows someone who is suffering and needs help. I hope that this article may cause you to pause, and take a moment to evaluate if anyone you know is in need of support. If there is such a person in your life, reach out. It could make the difference.

- In memory of Warren P. Myers

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## EMPLOYMENT DISCRIMINATION *(continued from page 1)*

prisingly, as the doctrine developed over the years, the circuit courts started to articulate differing standards, typically in terms of the level of influence the biased supervisor has over the decisionmaker.<sup>5</sup> For instance, the Fifth Circuit found that liability could be established merely by showing that the subordinate “possessed leverage, or exerted influence” over the decisionmaker.<sup>6</sup> At the other end of the spectrum, the Fourth Circuit held that the subordinate must virtually be the decisionmaker so that even having “substantial influence” or playing a “significant” role in the decisionmaking would be insufficient.<sup>7</sup> In 2006, the Tenth Circuit took a simpler approach, holding that a plaintiff must establish more than mere “influence or input,” and the crux of the issue is “whether the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action.”<sup>8</sup>

Two years ago, in *Staub v. Proctor Hospital*,<sup>9</sup> the Supreme Court stepped in to review the circuits’ varying standards, using the language of causation in its analysis. *Staub* was an unlawful termination action brought under the Uniformed Services Employment and Reemployment Rights Act of 1994<sup>10</sup> (USERRA), which prohibits as a motivating factor in the imposition of an adverse employment action, an employee’s membership, or obligation to perform service in, a uniformed service.<sup>11</sup> Mr. Staub had prevailed in a jury trial in the Central District of Illinois. The Seventh Circuit reversed, finding that Proctor Hospital was entitled to judgment as a matter of law. The Court found that Mr. Staub had failed to meet the Circuit standard, that is, he did not prove that the

biased subordinate had exercised such “singular influence” over the decisionmaker that the decision to terminate was essentially one of “blind reliance.”<sup>12</sup>

Vincent Staub was a member of the United States Army Reserve, which required him to drill one weekend per month and train full-time two to three weeks per year. The jury had found that both his immediate supervisor and her supervisor were hostile to his military obligations, believing them to be a waste of time and taxpayers’ money. The second-level supervisor reported to Proctor’s vice-president of human resources that Mr. Staub had left his desk without informing a supervisor in violation of a corrective action that had been imposed to address an alleged “availability” problem. Mr. Staub denied this accusation. The vice-president, relying on the accusation, and reviewing Mr. Staub’s personnel file, terminated his employment.<sup>13</sup>

The Supreme Court reversed and remanded.<sup>14</sup> The Court found that the Seventh Circuit had applied an incorrect standard under the Cat’s Paw doctrine. The Court said it should have looked to general tort law principles in its analysis.<sup>15</sup> It stated that if the subordinate employee intended the adverse action to occur for discriminatory reasons, the required element of scienter was present; and, if his actions were the proximate cause of the ultimate adverse employment action, liability should attach. Proximate cause, the Court stated, requires only “some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect.”<sup>16</sup> Even the decisionmaker’s exercise of judgment

does not automatically render the causal link to the subordinate employee’s bias too remote.

The question is whether Raton’s judgment is a cause of sufficiently independent origin so as to supersede Bertrand’s malevolence.<sup>17</sup> What if Bertrand’s offer had merely brought the chestnuts to Raton’s attention, and good kitty that he was, he simply acted to save them from burning so his guardian, the maid, would not get into trouble? One thing is certain - the metaphor is far from perfect! Anyway, thanks to the Supreme Court, we simply place the burden of the application of the Cat’s Paw doctrine on the jury, using the language of proximate cause. The jury gets to decide how convincing Bertrand really was.

***Hugh Pixler practices employment law in Boulder. He is Co-chair, along with Jennifer Lorenz, of the employment section of the Boulder County Bar Association.***

1. Wikipedia, *The Monkey and the Cat*, [http://en.wikipedia.org/wiki/The\\_Monkey\\_and\\_the\\_Cat](http://en.wikipedia.org/wiki/The_Monkey_and_the_Cat) (this article includes some great pictures used to illustrate the story over the centuries); see EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir. 2006), cert. dismissed, 549 U.S. 1334 (2007) (providing short version of story).

2. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); see BCI Coca-Cola, 450 F.3d at 484.

3. E.g., BCI Coca-Cola, 450 F.3d at 484-85 (citations omitted).

4. The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., in part, by adding the following:

Except as otherwise provided in [Title VII], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). This standard also applies to the ADA, USERRA and 42 U.S.C. § 1981. The most notable of the exceptions is the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, et seq. (ADEA). In *Gross v. FBL Financial Servs.*, 557 U.S. 167, 129 S.Ct. 2343 (2009), the Supreme Court held that age discrimination

*(continued on page 12)*



## LAWYER ANNOUNCEMENTS



is pleased to announce that

**David F. Bower**

has been admitted as a Partner of the Firm. Dave has practiced with the firm since 2008, primarily in the areas of water law, natural resources and civil litigation.

The firm is also pleased to announce that

**Lew M. Harstead**

has been admitted as an Equity Partner of the Firm. Lew has practiced with the firm since 2005, primarily in the areas of general civil litigation, land use and real estate.

Johnson & Repucci LLP's practice continues to emphasize real estate, water and land use, business and corporate law, environmental matters, commercial litigation common interest communities and employment matters.

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**EVENT DETAILS**

THURS., MARCH 21ST, 2013

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Second Wind is a small non-profit looking to expand their Board membership to the professional community. They would like to add interested attorneys and their firms both as donors and active Board members of this important program.

Second Wind was established in Jefferson County several years ago by a number of parents who's teenagers had suicided and wanted to do something to make interventions more readily available, especially for indigent kids without insurance coverage. SWFBC became the Boulder County affiliate, and we are providing early interventions for troubled teens in Boulder County.

Please contact Peter Kleinman at peterk218@gmail.com or Faye Peterson, the Executive Director of Second Wind with your interest and more information. Thank you.

Our sincere condolences to  
the law firm of  
Dietze & Davis, PC  
  
for the loss of their  
partner, colleague and friend,

**Joel C. Davis**

February 5, 1936 - February 5, 2013

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## TRIBUTE TO JAMES W. BUCHANAN *(continued from page 3)*

Schey of Longmont (1941-1942); Frank F. Dolan of Boulder (1942-1943); Lance W. Newby of Longmont (1943-44); and Virgil H. Reynolds, predictably of Boulder (1944-1945).

In all candor, the records of many of the association meetings of this era seem rather mundane. However, the minutes of the meeting of March 18, 1944, tell of Walter B. Franklin of the School of Business at the University of Colorado, fresh from a year's military service, presenting a talk on military law and the court-martial system. At the same meeting Lt.jg Howard O. Ashton, USNR, then attending a navy V-12 unit at State Teachers College, Minot, N.D. was admitted as a member of the association. He had stated his plans to return to Boulder after the war.

Then on April 5, 1945, calamity struck. The Masonic Temple, located at the corner of Pearl and 14th street burned to the ground. Rudolph Johnson's office was located on the second floor of the building, and as a consequence some of the bar association records of the period were destroyed.

At the April meeting in 1945 William E. Buck of Longmont ascended to the presidency. Sometime shortly before his election he had been coronated judge of the Boulder County Court and was

henceforth to be known for ever after as Judge William E. Buck. Judge Buck was credited with arranging good programs, most notable of which occurred the evening of August 22, 1945, when Justice Wiley B. Rutledge of the United States Supreme Court, who was spending his summer in Boulder, spoke on "The Work and Decisions of the Supreme Court of the United States."

Because Justice Rutledge had at one time been a member of the Boulder County Bar, and is probably our all-time most distinguished member, it seems appropriate to set forth a thumbnail sketch of his career. Born in Kentucky in 1894, he attended The University of Wisconsin where he received his B.A. degree in 1914. He then taught high school in Indiana, New Mexico and Colorado before attending the University of Colorado School of Law from which he graduated in 1922. He then practiced law in Boulder in the office of Goss and Hutchinson for two years before going into academia. He became dean of the law school at Washington University in St. Louis and later dean of the University of Iowa School of Law. He was a strong and vocal supporter of President Roosevelt's plan to pack the Supreme Court. Perhaps with this in mind, F.D.R appointed him to the United States Court of Appeals for the

District of Columbia in 1939 where he served until 1943 when he was appointed Justice of the United States Supreme Court. He was an outspoken liberal, a staunch defender of civil liberties and a frequent dissenter. For instance he dissented in the case of Yamashita v. Styer, 327 U.S. 1 (1946) which denied habeas corpus relief to Japanese general Yamashita who had been sentenced to death for war crimes based on hearsay evidence.

Justice Rutledge maintained his ties with Boulder and occasionally lectured at the CU law school. One summer, believed to be the summer of 1945 – the same year he spoke to the Bar Association - he further distinguished himself by arranging for 12 year old Neil King (son of Ed King, dean of the law school, who at the time was away serving in Italy with the Allied Military Government) to be released from police custody where he was being held as the leader of a gang apprehended for throwing green apples through the open windows of a passing City of Boulder bus. We know of no other case where a sitting Supreme Court justice acted so directly to protect the civil liberties of an errant juvenile.\* Justice Rutledge passed away September 10, 1949 at the age of 54.

Meanwhile, back at the bar association, it was Boulder's turn to fill the presidency, and John R. Wolff was selected to serve the year of 1946-1947. He was followed by Lawrence "Larry" B. Flanders of Longmont (1947-48), who was then followed by Boulderite, Dudley I. Hutchinson, Jr.- commonly called "Junior" (1948- 1949).

It was during Larry Flanders' and Junior's tenures that efforts were afoot on the state level to reform the Colorado judicial system. The principal reform sought was to get judges out of politics by adopting a merit selection process whereby they would be appointed by the governor from a list of nominees submitted by a judicial nominating commission. This and similar proposals were discussed at the bar

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## TRIBUTE TO JAMES W. BUCHANAN *(continued from page 3)*

meetings during this period, and on March 15, 1948 the association passed a motion urging a special session of the state legislature to act on a plan advocated by a committee of the state bar. Sadly, nothing came of this until 1966 when the present system was finally adopted by amending the state constitution. The December 11, 1948 edition of the Boulder Daily Camera carried the following article:

### *Legal Aid Clinic Helps Those Unable to get Professional Counsel*

A Legal Aid Clinic to assist persons unable to finance professional counsel has been organized by senior law students at the University of Colorado in cooperation with the Boulder County Bar Association, John J. Pickett, chairman of the group, announced today. Twenty –five students, members of the Student Bar Association, hold regular office hours in the Law building and handle all types of civil cases, including divorce petitions, contracts, traffic violations, and domestic problems. The students are allowed to practice in the Boulder justice of the peace court. Plans for the clinic, which is expected to become a regular part of the curriculum in the school of law, were made last year by a committee headed by Pickett and were approved by the Boulder County Bar Association. Lawrence DeMuth, professor of law, is faculty sponsor of the clinic.

While it did not directly involve the Boulder County Bar Association, no account of the decade of the 1940s which in any way touches on the law would be complete without mention of the infa-

mous case of Joe Sam Walker charged with the murder of CU coed Teresa Foster. On November 11, 1948, theretofore tranquil Boulder was rocked upon learning that two days before Teresa Foster had been raped and murdered on Lee Hill Road northwest of Boulder and her body disposed of south of town near where state highway 93 crosses Coal Creek Canyon.

The Denver post hired Erle Stanley Gardner and set him up in the Boulderado Hotel to write sensationalized stories about the investigation and development of the case. After several agonizing days, Joe Sam's common law wife turned him in. Without benefit of counsel, the 31 year old sheet metal worker who professed his innocence was subjected to lie detector tests in which the operator was reported in the papers as declaring they showed "positively that the subject was lying."

At one point Joe Sam asked to see Mike Rinn, prominent criminal lawyer and member of the Boulder County Bar Association. When Mike emerged from his two hour session with the defendant he was reported in the camera as stating:

I have not been retained to represent him. I told him to tell the truth, and he agreed to do that. His story is going to be vastly different from what he has been saying. It's a very bizarre situation.

While this is the way it was reported in the Camera, the rumor about town, true or not (I was attending the University of Colorado at the time and well remember this), was that he had stated, I have

never represented a guilty man yet and I am not going to start now.

Be that as it may, Mike Rinn visited Walker a second time to bring him some cigars. The pretrial publicity was intense and strongly pointed to Walker's guilt.

Joe Sam Walker was eventually represented by Denver attorneys. His trial was held in May of 1949. The jury is reported to have deliberated only 90 minutes before sentencing him to eighty years to life. But the case was to resurface in the 1970s when Joe Sam filed a writ of habeas corpus claiming all the pretrial publicity in his case had deprived him of a fair trial. District judge Rex Scott ruled in his favor and Joe Sam was released, a free but branded man, after having spent a quarter century in the state penitentiary.

All that remains to be heralded is that at the annual meeting of the association in April of 1949, the association, for a second year in a row, selected a president from Boulder. This was a break from tradition for which we have no explanation. Horace B. "Bud" Holmes of Boulder was elected President of the association to succeed Dudley I. Hutchinson, Jr., also of Boulder. However, true to form Rudolph Johnson was once again designated secretary.

At the beginning of the decade the association had some 43 members. At the end it claimed 52.



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feels attacked in a way that can penetrate to his core sense of self.<sup>3</sup>

Some attorneys do not believe it is their job to venture into such emotional terrain, and some clients may be unable to admit or articulate such emotional needs. However, an attorney who hopes for an early settlement should at least evaluate the likely role of emotions in the mediation process, and should be aware of a few common strategies to address them. For example, some clients may have a strong need to “tell the story,” if not to a judge, then to an empathically-attuned mediator, during a separate caucus that is devoted largely to that activity. Once unburdened of the need to “speak truth,” this person may be psychologically freed-up to focus on the economics of settlement. Conversely, some parties may need to hear an explanation – if not an apology – from the other side, requiring a joint session in which the emotional need is to “understand how all this happened.” If a client has this need, then coordination between counsel may be helpful in advance of the mediation, so that the party who is being asked to “explain” can prepare appropriately. If the need for “explanation” becomes apparent during the mediation itself, the mediator can help the “explaining” party prepare in a caucus (complete with a rehearsal of what the person intends to say) before getting back together in joint session. These steps can minimize the risk that the “explaining” party may admit too much, or deny too much, or attempt to say the right thing in the wrong way.

In sum, successfully mediating residential construction disputes draws on lawyers’ and mediators’ expertise in the areas of project accounting, building science, and procedural con-

struction law, as well as their familiarity with insurance issues and their ability to attend to emotional issues. Despite these challenges, clients can reap huge benefits when residential construction cases are settled fairly at an early stage -- before the costs of litigation on all sides mount to the point where every participant becomes a loser.

*John Tweedy mediates and litigates construction disputes, and other civil matters, with Robinson-Tweedy, P.C. John is also the co-chair of the BCBA ADR section.*

### FOOTNOTES

2. For a fuller discussion of the CDARA requirements, see “Statutory Regulation of Construction Defects,” Boulder County Bar Newsletter (Nov. 2012).

3. Attorneys often fail to appreciate litigation’s emotional toll on clients. For an empirical view of “litigation stress” and its affects, see Picou, “When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon-Valdez Oil Spill,” 7 U. St. Thomas L.J. 68 (2009).

plaintiffs must prove the more difficult “but-for” standard of causation. Recently, the Tenth Circuit found that the Cat’s Paw doctrine applies to age FOOTNOTES from page 8

discrimination cases. However, because of the higher standard of proof, an ADEA plaintiff must show that the subordinate supervisor’s bias was “the factor that made a difference.” *Simmons v. Sykes Enterprises, Inc.*, 647 F.3d 943, 949-50 (10th Cir. 2011) (emphasis added) (citation omitted).

5. Some courts have used what is probably a more accurate, and more directly applicable, metaphor, that of “rubber stamp,” to describe subordinate liability analysis. See *BCI Coca-Cola*, 450 F.3d at 484 (collecting cases).

6. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000).

7. *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277, 288 (4th Cir. 2004) (en banc), cert. dismissed, 125 S.Ct. 1115 (2005).

8. *BCI Coca-Cola*, 450 F.3d at 488 (emphasis added) (citation and internal quotation marks deleted); see also Julie M. Covel, *The Supreme Court Writes a Fractured Fable of the Cat’s Paw Theory in Staub v. Proctor Hospital*, 51 Washburn L. J. 159 (2011) (arguing that the Tenth Circuit’s “causal connection” standard works best).

9. 562 U.S. \_\_\_, 131 S.Ct. 1186 (2011).

10. 38 U.S.C. §§ 4301, et seq.

11. 38 U.S.C. § 4311(a) and (c).

12. 131 S.Ct. at 1190 (internal quotation marks and citation omitted).

13. *Id.* at 1189.

14. *Id.* at 1194-95.

15. The question not being before it, the Court explicitly declined to delve too far into agency law to determine whether a non-supervisory employee’s discriminatory influence could result in employer liability. *Id.* at 1194 n. 4. The Tenth Circuit has not decided the issue, but has used language that would appear to support liability in such a case. See *English v. Colorado Dep’t of Corrections*, 248 F.3d 1002, 1011 (10th Cir. 2001). It would seem that since proximate cause can be established based on a biased employee’s recommendations or investigations concerning other employees, supervisory capacity should not be required. Traditional agency law would not require it. Cf. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). A case now pending before the Supreme Court, *Vance v. Ball State Univ.*, No. 11-556, is expected to clarify who is and who is not a supervisor for purposes of determining liability in sexual and racial harassment actions, and could lend guidance on this issue.

16. 131 S.Ct. at 1192 (internal quotation marks and citation omitted).

17. Cf. *id.* at 1192-93.

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