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COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
Colorado Court of Appeals Cases 12CA0595 Opinion by Davidson, CJ., Marquez, J., concur. Webb, J. dissents. District Court of Arapahoe County The Honorable Elizabeth Volz Case Number 2011CV1464	
Petitioner: BRANDON COATS v. Respondent: DISH NETWORK, LLC	COURT USE ONLY
Attorneys for Petitioner: Michael D. Evans, Atty. Reg. #39407 THE EVANS FIRM, LLC 4610 South Ulster St., Suite 150 P.O. Box 371896 Denver, CO 80237 (303) 221-3634 (Telephone) (303) 221-3063 (Fax) info@theevansfirm.com Thomas K. Carberry # 19707 149 West Maple Avenue Denver, Colorado 80223 (303) 722-3929 (Telephone) tom@carberrylaw.com	Case No.: 2013SC000394

REPLY IN SUPPORT OF AMENDED PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply complies with all requirements of C.A.R. 53 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this Reply complies with C.A.R. 53(a) in that it contains 2,273 words, exclusive of the caption, certificates, table of contents, appendix, and attached documents, and thus does not exceed the limit of 3,150 words.

I acknowledge that my Reply may be stricken if it fails to comply with any of C.A.R. 32 or C.A.R. 53.

Michael D. Evans # 39407

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REPLY

I. The Grounds for Certiorari Are Well Established & Articulated

DISH claims this case does not present a novel issue and therefore does not meet C.A.R. 49(a)(1). Opposition, p.5, ¶3. It could not be more incorrect. The Court of Appeals *published* an opinion in this case - despite the list of appellate cases DISH claimed as binding precedent - unequivocally establishing this case's uniqueness. Nor did the majority rely on those cases in reaching its' decision. *Coats* is the first and only case to analyze the application of C.R.S. § 24-34-402.5 in relation to Colo. Const. art. XVIII, § 14 and § 16, and it does so all within a single legal issue involving a Colorado corporation terminating a quadriplegic, well-performing, unimpaired employee-patient. Although DISH may now claim the case is not novel, it argued the exact *opposite* when it billed Mr. Coats over $44,000 in attorney fees for drafting a single motion to dismiss. PDF Record 12CA595, pp.251-253.

DISH claims the Court of Appeals decision in *Coats* does not conflict with *Sexton*, *Watkins*, and *Beinor* and therefore does not meet C.A.R. 49(a)(3). Opposition, p.5, ¶4. This argument is flawed. The majority did not use these appellate cases to reach its published decision in *Coats.* Moreover, Mr. Coats illustrates in his Amended Petition how these appellate cases themselves are

inconsistent and have garnered dissenting opinions. Amended Petition, pp.19-20. Inconsistent interpretations of Colo. Const. art. XVIII, § 14, like the one in *Coats*, are prevalent throughout the state and desperately need this Court's input.

Here, the majority in *Coats* chose not adopt the district court's holding – which was based on *Beinor* - that Colo. Const. art. XVIII, §14 only provided an affirmative defense. PDF Record 12CA595, pp.174-175.

Nor did the majority agree with DISH that medical marijuana is illegal even under Colorado state law. Interestingly DISH claims that only recreational use under Colo. Const. art. XVIII, § 16 is legal in Colorado. Opposition, p.1, ¶2; p.3, fn1; p.4, ¶3; p.7, fn3; p.14, ¶2; p.15; p.16, ¶2.

Rather the Court of Appeals chose to issue a narrowly tailored decision, finding that marijuana use was illegal under *federal* law, and declined to decide whether medical marijuana use was a state constitutional right. *Coats*, 2013 COA 62, ¶¶14, 23 (Colo. App. 2013). As articulated in his Amended Petition, hundreds of thousands of people would benefit from a definitive opinion from this Court that resolves district and appellate courts' inconsistent interpretations of this state's constitutional and statutory law. Amended Petition, p.10, ¶2.

It is erroneous for DISH to suggest that the denials of certiorari in prior appellate cases, cases even the majority in *Coats* did not find helpful, are

conclusive for this case. Opposition, p.5, ¶3, p.6, ¶1. Mr. Coats believes DISH confuses Justice Monica Márquez with her father, retired Judge Jose Márquez sitting by assignment, as the concurring opinion in this case. Opposition, p.14, fn2. This Court, including Justice Monica Márquez, had indicated interest in *Watkins* and *Beinor*.

DISH claims the Court of Appeals decision in *Coats* is consistent with previous appellate decisions and therefore does not meet C.A.R. 49(a)(3). (Opposition, p.5, ¶4). But DISH fails to respond to Mr. Coats' argument on how *Coats* has departed from this Court's holding in *Watson* that "any lawful activity" in § 24-34-402.5, C.R.S. means as "all" legal activity. *Watson v. Public Service Co. of Colo.*, 207 P.3d 860, 864 (Colo. 2008). "All legal activity" should necessarily include state laws like Colo. Const. art. XVIII, § 14. Amended Petition, pp.13-17.

DISH claims this Court never addressed the meaning of "lawful activity" in *Watson*, and that "all" legal activity did not include both federal and state law. Opposition, p.10, ¶3. DISH's convenient arguments of statutory interpretation and plain meaning do little to explain why the word "lawful" should mean one thing in Colo. Const. art. XVIII, § 14(4)(a), and something else in § 24-34-402.5, C.R.S. Opposition, pp.8-9. Mr. Coats addresses these issues in his Amended Petition.

Amended Petition, pp.13-17. An appellate opinion that assigns two different meanings to the same word, departs from a prior holding of this Court, and is at odds with the basic rules of statutory construction requires this Court's attention.

II. The Facts Remain Undisputed, Accepted as True, & Viewed In The Light Most Favorable to Mr. Coats

DISH did not, and therefore cannot now choose to argue facts where they were undisputed in both the district court, (PDF Record 12CA595, p.143, ¶1), and the appellate court (Response Brief 12CA595, p.7, fn.1).

DISH fails to state what facts it claims are "new", so Mr. Coats cannot respond. DISH also describes the facts as "unproven" – but not as "incorrect". Opposition, p.2, ¶5. Since DISH filed a C.R.C.P. 12(b)(5) motion prior its Answer, the case never reached formal discovery. However, exhibits were attached to Mr. Coats' Complaint. PDF Record 12CA595, pp.13-20.

The district and appellate courts both accepted as true all averments (and attached exhibits) of material fact. *Coats*, 2013 COA 62 at ¶10; PDF Record 12CA595, p.174, ¶1. The district and appellate courts both viewed the allegations of the Complaint (and attached exhibits) in the light most favorable to Mr. Coats. *Coats*, 2013 COA 62 at ¶10; ; PDF Record 12CA595, p.174, ¶1.

Exhibit 4 to the Complaint shows DISH tendered a complete copy of its personnel file on Mr. Coats. PDF Record 12CA595, p.16, ¶3. While these employment records may not have been exchanged under C.R.C.P. 16 or 26, DISH cannot deny, (and in fact have admitted), that they show three (3) years of satisfactory performance reviews, little to no absences or disciplinary history, and the complete absence of any suspicion that Mr. Coats was impaired or under the influence while at work. Mr. Coats was in the top five percent (5%) of DISH's customer service employ.

While DISH improperly attempts to admit new and unsupported theories on the effects of marijuana in the workforce, the undisputed facts in the record about Mr. Coats completely contradict that a patient-employee will develop "significant performance and attendance issues" or "mishandle" customers. Opposition, p.17, ¶1. Protecting a seriously ill or disabled patient like Mr. Coats, who was a model employee and law abiding citizen, is why this Court should accept certiorari.

III. Employment Laws Remain Unchanged

DISH claims that at-will employment in Colorado will be altered by reversing the Court of Appeals. Opposition, p.2, ¶3; p.5, ¶1; p.16, ¶1. This is simply incorrect. The Colorado Lawful Activities Statute is a recognized statutory

exception to the at-will employment doctrine. See *Wisehart v. Meganck*, 66 P.3d 124, 126-127 (Colo. App. 2002).

As reflected in Exhibit 4 attached to the Complaint, DISH terminated Mr. Coats *specifically* for the presence of an unknown amount of THC in his system, claiming it violated their drug-free work place policy. PDF Record 12CA595, p.16, ¶3. Mr. Coats argues that medical marijuana use is lawful under Colo. Const. art. XVIII, § 14, (and now § 16), and therefore asserts DISH "triggered a recognized exception" to at-will employment by violating Colorado's Lawful Activity Statute, § 24-34-402.5, C.R.S.

If the interpretation of "lawful" is to remain consistent with this Court's holding in *Watson* –"any" means "all" – then state laws like Colo. Const. art. XVIII, § 14 and § 16 must be included and protected under the Statute. *Watson*, 207 P.3d at 864. No new language to the Colorado Lawful Activities Statute is necessary. Opposition, p.1, ¶4; p.18, ¶2. This Court would only be defining the scope of the exception the statute already creates.

Contrary to DISH's assertions, nothing in the undisputed facts of this case implicates the employer protections under Colo. Const. art. XVIII, § 14(10)(b) or § 16(6)(a),(d). Opposition, p.16, ¶2. Mr. Coats simply did not request or require any work place accommodation for medical marijuana "use" as defined in Colo. Const.

art. XVIII, § 14(1)(b). See also *Beinor*, 262 P.3d at 980 (Gabriel, J., dissenting) (THC in the blood does is not contemporaneous consumption or possession of medical marijuana).

IV. Federal Law Does Not Preclude State Law

DISH claims "there is no preemption issue in this case", then argues that federal law completely precludes state law on marijuana use. Opposition, p.7, ¶2; p.9, ¶1; pp. 12-13. According to DISH, Colo. Const. art. XVIII, § 14 and § 16 must also be "illegal" because they would violate federal law. DISH fails to understand and correctly apply *Gonzales v. Raich*, 545 U.S. 1 (2005), 21 U.S.C. § 903, and the pre-emption doctrine in relation to the Tenth Amendment. Amended Petition, pp. 10-13.

Gonzales did not hold that federal law excluded or preempted state law on medical marijuana use. Congress did not intend, expressly or impliedly, to occupy the field of drug regulation in the Controlled Substances Act. 21 U.S.C. § 903; *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 382-383 (Cal. App. 2008). Absent a clear and manifest purpose of Congress, a court must presume that a state's police powers derived from the Tenth Amendment are not superseded by a federal statute. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1147-1152 (Colo. 1997). See also *Middleton*

v. Hartman, 45 P.3d 721, 731-732 (Colo. 2002). Congress cannot compel the States to enact or enforce a federal regulatory program. *Printz v. United States*, 521 US 898, 935 (1997); *New York v. United States*, 505 US 144, 162, (1992). This complex interplay of state and federal law, having gone unaddressed by the appellate courts, merits review by this Court.

V. Public Policy is a Consideration

DISH argues that matters of public policy are not a concern for this or any other court, then advances public policy arguments of its own. Opposition, p.2, ¶1; pp.4-5; p.6, ¶3; p.7, ¶1; p.16, ¶3; p.18, ¶2.

Public policy is a matter for the Court's consideration in this case. Strict statutory interpretation is relaxed when a statute is "designed to declare and enforce a principle of public policy." *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 985 (Colo. App. 1983). The spirit of a statute may be considered instead of simply applying the letter of the law. *People v. Manzanares*, 85 P.3d 604, 607 (Colo. App. 2003). "One of the primary uses of legislative history as an aid to statutory construction is to discern the policy objective to be achieved by a statute, so that a court may consider the consequences of a proposed construction and adopt a reading that will achieve consequences consistent with legislative intent."

Allstate Ins. Co. v. Schneider Nat'l Carriers, 942 P.2d 1352, 1356 (Colo. App. 1997).

Colorado's Lawful Activity Statute, § 24-34-403.5, C.R.S. codifies clear policy goals to prevent discriminatory and unfair employment practices against individuals that live their lives within the boundaries of the law. *Watson*, 207 P.3d at 864. "…[W]e agree that the general purpose of section 24-34-402.5 is to keep an employer's proverbial nose out of an employee's off-site off-hours business…" *Coats*, 2013 COA 62 at ¶15.

Marijuana use in Colorado is a lawful activity as well a matter of policy. See Colo. Const. art. XVIII, § 14(4)(a), (2)(e); art. XVIII § 16(1)(a), (3)(a),(3)(d), (8); C.R.S. § 18-18-406.3(1)(f); Colorado Legislative Council, Research Pub. No. 475-6, An Analysis of 2000 Ballot Proposals 1 (2000); *Watkins*, 2012 COA 15 at ¶23 (medical marijuana use as lawful).

As articulated in Mr. Coats' Amended Petition, this case addresses whether employment can be lawfully terminated for conduct sanctioned and permitted by the state, not to mention recommended by a licensed physician. Amended Petition, pp.17-19. A ruling should issue from this Court, not a divided three judge appellate panel.

While DISH may dispute there are hundreds of thousands of Coloradans who may face termination, their actions speak louder than their words. Opposition, p.17, ¶2; p.18, ¶1. Given the choice, employers will simply not keep or hire patient-employees. DISH's own decision to terminate a disabled, well-performing employee is the no doubt best evidence of this fact. It is inevitable (and troubling) that patient-employees suffering from serious illness and / or disability will be forced to stop taking a medication permitted under Colo. Const. art. XVIII, § 14 if they wish to remain employed. Amended Petition, p.18, ¶3; p.19, ¶¶1-2. How many will be affected can be derived from the data on registered patients reported by the Colorado Department of Public Health. PDF Record 12CA595, pp.138-139. The widespread and potential economic impact demands review by this Court, not a divided three judge appellate panel.

CONCLUSION

Mr. Coats' Amended Petition provides an ample independent basis for certiorari. If accepted, Mr. Coats will submit a detailed brief on the legal arguments and merits raised by DISH in its Opposition. DISH's Opposition really only confirms why this Court should accept certiorari and issue an opinion on these important, heavily contested legal issues that have great public impact.

The Colorado's Lawful Activities Statute, § 24-34-402.5, C.R.S., should protect a sick or disabled employee from being terminated by a Colorado employer for lawfully engaging in the use of medical marijuana pursuant to Colo. Const. art. XVIII, § 14 after work hours and off company property, and where despite the presence of T.H.C., there is no additional evidence of impairment, poor performance, occupational safety risk, or conflict with federal obligation.

WHEREFORE, Mr. Coats respectfully requests this Court to grant this Amended Petition for Writ of Certiorari, to recognize his claim as a matter of law, to reverse the dismissal of his claim, to remand the claim to the district court for a trial on all issues so triable, and for any other relief to which Mr. Coats may be entitled to law or in equity.

Dated: July 29, 2013

Respectfully submitted,

Atty. Michael D. Evans, #39407

CERTIFICATE OF SERVICE

I certify that on July 29, 2013, I ICCES E-Filed a copy of this REPLY IN SUPPORT OF AMENDED PETITION FOR WRIT OF CERTIORARI to:

Attorneys for Defendant-Appellee:
Meghan W. Martinez, #26295
Martinez Law Group, PC
720 South Colorado Blvd. Suite 530-S
Denver, Colorado 80246
(303) 597-4000
(303) 597-4001

Attorney: Michael D. Evans #39407