Court of Appeals, State of Colorado, 101 West Colfax Ave., Suite 800 Denver, CO 80202 Telephone: 303-837-3785 Appeal from the District Court, City and County of Denver The Honorable Michael A. Martinez Case No: 11 CV 1584	▲COURT USE ONLY ▲ Case No.: 2012 CA 921
MICHAEL SACKEL, Plaintiff-Appellant v. **RONALD PHILLIPS; TIMOTHY NESTOR, FREDERICK GRAFFAM; COMCAST CABLE COMMUNICATIONS, LLC; and COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.** Defendants-Appellees	
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REPLY BRIEF

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. The undersigned certifies that this brief complies with C.A.R. 28(g) because it contains 3,511 words, inclusive of everything, including the title page, this page, the certificate of service, and all footnotes.

Robert M. Liechty

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Defendants make the following three arguments: (1) that Mr. Sackel did not preserve the issue of whether he knowingly waived his claims when he signed the release, (2) that Mr. Sackel released the tort claim of intentional interference with contract, and (3) that defendants were entitled to judgment on grounds that no jury could believe Mr. Sackel's theory of recovery (an issue not decided by the trial court).

Mr. Sackel acknowledges that the release in this case would have covered his intentional interference claims but for the clause in the release that states "[t]his Agreement does not, however, release any rights or claims which may arise after the date on which you sign this Agreement." **See** Opening Brief, page 9, last paragraph. Thus, this appeal hinges to a large degree on whether Mr. Sackel's intentional-interference claim arose on the date he was terminated or much later when he discovered a required element of that claim. Mr. Sackel clearly asserted below that, at the time he signed the release, he was unaware of the wrongful motivation behind his termination. The trial court stated that that did not matter because the claim had arisen previously even though Mr. Sackel was unaware of it.

The Issue of Waiver has been Preserved

Defendants themselves presented the issue of whether Mr. Sackel waived his claims under the contract. **See *Genova v. Longs Peak Emergency Physicians***, 72

P.3d 454, 461 (Colo. App. 2003), and ***Joseph v. Viatica Mgt., LLC***, 55 P.3d 264, 267-68 (Colo. App. 2002), both of which held that the issue could be preserved by the appellee. As stated above, the contract did not apply to any claims that "may arise" (to use the contract term) after Mr. Sackel signed the contract. Therefore, the dispositive issue that the trial court decided was whether the intentional-interference claims arose prior to when Mr. Sackel signed the release.

As a result, the issue of knowing waiver was preserved as a matter of law because the trial court dismissed the case upon a finding that Mr. Sackel had waived his claim by signing the release. That is, the trial court simply applied contract principles to the meaning of the contract and found that the contract released the claims, even those of which Mr. Sackel was not aware. To come to this result, the trial court borrowed logic from a case concerning a statute of limitations, ***Sterenbach***, which discussed when a claim accrued for purposes of determining when the statute of limitations began to run. However, this does not erase the fact that the court below ruled that Mr. Sackel had waived his claim, even though he did not know it existed at the time he signed the release, because the contract stated it applied to all claims that had arisen at the time of signing. In the end, this analysis focuses upon one issue only – does the discovery rule apply to whether the claim herein had already arisen when Mr. Sackel signed the release?

The first section of defendants' summary judgment brief filed below began with the heading "Mr. Sackel's intentional interference with contract claim has been waived." **See** summary judgment brief, doc. # 45797643, page 81. Defendants argued that the release was clear and released any claim that had arisen at the time that Mr. Sackel signed the release. They argued that

> [b]ecause Mr. Sackel agreed to this comprehensive general release, he can only assert claims that arose after the date he executed the Agreement. Mr. Sackel's tortious interference claim did not arise after that date.

Id., page 83. Thus, defendants presented the issue in terms of the contract language: had the claim arisen at the time that Mr. Sackel signed the release?

In his summary judgment response, Mr. Sackel argued that under Pennsylvania law that "a release only releases those claims that had accrued prior to the signing of the release. [Citation omitted.] Pennsylvania applies the discovery rule to determine when such claims accrue." **See** summary judgment response, doc. #46409511, page 211. He further argued that if he "had not yet discovered that he had been wronged, his claim [had] not yet accrued. The determination of when a plaintiff knew he was wronged in a contract is generally a question for the jury." He argued that because he did not know of the improper motivation behind his termination, an essential element of his intentional-interference claim, he could not have waived a claim that was hidden from him.

To support his position, he cited three Pennsylvania cases that relied upon the discovery rule. ***Id.*** One of these cases, the ***Youngren*** case, stated that

> "The courts of Pennsylvania have traditionally determined the effect of the release using the ordinary meaning of its language and interpreted the release as covering 'only such matters as can fairly be said to have been within the contemplation of the parties when the release was given.'" [Citations omitted.] Furthermore, under Pennsylvania law it is well settled that "releases are strictly construed so as not to bar the enforcement of a claim which had not accrued at the date of the execution of the release."

Youngren, 876 F. Supp. at 79, cited by Mr. Sackel at doc. #46409511, page 211.

> As a general rule, a cause of action accrues at the time of injury. [Citation omitted.] However, under the discovery rule, the statute of limitations is tolled and the cause of action does not accrue until plaintiff knows or reasonably should have known that she has been injured and the injury has been caused by another party.

Youngren, at 80.

In short, the dispositive issue, from the trial court's point of view, was an interpretation of the contract and whether the intentional-interference claim arose before or after the date that Mr. Sackel signed the release. Not only was the issue of waiver preserved, it was, in the end, the only issue the trial court decided. Mr. Sackel specifically argued that he did not knowingly waive the claim because he did not know an essential fact upon which the claim was based. The only complicating issue was to what degree cases interpreting when a claim would accrue (in a statute of limitation's context) would be used to analyze the contract language herein.

However, this does not change the fact that the trial court dismissed the claims upon application of the terms of the contract.[1] Thus, whether the claim was knowingly waived or not was clearly preserved for appeal. **See *Richardson v. Farmers Ins. Exchange***, 101 P.3d 1138, 1141 (Colo. App. 2004); ***Genova v. Longs Peak Emergency Physicians***, 72 P.3d 454, 461 (Colo. App. 2003); ***Omedelena v. Denver Options, Inc***., 60 P.3d 717, 727 (Colo. App. 2002); and ***Joseph v. Viatica Mgt., LLC***, 55 P.3d 264, 267-68 (Colo. App. 2002), all of which hold that the issue is preserved when it was presented to the court below.

Defendants did not respond to the merits of the argument that Mr. Sackel did not knowingly waive his claim, so Mr. Sackel can make no reply. However, it is clear that interpretation of the contract term is pursuant to Pennsylvania, and not Colorado, law. **See** *infra*, pages 8-9.

The Tort Had Not Accrued When the Release Was Signed

As stated above, this second issue is important only if an analysis of when the claim accrues helps in interpreting the contract language as to when a claim arises.

[1] In other words, it is clear that the trial court did not consider a statute of limitations defense and, therefore, analysis of the term "accrued" was, in the end, only pertinent to interpreting the contract phrase "may arise."

That is, in the end, this case is a case of contract interpretation and not a case of claim accrual in the context of a statute-of-limitation's defense.[2]

On this second issue, defendants argue that Mr. Sackel has not cited any case that the release should be limited to releasing only those claims known at the time of signing the release. **See** Answer Brief, page 18. They also argue that Colorado law, not Pennsylvania law, determines when the tort accrued (***id.***, page 19, fn. 3) and that the discovery rule does not save the matter. ***Id.***, pages 20-21. But their principal argument is that the tort accrued on the date of the termination and that there was no need to discover the improper motive in order to have the claim accrue. ***Id.***, pages 21-22.

Mr. Sackel agrees that Colorado law would determine when the tort accrued in a statute of limitations context, but that is not the context herein. Rather, this case concerns the interpretation of the contract itself—whether Mr. Sackel agreed to waive claims of which he was not aware. By agreement, the parties stated that Pennsylvania law would apply to an interpretation of the contract. **See** the agreement which states that Pennsylvania law applies to his interpretation, doc. #45798040,

[2] Mr. Sackel acknowledges that he did not tightly separate the two contexts in his summary judgment response, doc. #46409511. However, it was also clear that he specifically opposed the argument that he had waived his claim when he signed the release because he did not know that he had a claim at that time.

page 166, ¶ 15. However, for practical purposes, it does not appear that there is much difference, if any, between Colorado and Pennsylvania law on this issue. In either jurisdiction, a party cannot waive something of which it was not aware. **Compare *Youngren***, 876 F. Supp. at 79 (Pennsylvania law), with ***Gleason***, 623 P.2d at 383 (Colorado law).

Mr. Sackel disagrees with defendants' remaining arguments, which are addressed by Colorado's accrual statute, C.R.S. §13-80-108. **See** Opening Brief, page 16. This statute states that "a cause of action for injury to person … shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." **See** Opening Brief, pages 16-17. Defendants did not mention this statute in their Answer Brief. Again, Mr. Sackel pursues this reasoning only to the degree that it helps interpret the contract term at issue herein: whether the intentional-interference claim had arisen at the time he signed the release.

The pertinent application of this statute herein focuses upon the meaning of the phrase "the injury and its cause," but in the context of when a claim is deemed to have arisen. It is clear that ***Sterenbuch***, the case upon which the trial court relied, addressed a different aspect of this statute because it concerned whether a claim had accrued prior to the plaintiff knowing what damages flowed from the injury. The

Sterenbuch court stated that because an injury is different from the damages that flow from the injury, the claim accrued on the date of the injury and the statue limitations would begin running on that date. Thus, defendants' argument on page 19 of its Answer Brief, which cites to ***Sterenbuch*** but does not analyze it, only touches the edges of the instant argument.

Mr. Sackel was very clear that, at the time he was terminated, he thought it was wrong to terminate him. However, most terminations are not unlawful (even wrongful ones to a lay mind) and do not provide a basis for litigation. Therefore, he knew that he had no legal basis upon which to sue for wrongful termination, so he signed the release. It was not until well after he signed the release that he saw the transcript which provided him the necessary fact upon which to base an intentional-interference claim. Absent knowledge of the improper motive, Mr. Sackel had no indication that he could pursue litigation.

In this respect, his claim is firmly premised upon the logic of ***Owens***, 474 P.2d at 605, where the Supreme Court first discussed the discovery rule:

> What a mockery to say to one, grievously wronged, "certainly you had a remedy, but while your debtor concealed from you the fact that you had a right, the law stripped you of your remedy."

Given this logic underlying the discovery rule, Mr. Sackel asserted in his Opening Brief, page 18, that the cause referenced in the accrual statute was a legal cause, a

cause for which there is a remedy. Defendants made no response to this argument, so Mr. Sackel has no reply.

Instead, defendants state that, in a statute of limitation's context, Mr. Sackel would have had two years after his termination to have discovered the wrongful motivation upon which to base an intentional interference case and, therefore, the claim would have accrued as of the date of termination. If the claim accrues as of the date of termination, then defendants argue that the release bars the claim because it arose after the signing of the release. **See** Answer Brief, pages 21-22.

This brings the discussion back to a point raised in the Opening Brief, page 16, that the context herein defines the meaning of the term "arise." In a statute of limitation's context, a plaintiff is given a certain number of years to file a claim once he is given notice of facts to support the claim. On the other hand, Mr. Sackel had been given only days to contemplate whether he would sign the release. Mr. Sackel alleges that the defendants purposefully hid from him the facts supporting his claim. Therefore, the public policy underlying a statute of limitation's analysis (after a certain number of years a claim must die) does not apply to whether Mr. Sackel waived his claim.

In the alternative, to the degree that this Court finds that the term in the contract, "arise," has the same legal meaning as when a claim accrues for purposes of

a statute of limitations defense, Mr. Sackel submits that under the accrual statute, his claim herein would not "arise" until he discovered the essential elements of his claim.

There Was a Dispute of Fact as to Whether Mr. Sackel Had a Valid Claim

Defendants' final argument is that "[n]o reasonable jury could conclude … that Sackel was terminated as part of a scheme to make him a 'scapegoat' in the ***Guenter*** litigation." **See** Answer Brief, page 27. The facts set forth in Mr. Sackel's Response to Motion for Summary Judgment are sufficient to create a reasonable inference that Mr. Sackel was terminated because he was being made a scapegoat. The fact that the ***Guenter*** litigation was resolved early on, and the scapegoat defense was never fully developed, does not dispose of Mr. Sackel's theory. **See** Answer Brief, page 28.

Mr. Sackel presented the following evidence in his summary judgment response (doc. # 46409511), typically presented under the ***McDonnell Douglas*** burden-shifting test where a plaintiff must prove a defendant's hidden motivations.

Mr. Sackel began working for Comcast as head of its security in the West Division, centered in Denver, although he worked closely with the security division at the headquarters in Pennsylvania. **See** Mr. Sackel's affidavit, doc. # 46409574, page 215, ¶ 1. He received a good evaluation in 2007. ***Id.***, ¶ 2. In 2008, Mr. Nester (who was not in security) wrote his second evaluation, which was a poor evaluation.

Id. Mr. Nester could not write the evaluation upon his own experience with Mr. Sackel in 2008 because Mr. Sackel reported to Mr. Graffam in 2008 (Mr. Sackel reported to Mr. Nester in 2009 and, hence, Mr. Nester did the evaluation). **See** summary judgment response, doc. # 46409511, page 210, ¶ 2. Although Mr. Nester alone made the decision to terminate, he did this after reaching out to Mr. Phillips (the other defendant regarding this claim and whose deposition alerted Mr. Sackel to the improper conduct herein). ***Id.*** At any rate, the poor evaluation confused Mr. Sackel because he had received no negative feedback, except on a few minor points, until that time. **See** affidavit, page 215, ¶ 2. He could tell that for some unknown reason Mr. Nester wanted to terminate him, which Mr. Nester did three months later. ***Id.***

Mr. Bates, the corporate director of security, was satisfied with how Mr. Sackel had performed his duties. **See** response brief, doc. # 46409511, page 210, ¶ 3. The only negative matter Mr. Bates had heard was that Mr. Sackel allegedly told some employees that he was going to ensure that they received raises. Mr. Bates was surprised that Mr. Nester put Mr. Sackel on a PIP. ***Id.***

Mr. Farrell, the chief security officer for Comcast, gave Mr. Nester the headquarter's feedback for Mr. Sackel's 2008 review, the first heading of the review that Mr. Nester wrote. ***Id.***, ¶ 4. Under this heading, Mr. Nester had written that Mr.

Farrell told him that "Mike [Sackel] doesn't have the influence he needs in the Division to effectively perform his role," *i.e.*, Mr. Nester wrote that Mr. Farrell thought that Mr. Sackel could not do his job. ***Id.*** Mr. Sackel asserts that this was a deliberate pretext on Mr. Nester's part – Mr. Farrell had told Mr. Nester that Mr. Nester (not Mr. Sackel) was the problem because Mr. Sackel "hasn't been supported by Nester and other senior leadership people throughout the division to make him an effective manager." ***Id.***

After Mr. Sackel read Mr. Phillip's deposition, he concluded that he had been made a scapegoat in the ***Guenter*** litigation and that Comcast was blaming him for the termination so that Comcast could argue that Mr. Guenter was not terminated because of his age. **See** affidavit, page 216, ¶ 6. Mr. Phillips told Mr. Sackel that an attorney in the ***Guenter*** case told him that Mr. Sackel's investigation of Mr. Guenter was the worst he had ever seen. ***Id.***, ¶ 7. Mr. Sackel was confused by this because he knew that it was a good report and no one had told Mr. Sackel otherwise, even though three levels of review at Comcast had approved the report. ***Id.***

Given the above, Mr. Sackel asserted that there was a genuine dispute of fact as to whether the reason for Mr. Sackel's termination was as Mr. Nester maintained (Mr. Sackel's alleged incompetence) or whether these reasons were merely a pretext to hide the assertion that Mr. Sackel was fired to make him a scapegoat in the

Guenter litigation. Questions of motivation typically are questions for a jury because they are, by their nature, hidden and can only be determined through inferential proof.

Mr. Sackel respectfully requests that this Court reverse the trial court and remand for further proceedings.

Respectfully submitted this October 19, 2012.

CROSS LIECHTY LANE PC

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, a true and correct copy of the foregoing **REPLY BRIEF** was served upon the following persons as indicated below:

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Duly signed original on file in the offices of Cross Liechty Lane PC

s/ *Linda L. DeVico*