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	
MICHAEL SACKEL, Plaintiff-Appellant v. **RONALD PHILLIPS; TIMOTHY NESTER; COMCAST CABLE COMMUNICATIONS, LLC; and COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.** Defendants-Appellees	▲COURT USE ONLY ▲ Case No.: 2012 CA 921
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AMENDED OPENING 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. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g): It contains 6,102 words, inclusive of everything, including the title page, this page, the certificate of service, and all footnotes.

The brief complies with C.A.R. 28(k): It contains a statement under a separate heading regarding the standard of review and where the issue was raised and ruled on.

Robert M. Liechty

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IV. STATEMENT OF THE CASE

Mr. Sackel brought a claim of tortious interference with contract against defendants Nester and Philips, premised upon a claim that they caused the employer Comcast to terminate Mr. Sackel's contract so that he would be a scapegoat in litigation filed by another Comcast employee.[1] The case below concerned whether Mr. Sackel's employment was terminated to reduce Comcast's liability in the other litigation (an allegedly improper reason) or whether he was terminated because he was not competent (a permissible reason). **See** Summary Judgment Response, doc. # 46409511, pages 210-11.

At the end of discovery, defendants filed a motion for summary judgment, which the trial court granted without oral argument solely upon grounds that Mr.

[1] Mr. Sackel voluntarily dismissed the defamation against Mr. Phillips and dismissed Mr. Graffam from the case, leaving a claim of intentional interference against defendants Nester and Phillips each and a claim of vicarious liability against Comcast. **See** Response to Summary Judgment, doc. #46409511, page 211.

Sackel had released his claims. The trial court determined that Mr. Sackel knew of the tortious interference at the time of his termination, shortly before he signed the release. On the other hand, Mr. Sackel submits that because this claim depended upon the motive behind the termination, which motive he did not know when he was terminated, he did not know of the existence of this claim until months after he signed the release. ***Id.***, page 211.

The essence of his claim was as follows. Mr. Sackel worked for Comcast's security division in the western area. As part of his duties, he was asked to investigate the financial actions of a Mr. Guenter (the litigant referred to above), an executive who worked for Comcast in California. After the investigation, Mr. Guenter was terminated. Mr. Guenter then sued, alleging in part that he was terminated because of his age. **See** affidavit of Sackel, doc. # 46409574, page 216, ¶ 4. Mr. Sackel alleges in the instant case that he later discovered that he (Mr. Sackel) had been terminated to make it look like his poor investigation of Mr. Guenter, and not Mr. Guenter's age, was the reason for Mr. Guenter's termination. ***Id.***, ¶ 6.

As part of this scheme, Comcast terminated Mr. Sackel (after Mr. Sackel had allegedly caused Mr. Guenter's termination) to show that Mr. Sackel was incompetent and to distance Comcast from Mr. Sackel's actions that had harmed Mr. Guenter. **See** Response, doc. #46409511, page 209. Mr. Sackel also claimed that the

proffered reason for his termination was a pretext, designed to hide the real reason for his termination. ***Id.*** However, the vitality of this claim is not an issue on appeal. Rather, the dispositive issue on appeal only concerns when Mr. Sackel discovered the facts that would lead him to believe that he was being made a scapegoat in the ***Guenter*** litigation. That is, the dispositive issue on appeal only concerns whether Mr. Sackel knew he was waiving this claim.

Comcast terminated Mr. Sackel on June 19, 2009 (**see** affidavit, doc. # 46409574, page 216, ¶ 3) and Mr. Sackel signed the release on July 2, 2009. ***Id.*** At the time that he signed the release, he did not know of the above motive behind his termination and, instead, believed that the termination had to do with general incompetence by management. ***Id.*** He understood that such a motivation would not support a claim for wrongful termination and, therefore, he signed the release. ***Id.*** The specific facts supporting when Mr. Sackel discovered the improper motivation for termination are copied below from his affidavit (doc. #46409574, pages 215-16, ¶¶ 2-7).

> 2. I received a good evaluation for my first half-year in 2007. Although I did not report to Mr. Nester in 2008, he wrote my [2008] evaluation, which I received on March 10, 2009. This evaluation was a poor evaluation, which confused me because I had received no negative feedback, except on a few minor points, until that time. I could tell that for some unknown reason Mr. Nester wanted to terminate me, which he did three months later, on June 19,

2009, after he concluded that I had not complied with a Personal Improvement Plan.

3. Although I was in complete disagreement with this decision, I came to the conclusion, in June, 2009, when I was terminated, that it was simply an incompetent decision by Comcast. I knew that I could not sue Comcast based on this reason for my termination and, consequently, I signed the release on July 2, 2009.[2]

4. I was named as a defendant in Mr. Guenter's case and I knew that he had brought a claim of age discrimination. I had investigated Mr. Guenter, with Mike Bates who was with the security division at headquarters, and concluded that he had been using a drawdown account in order to shorten the Comcast procedures for making payments. My investigation did not conclude that he had done anything to increase his financial gain, to take money from Comcast, or to violate written policies. I did not make a recommendation that Mr. Guenter be terminated or suffer any discipline. I was not even aware he had been terminated until well after the fact.

5. In April, 2010, I read the deposition given by Ronald Phillips[3] (a human resources manager) in the ***Guenter*** case. I was shocked when I read that Mr. Phillips said that it was I who had told him that Mr. Guenter had to be terminated and that I based my decision upon my investigation of Mr. Guenter.

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[2] In the order granting summary judgment, the trial court noted that on April 11, 2011, Mr. Sackel had sent correspondence to CEO Roberts in which he said "that at the time of his termination he felt that he was wrongfully terminated but ultimately agreed to the severance package." **See** order, doc. #48098326, page 338, ¶ 11. The Court did not cite to the record for this statement, but Mr. Sackel wrote only once to Mr. Roberts on March 4, 2010, not a year later on April 11, 2011, as the court said in ¶ 11. **See** letter to Roberts, doc. #457982040, pages 150-53. On page 152, ¶ 3, Mr. Sackel said that he signed the severance package, even though he felt he had been wrongfully terminated. But he continued to explain on the remainder of that page and into the next page that he had just discovered the slanderous attacks by Mr.'s Phillips and Nester which caused him to believe, for the first time, that "[i]t appears I'm being made a scapegoat in this case." ***Id.***, page 153, ¶ 2.

[3] The court's order, ¶ 9, notes that Mr. Sackel first heard of this deposition testimony a few months earlier in January, 2010, although Mr. Sackel did not actually read the transcript until April.

6. After I read Mr. Phillip's deposition, I concluded that I had been made a scapegoat in the ***Guenter*** litigation[4] and that Comcast was blaming me for the termination so that Comcast could argue that Mr. Guenter was not terminated because of his age.

7. Mr. Phillips told me [at the time of the termination] that an attorney in the ***Guenter*** case told him that my investigation of Mr. Guenter was the worst he had ever seen. I was confused by this because I knew that it was a good report and no one had told me otherwise, even though three levels of review at Comcast had approved the report.

From the above, the trial court made the following factual finding that the claim had accrued on the date Mr. Sackel was terminated:

> Here, the record reflects that Plaintiff's claim for intentional interference accrued no later than June 19, 2009, when his at-will employment was terminated by Nester. Specifically, on the date of June 19, 2009, Plaintiff knew that he had suffered an injury (the termination of his employment) and knew the cause of the injury (Nester's decision to terminate his employment). Moreover, at the time of his termination, Plaintiff had suspicions that he was wrongfully terminated but did not take any action. Instead, Plaintiff negotiated and executed the Release.
>
> In a letter drafted in April 2010 by Plaintiff to Comcast's Chief Executive Officer, Brian Roberts,[5] and in Plaintiff's sworn affidavit attached to his Response to Defendants' summary judgment motion, Plaintiff acknowledges that, at the time of his termination, he felt wrongfully terminated. Plaintiff further suspected that Nester wanted to terminate his employment a few months prior to the date of his actual termination.

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[4] As stated above, the trial court noted in its order, ¶ 10, that Mr. Sackel had heard of this a month earlier on March 1, 2010, as noted in an e-mail of that date to attorney Sheehan. **See** e-mail to Sheehan, doc. #45797930, pages 154-55. However, whether the court used the January or the April date as the date Mr. Sackel discovered the facts regarding the scapegoating scheme makes no difference because both dates occurred well after the July 2, 2009, date when he signed the release.

[5] **See** footnote 2. The only letter Mr. Sackel drafted to Mr. Roberts is dated March 4, 2010. **See** letter to Roberts, doc. #457982040, pages 150-53.

> However, despite disagreeing with the decision to terminate his employment and feeling like he was wrongfully terminated, Plaintiff determined, on his own behalf and without consulting an attorney, that the decision to terminate his employment was merely an incompetent decision by Comcast with no legal recourse. Plaintiff signed and executed the Release thereafter to receive his severance package in exchange for his release of any and all potential causes of action.

See order, doc. #48098326, pages 341-42. The trial court made no finding as to whether Mr. Sackel knowingly waived the claim of tortious interference. However, there were no facts in the record demonstrating that he had knowledge of this claim at the time he signed the release.

The release was broad, but not all inclusive. It released the defendants from claims "that the Employee Releasors any of them ever had, now have, or may have against the Comcast Releasees … This Agreement does not, however, release any rights or claims which may arise after the date on which you sign this Agreement…." **See** Separation Agreement, doc. #45798040, page 164 and page 165.[6] Furthermore, it did not release Comcast or its employees from "claims unknown" (language found in many releases).

[6] The trial court applied Pennsylvania law to the interpretation of the release but Colorado law to when the claim accrued. **See** order, doc. #48098326, page 341, ¶ 2. The Agreement itself said it would be governed by the law of Pennsylvania. **See** doc. #45798040, page 166, ¶ 15.

The trial court recognized that the underlying "dispute arises over the termination of Plaintiff and the alleged improper motivation of Defendants behind the termination." S**ee** order, doc. #48098326, page 336, ¶ 1. The court stated that the issue for it "to determine, based upon the undisputed material facts, is at what time did Plaintiff's cause of action for intentional interference with contract originally accrue." ***Id.,*** page 341, ¶ 1. The release did not cover those "claims which may arise" after signing the release. Thus, using the trial court's analysis (the second issue below), if this claim accrued after the date of the release, the release would not bar it.

V. SUMMARY OF THE ARGUMENT

The trial court erred in determining that the issue was one of when Mr. Sackel's claim accrued; rather, the issue should have been whether Mr. Sackel knowingly waived his claim of tortious interference at the time he signed the release. He did not. However, neither did the tortious interference claim accrue prior to him signing the release because he was unaware of facts supporting the claim. In the alternative, a jury should resolve either, or both, issues.

VI. ARGUMENT

Standard of Review

This Court grants *de novo* review in determining whether the trial court correctly granted summary judgment. ***Han Ye Lee v. Colorado Times, Inc***., 222 P.3d 957, 916 (Colo. App. 2009). Both of the issues below were raised in defendants' motion for summary judgment (doc. #45797643, page 81) and were resolved in the court's order regarding same (doc. #48098326, page 336).

1. Mr. Sackel Did Not Release the Claim

The trial court held that the claims of tortious interference with contract accrued as of the date that Mr. Sackel was terminated premised upon the sole facts that Mr. Sackel knew he had been terminated, knew that Mr. Nestor had terminated him, and suspected that he had been wrongfully terminated. On the other hand, Mr. Sackel claimed that he did not release this claim because he did not know until months later that the termination was part of the scheme making him a scapegoat.

The trial court specifically stated that the issue before it was to determine when the claim "originally accrue[d]." **See** order, doc. #48098326, page 341, ¶ 1. That was the wrong issue—the issue was not when the claim accrued; rather, the issue was whether Mr. Sackel voluntarily waived the claim when he signed the release. Although the two concepts (accrual and waiver) are similar, the differences

are highlighted herein. Under a traditional statute-of-limitations analysis, a litigant will have a time limitation (for instance, two years) in which to investigate and bring a claim after that claim has deemed to have accrued. Thus, there is a buffer before the accrual results in a consequence. On the other hand, a knowing waiver of a claim focuses upon the litigant's knowledge at the time he signs the release.

The trial court mistakenly applied herein the concept of accrual to the activity of a waiver. It is hornbook law that in order to waive a claim, the waiver must be done knowingly. **See**, *e.g.*, ***Gleason v. Guzman***, 623 P.2d 378, 383 (Colo. 1981); ***Scotten v. Landers***, 543 P.2d 64, 66-67 (Colo. 1975); ***Rasmussen v. Freehling***, 412 P.2d 217, 219 (Colo. 1966), and ***Torrez v. Public Service Co. of New Mexico, Inc.***, 908 F.2d 687, 689 (10th Cir. 1990).

To the degree that this Court applies Pennsylvania law, it is substantially the same. **See *Pennsylvania Turnpike Com'n v. K. & S. Trucking LLC***, 362 F. Supp. 2d 598, 603 fn. 26 (E.D. Pa. 2005); and ***Kramer v. Schaeffer***, 751 A. 2d 241 (Pa. Super. 2000)("On the other hand, when there is mistake on one side and fraud on the other, relief is available. [Citation omitted.] Likewise, irrespective of active fraud, if the other party knows or has good reason to know of the unilateral mistake, relief will be granted to the same extent as a mutual mistake").

Thus, the trial court erred by focusing on when the claim accrued; rather, the trial court should have focused on whether the waiver was knowingly performed. The trial court mistakenly presumed that since Mr. Sackel's claim had accrued,[7] he is deemed under the law to have knowingly waived the claim. In a nutshell, that was the court's error.

The elements of a tortious interference claim are set forth in ***Trimble v. City and County of Denver***, 697 P.2d 716, 726 (Colo. 1985). ***Trimble*** stands for the proposition that an agent of the company may not unlawfully interfere in contractual relations between that company and its employee, as Mr. Sackel alleges occurred herein (***Trimble***, 697 P.2d at 725); however, for such interference to be actionable, it must be "improper" as set forth in the *Restatement (Second) of Torts §767*:

> In determining whether an actor's conduct in intentionally interfering with a contract … is improper or not, consideration is given to the following factors:
>
> a. the nature of the actor's conduct,
> b. the actor's motive,
> c. the interests of the other with which the actor's conduct interferes,
> d. the interests sought to be advanced by the actor,
> e. the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> f. the proximity or remoteness of the actor's conduct to the interference, and
> g. the relations between the parties.

[7] Mr. Sackel asserts *infra* that the claim had not yet accrued, but that is a second inquiry.

Trimble, 697 P.2d at 726. Of the above, factor number two, concerning defendants' motive, is the most important factor herein. Until Mr. Sackel knew of the facts concerning the "improper"[8] motive (that he was being used as a pawn in the ***Guenter*** case), he would not know the legal cause of his injury. The fact that he may have believed at the time of his termination that the termination was the result of incompetence, was illogical, was a poor business decision, or was unfair would be irrelevant because until he knew of the "improper" motive, he would not know that his injury had relief in court.

In the arena of employment law, an employer may terminate an employee for most any reason. However, there are a certain number of limited reasons that are unlawful, such as discrimination under Title VII, reasons deemed to be against public policy (***Martin Marietta Corp. v. Lorenz***, 823 P.2d 100, 107 (Colo. 1992)), to retaliate against whistle blowing (***Kearl v. Portage Environmental, Inc***., 205 P.3d 496, 499 (Colo. App. 2008)), or the *Restatement's* "improper" reasons set forth above. In all of these cases, the dispositive question focuses on the motivation behind the termination. However, the dispositive dispute in the instant case does not

[8] The word "improper" is put in quotation marks to show that it has the specialized meaning assigned to it in the *Restatement*.

concern the actual motivation of defendants;[9] rather, the dispositive issue concerned whether Mr. Sackel knew of facts at the time he signed the release that would have indicated he had this claim.

> In a summary judgment context, the following well-established rules apply:
>
> In determining the existence of an issue of material fact, a court must view the evidence in the light most favorable to the nonmoving party. A material fact is one that will affect the outcome of the case. When the pleadings and affidavits show material facts are in dispute, it is error to grant summary judgment.

Han Ye Lee, 222 P.2d at 960 (citations omitted). Clearly, whether Mr. Sackel knew of the "improper" motivation behind his termination, at the time he signed the release, was a material fact because it determined whether he had released the tortious interference claim. The trial court did not view this evidence in the light most favorable to Mr. Sackel. Instead, the trial court simply assumed that Mr. Sackel knew he was being used as a scapegoat on the date he was terminated.[10] However, his affidavit showed otherwise and it was error to grant summary judgment.

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[9] Such motivation underlying a termination is generally proved through the shifting-burden analysis set out in ***McDonnell Douglas***. **See *Bodaghi v. Department of Natural Resources***, 995 P.2d 288, 296 (Colo. 2000).

[10] Actually, given the trial court's focus on the accrual argument, it probably was thinking that an initial notice of the claim arose upon termination, thus giving Mr. Sackel two years to determine the real cause for termination. Mr. Sackel submits below that such notice did not accrue on the date of termination.

Mr. Sackel submits that the matter should be reversed on this ground only (and not on the accrual argument below). It is undisputed that Mr. Sackel did not know of the "improper" motive at the time he signed the release. Therefore, he did not knowingly waive the claim. Given this conclusion, Mr. Sackel submits that this Court need not consider the accrual below.

2. The Claim Accrued after Mr. Sackel Signed the Release

The issue of accrual may have an impact on the instant appeal because of the wording in the release. Specifically, the release said that it did not release any "claims which may arise after the date on which you sign this Agreement." **See** Separation Agreement, doc. #45798040, page 165. Thus, if the tortious interference claim did not arise, that is, accrue,[11] until after Mr. Sackel had signed the agreement, then the claim was not released. Nonetheless, this should not change the effect (discussed above) of the waiver because Mr. Sackel could only waive those claims that were known on the date he signed the release.

In Colorado, a claim accrues pursuant to C.R.S. §13-80-108. The claim of intentional interference with contract is a tort (**see *Sterenbuch v. Goss***, 266 P.3d 426, 432 (Colo. App. 2011)) and subsection (1) of the above statute applies: "a cause of

[11] ***Owens v. Brochner***, 474 P.2d 603, 606 (Colo. 1970), states that the word "accrue" "'means to arise, to happen, to come into force or existence.'"

action for injury to person… relationship, or status 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 *Sterenbuch***, at 433, which applied this subsection to this particular tort. Mr. Sackel agrees that the injury (*i.e.*, the termination) was known on the day he was terminated. However, the cause of that injury was not known until months later when he discovered the subterfuge related to Mr. Guenter.

The trial court relied exclusively upon ***Sterenbuch v. Goss***, 266 P.3d 426 (Colo. App. 2011), for its conclusion that Mr. Sackel's claim accrued when he "had suspicions that he was wrongfully terminated." **See** order, page 341. As stated above, the statute defining accrual of an action focuses on both when the plaintiff knew of the injury and of its cause. ***Sterenbuch*** concerned one attorney stealing clients from another attorney. The dispositive issue came down to when the first attorney knew that the second attorney had injured him by stealing his clients. This Court concluded that the first attorney knew of the injury when he discovered that his clients had been taken: "'[A]n injury is different from the damages that flow from the injury. … [D]amages do not need to be known before accrual of the claim.'" ***Sterenbuch***, 266 P.3d at 433.

The trial court appeared to apply this same type of reasoning to the instant action. That is, Mr. Sackel knew that he was injured when he was terminated. He knew that Mr. Nester caused his termination. Therefore, Mr. Nester caused the injury and the claim accrued on the date of the termination. The fallacy in this logic is that although Mr. Nester caused the injury, until Mr. Sackel knew that the motive behind this cause was "improper," he would not know that a claim existed. This logic is reminiscent of that stated in ***Owens v. Brochner***, 474 P.2d 603, 605 (Colo. 1970), in which 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."

In short, the "cause" applicable herein is a "legal cause," that is, a cause for which there is a remedy.

The above statute says that a claim accrues when both the injury and its cause are known. ***Sterenbuch*** concerned when the injury was known. The issue herein concerned when the cause was known. Mr. Sackel initially believed that the cause was incompetence on the part of Mr. Nester, but incompetence will not support the tort of intentional interference; rather, only the *Restatement's* "improper" conduct will support such a tort. Mr. Sackel did not discover that "improper" conduct, *i.e.*, that he was being used as a scapegoat, until months later.

The instant issue comes under the reasoning set forth in ***Financial Associates Ltd. v. G.E. Johnson Construction Co., Inc.***, 723 P.2d 135 (Colo. 1986). In that case, a commercial building owner sued its contractor and engineer for negligent design and construction of the building. Plaintiff first noticed cracks in the construction in 1978 and was given a second engineering report regarding the cause of those problems in 1980. Plaintiff filed suit in March, 1983. The trial court granted summary judgment upon grounds that the owner should have discovered the cause of the damage within two years after the 1980 report. The building owner argued to the Court of Appeals that the limitations period should not have begun running until receipt of yet another report in 1982. The Court of Appeals disagreed, but the Supreme Court reversed because it was not clear as to when the owner was put on notice of the actual cause of the injury:

> Because the reports could support conflicting inferences as to the plaintiff's knowledge of the existence of a causally related defect, an issue of material fact is presented and an entry of summary judgment is unwarranted.

723 P.2d at 140. **See also** ***City of Aurora v. Bechtel Corp***., 599 F.2d 382, 389 (10th Cir. 1979) ("the cause of action does not accrue until the plaintiff knows, or should know … all material facts essential to show the elements of the cause of action").

The same type of focus decided ***Mastro v. Brodie***, 682 P.2d 1162 (Colo. 1984). In ***Mastro***, the plaintiff knew that she did not have a good result following a

shoulder surgery – she developed a keloid scar. The operation occurred in February, 1977, and it was not until August, 1979 (after the statute of limitations had run), that another doctor told her that dark-skinned individuals such as she had a higher risk of developing such a scar. She then filed suit in November, 1979, that she should have been warned of this proclivity, but summary judgment was granted in favor of the doctor upon a statute of limitations defense. The pivotal question was whether she "filed suit within two years after she 'discovered, or in the exercise of reasonable diligence and concern should have discovered, the *injury*.'" ***Mastro***, 682 P.2d at 1166 (emphasis in original).

Mastro instructed that the word "injury" meant "legal injury, *i.e.*, all the essential elements of a claim for medical malpractice." ***Id.***, at 1167. "We hold that the statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of injury and that the injury was caused by the wrongful conduct of another." ***Id.***, at 1167. Furthermore, ***Mastro*** held that "only in the clearest cases may a summary judgment motion be granted where discovery of the injury is the pivotal issue." ***Id.***, at 1169. Thus, the summary judgment was reversed.

Clearly, in the instant case, Mr. Sackel had no idea, two weeks after his termination, that his termination was done as a part of the scheme to make him a

scapegoat in the ***Guenter*** case. True, he believed the termination was wrongful, but most every lay person who is terminated believes it was wrongful. The point is, there was nothing putting him on notice that he was being made a scapegoat and, until he knew that, he had no facts upon which to base a valid claim.

In this sense, his case is similar to ***Winkler v. Rocky Mountain Conference of United Methodist Church***, 923 P.2d 152 (Colo. App. 1995). In ***Winkler***, a parishioner sued both her pastor and his church[12] stemming from the pastor's sexual advances towards the parishioner. The parishioner claimed that the church negligently hired or supervised the pastor and the church claimed this was barred by the statute of limitations. However, the parishioner stated that she did not know of the negligent hiring or supervision claim until January, 1992, when she had an incident with the pastor in a storeroom and, upon leaving a storeroom and telling two women of the incident, "one responded, 'My God, not you too.'" ***Winkler***, 623 P.2d at 156. The church argued that the question of when the cause of action accrued should have been given to a jury. The Court of Appeals disagreed:

> Here, Winkler did not know, nor could she be expected to discover, the factual basis for her claims of negligent hiring or supervision until January 1992, when the storeroom incident occurred and Winkler first learned that at least

[12] The church belonged to a Conference and it was the Conference that was the defendant because the church itself had settled; however, for ease of reference, the defendant is referred to herein as the church.

> one other woman had similar experiences with [the pastor] and that the church authorities had been so informed. January 1992 was well within the applicable two-year statute of limitations.

Id., at 159.

The parishioner had been sexually approached by the pastor 1½ years earlier in August, 1990. ***Id.***, at 156. Even though one could argue that a man with the pastor's proclivities probably did not limit his actions to only one female, thus putting the parishioner on notice that she should have inquired as to whether the pastor was doing this with other females, the court held, as a matter of law, otherwise. If the parishioner was not put on notice in ***Winkler***, Mr. Sackel surely was not put on notice that he was being made a scapegoat in the case herein.

This highlights the error by the trial court herein where it held that

> However, despite disagreeing with the decision to terminate his employment and feeling like he was wrongfully terminated, Plaintiff determined, on his own behalf and without consulting an attorney, that the decision to terminate his employment was merely an incompetent decision by Comcast with no legal recourse.

See order, doc. #48098326, page 342, ¶ 1. Mr. Sackel was in no different position than was the parishioner in ***Winkler***. Obviously, the parishioner knew as early as August, 1990, that the pastor was doing something wrong. Mr. Sackel that he was being treated wrongfully when he was terminated. However, the parishioner was not charged with being put on notice that the pastor could have been doing this

with others. In the same light, Mr. Sackel should not be put on notice that his termination was related to the ***Guenter*** litigation.

The trial court applied Colorado law to its accrual analysis, as opposed to Pennsylvania law (which the parties agreed would apply to application of the release, **see** Separation Agreement, #45797930, page 166, ¶ 15), but there is no difference between the two jurisdictions. Pennsylvania also applies the discovery rule to released claims. ***Youngren v. Presque Isle Orthopedic Group***, 876 F. Supp. 76 (W.D. Pa. 1995), and ***Vaughn v. Didizian***, 648 A.2d 238 (Pa. Super. 1994). Under Pennsylvania law, a release only releases those claims that had accrued prior to the signing of the release. ***Youngren***, 876 F. Supp. at 79-80. Pennsylvania applies the discovery rule to determine when such claims accrue**.** ***Sadtler v. Jackson-Cross Co***., 587 A.2d 727, 731 (Pa. Super. 1991). Thus, if a plaintiff 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 action is generally a question for the jury. ***Id.***, at 731-32.

The trial court erred in deciding this question as a matter of law when the facts were clearly otherwise. "When a particular claim accrues … ordinarily [is a] question of fact for a jury to resolve." ***Sterenbuch***, 266 P.3d at 432. In fact, there was no indication that at the time Mr. Sackel signed the release, he knew he had been

made a scapegoat. Thus, given the facts before it, the trial court could only find in favor of Mr. Sackel as to whether the release provided judgment in favor of defendants. Indeed, under either analysis, the waiver or the accrual analysis, the matter should be reversed. Only in the alternative, Mr. Sackel submits that either question should be submitted to a jury because of the factual dispute inherent in each determination.[13]

VII. CONCLUSION

Mr. Sackel respectfully requests that this Court reverse the order of the court below, direct that the release does not preclude Mr. Sackel's claims or, in the alternative, that this issue should be resolved by the jury, and remand for further proceedings.

Respectfully submitted this August 21, 2012.

CROSS LIECHTY LANE PC

By: s/ *Robert M. Liechty*
Robert M. Liechty, No. 14652
ATTORNEYS FOR APPELLANT

[13] Mr. Sackel submits this only alternatively because he believes that there are only undisputed facts concerning either of these issues and that these facts support his position only.

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2012, a true and correct copy of the foregoing **AMENDED OPENING BRIEF** was served upon the following persons as indicated below:

Darin Mackender, Esq.
Ruth Mackey, Esq.
FISHER & PHILLIPS LLP
1999 Broadway, Suite 3300
Denver, CO 80202

( ) by 1st-Class U.S. Mail, postage prepaid
( ) by Hand Delivery
( ) by Facsimile to 303-218-3651
( ) by Overnight Mail
( ) by Email
(X) Justice Link electronic filing

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

s/ *Linda L. DeVico*