

2007 FALL REAL ESTATE UPDATE

**Colorado Bar Association
CLE in Colorado, Inc.
Denver, Colorado
November 2, 2007**

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Introduction

Where a Pacific citation (West) is available, it is given; otherwise we offer the LEXIS and WESTLAW cites. In addition, the date of each decision is given in the text, so that the cases can be conveniently located in the Colorado Lawyer or in the Colorado Bar Association's excellent web pages, www.cobar.org/coappcts/ctappndx.htm and www.cobar.org/coappcts/scndx.htm.

The cases are placed in chronological order by subject. Case coverage is current through October 31, 2007. Unless otherwise noted, "supreme court" means the Colorado Supreme Court, and "court of appeals" means the Colorado Court of Appeals.

Some effort has been taken to present these cases in a way that real estate experts and non-specialists alike will get something out of this presentation, and so that this summary may be useful as a research tool. Any opinions expressed here are strictly our own, and are given only to make the subject matter and its presentation more interesting.

Geoff thanks Genevieve Bernal and Ruth Rouse, both of Burns Figa & Will, P.C., for their assistance in preparing this outline.

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1. BROKERS / FIDUCIARY DUTY

No cases reported

2. BOUNDARY / ADVERSE POSSESSION

Morales v. CAMB

Colorado Court of Appeals, March 22, 2007

160 P.3d 373 (Colo. App. 2007)

Boundary dispute; subdivision monuments; monuments vs. calls.

In this boundary dispute between the owners of adjoining subdivision lots, a simple issue was presented. The location of the boundary as described on the metes and bounds descriptions on the subdivision plat, and as shown on the plat map, favors one lot owner. The location of subdivision monuments on the ground, placed pursuant to C.R.S. § 38-35-105(1), and approximately 13 feet south of the platted line, favors the other lot owner. The subdivision plat contains the required surveyor's certificate attesting that appropriate monuments had been placed on the ground. Applying rules of survey interpretation, the latter owner wins. Monuments prevail over metes and bounds description, even if they are graphically depicted on a subdivision plat map. Indeed, in this situation, the monuments are "conclusive." See *Everett v. Lantz*, 126 Colo. 504, 514, 252 P. 2d 103 (1952). This is the holding even if (as here) the plat's legal description does not "close" if one defers to the monuments, implying that the monuments were misplaced at the outset.

3. CONDEMNATION

School Dist. No. 12 v. Security Life of Denver Ins. Co.

Colorado Court of Appeals, January 25, 2007

2007 Colo. App. LEXIS 102, 2007 WL 177674

Condemnation; damages award; attorney fees.

School District files a petition to condemn a sixty acre parcel (Parcel A) owned by Security, so that it can build a school. The court gives School District immediate possession of Parcel A. Before filing its petition, School District makes a last written offer of \$3,250,000. School District later amends its petition to include an adjacent seventy-eight acre parcel (Parcel B) also owned by Security, but did not take immediate possession of Parcel B. Prior to filing its amended petition, School District makes Security a "final written offer" for both parcels for \$6,564,492.

The case goes to trial by jury to determine just compensation. Because School District is uncertain whether it should take Parcel B, it has the jury render alternate verdicts. The jury determines the market value of Parcel A as \$5,619,240, damages to Parcel B, if not taken as \$2,000,000, and values Parcel B at \$1,655,280 if taken.

Problem: how can damages to Parcel B be greater than the value of the entire Parcel B, if taken? Security argues to the trial court that the jury meant to award *both* damages for Parcel B *and*

Parcel B's fair market value and that the trial court should award the total of all three awards: \$9,274,520. The trial court agrees with Security, enters a total judgment for \$9,274,520 and also awards attorney fees.

Following trial, School District does decide to condemn Parcel B, and the trial court issues a rule and order awarding title to Parcels A&B to School District.

On appeal, School District argues that the trial court erred confirming the jury verdict. A trial court can modify a jury verdict to correct a technical error, but cannot make a substantive change to disturb the jury's underlying intent. The court of appeals holds that the trial court erred because the jury could not have followed the jury instructions and made the award where the damages to Parcel B were bigger than its fair market value. If there is a total taking of Parcel B, there could not also be damages to the residue of Parcel B. The court of appeals affirms the jury award for Parcel A, but remands for a damages determination from the time the School District took possession of Parcel A to the date it took title to both Parcels A & B, as well as for a determination of the value of Parcel B at the time of taking.

School District argues that the court erred in awarding attorney fees. C.R.S. § 38-1-122(1.5) provides that a trial court should award attorney fees if the verdict exceeds 130% of the "last written offer given to the property owner prior to the filing of the condemnation action." School District here made a second offer after the petition had been filed but before amending the petition to add Parcel B. The court of appeals holds that the amendment to the petition is so substantial that it is tantamount to filing a new condemnation action such that a "new last written offer" is permitted for purposes of the statute under such circumstances, but is not required. The Court affirms the attorney fees award for Parcel A but remands for Parcel B.

In Re: Tonko

Colorado Supreme Court, March 19, 2007

154 P.3d 397 (Colo. 2007)

Ditch right-of-way condemnation; adjudicated water right; condition precedent.

This case presents interesting jurisdictional issues involving the private condemnation of rights-of-way for construction of a water ditch. Colo. Const. Art. XVI, sec. 7; C.R.S. § 37-86-101. The Court sets out a thorough history of ditch easements and the right to condemn a ditch across adjoining lands. One action was filed by Tonko's predecessor to condemn such a ditch easement. The district court dismissed, saying that it lacked subject matter jurisdiction to determine whether the condemnor had water rights – a prerequisite for condemning a ditch. When the Tonko's went to the water court, however, they were thrown out on summary judgment because of the preclusive effect of the "adverse" ruling of the district court. The Supreme Court reverses. It holds that the district court correctly ruled that it lacked jurisdiction to make the necessary findings of water rights, but that the water court should have taken up the issue. Issue preclusion does not apply, as the Tonko's never had a full and fair opportunity to litigate their underlying water right.

Dept. of Trans. of the State of Colo. v. Marilyn Hickey Ministries
Colorado Supreme Court, May 29, 2007
159 P.3d 111 (Colo. 2007)

Eminent domain; damage to the remainder; loss of visibility from public highway.

We reviewed the decision of the court of appeals in this condemnation case in 2005. The case involves a partial taking of property in connection with T-REX. Specifically, CDOT took a ¼ acre strip of land from the Marilyn Hickey Ministries property at the northwest corner of I-25 and Orchard Road for a retaining wall and light rail line, expanding the former I-25 right-of-way. In the process of construction, the “massive” retaining wall blocks the view of the church from motorists who are traveling on I-25, though it does not obstruct the view of riders on the new light rail train. Hickey sought recovery of damages for this loss of visibility into the property as a part of the damage to the remainder of its property. The trial court excluded this evidence in a pre-trial ruling, and the evidence of this category of damage was not heard by the commissioners who heard the valuation hearing. The commission awarded \$249,000 for the land taken; Hickey sought \$1.9 million for loss of value due to its loss of visibility from the highway.

The general test for recovery of damage to the remainder is that the property owner should be compensated for “all damages that are the natural, necessary and reasonable result of the taking.” *La Plata Electric Ass’n v. Cummins*, 728 P.2d 696 (Colo. 1986) (abolishing common law rule requiring landowners to demonstrate special damages not shared by the public generally). The court of appeals relied on this case to hold that any reduction in property value based on a loss of *view into the property* which naturally and reasonably results from the construction of the retaining wall on the land that was taken is compensable.

The Supreme Court accepted certiorari review and reverses, holding that its earlier case of *Troiano v. Colorado Dept. of Highways*, 170 Colo. 484, 463 P.2d 448 (1969) is dispositive. It distinguished highway access cases from the normal condemnation case, and holds that a landowner has no property right to visibility from an adjoining highway. In *Troiano*, the owner of a motel at I-70 and E. 46th Avenue was hidden from view when a viaduct was built over East 46th Avenue, yet the court denied compensation. *La Plata*, the court here reasons, did not change this result, as it dealt with the loss of aesthetic views from the property upon construction of “unattractive” power transmission lines through the subject property.

Sheridan Redevelopment Agency v. Knightsbridge Land Co., L.L.C., et al.
Colorado Court of Appeals, May 31, 2007
159 P.3d 259 (Colo. App. 2007)

Urban renewal; opportunity to redevelop own property; public purpose; good faith negotiations.

Three investors entered into a contract to purchase a vacant tract of land in the City of Sheridan. While the property is under contract, the investors discuss their development plans with Sheridan officials. Before closing, Sheridan completes a blight study, and tells the investors that an urban renewal plan is being prepared for a large tract of land which encompassed the property. They also advise that the City was imposing a six-month moratorium on rezoning. Landowners, not deterred, proceeded to close on the property.

Sheridan then creates the Sheridan Redevelopment Agency (“Agency”) and approves a Redevelopment Plan, which includes the property. The Agency solicits redevelopment proposals, and the new owners submit a redevelopment concept for their property. However, the Agency rejects landowners’ proposal in favor of a plan submitted by Miller Weingarten, another private company, to act as master developer of the entire redevelopment area, including the property.

The trial court ruled against the landowners at the immediate possession hearing. The landowners appealed these orders to the Colorado Court of Appeals.

Since the Agency made its blight determination in 2003, C.R.S. § 31-25-107(3)(b), which now mandates that a blight finding be made without regard to the economic performance of the property to be acquired, did not apply to this condemnation action. After examining the statutes governing selection of a proposal for urban renewal, the court of appeals concludes that an individual owner is not given a right under the statutes to redevelop their own property beyond participating in the general developer selection process.

The landowners argues that the Agency did not meet the terms of its own redevelopment plan, which lists as a goal giving private property owners a full opportunity to voluntarily follow an approved redevelopment plan. The court of appeals holds that that the terms of the plan are goals and not strict guidelines. The court holds that the Agency has broad discretion to consider which private developer was most suitable for the redevelopment plan, without regard to the right of landowners to develop its own property. The court of appeals also found no reason to disturb the trial court findings that Sheridan and Weingarten did not make secret deals and that the Weingarten proposal was better for the entire project area and had better funding.

The court of appeals holds that the Agency engaged in good faith negotiations because it obtained an appraisal of \$1,992,000 and made two offers to the landowners (\$2,129,180 and \$2,590,000) exceeding the amount of the appraisal. The court of appeals rejected landowners’ argument that the trial court misapplied the law by emphasizing the absence of an appraisal for the landowners’ counteroffer (\$5,500,000) because such consideration is proper, even if not alone determinative of good faith negotiations.

The court of appeals reverses and remanded on the issue of public purpose. The trial court stated in its order that it could not substitute its judgment for the judgment of the Agency that the property was in a blighted area absent a finding of bad faith. After stating that the facts did not rise to the level of bad faith, the trial court stated that the proceeding could not be dismissed for a lack of public purpose or necessity for the taking. The court of appeals holds that the trial court confused necessity for the taking with public purpose. Public purpose requires an independent judicial examination pursuant to Colorado Const. Art. II § 15 of whether the taking is for a public use, to determine whether the essential purpose of the project is to obtain public benefit. The court remands to the trial court for further findings on this issue.

4. CONSTRUCTION DEFECT/ MECHANIC LIEN

Hoang v. Assurance Co. of America

Colorado Supreme Court, January 8, 2007

149 P.3d 798 (Colo. 2007)

CGL policy; construction defects; occurrence policy; claim of subsequent owner.

This case was addressed by us in 2005 at the court of appeals level, and resolves the issue addressed in at least two series of cases working their way through the appellate courts. The court holds that an insurance company issuing a CGL policy to a homebuilder is liable to pay a homeowner who recovers judgment against the homebuilder-insured for damages that occurred as a result of the builder's negligence during the period of the policy, even though the successful plaintiff is a subsequent purchaser not in privity with the insured builder and the claim is brought after expiration of the policy period. The Court's certiorari statement gave a clue of the court's position:

- Whether liability insurance coverage for property damage is voided if the damage occurs while a claimant's predecessor in interest owns the damaged property, despite the insured being found legally liable to pay all the claimant's damages, including damages attributable to such property damage, a view every other state and federal court has rejected?

The court notes that the policy did not contain an exclusion for claims brought by a subsequent purchaser or that coverage terminated upon sale of the property by the insured's original purchaser. It is clear that the insured's liability extends to subsequent owners, under the *Cosmopolitan Homes* and *Yacht Club II* cases. The court distinguishes and partially overrules its holding in *Browder v. U.S. Fidelity & Guaranty Co.*, 893 P.2d 132, 134 (Colo. 1995), which dealt with a special multi-peril policy that expressly excludes coverage for damage occurring while the property was owned by the insured – whether this distinction bears close analysis may be debated by insurance experts.

Because it decides that the policy covers the claim of the subsequent owner, the court does not address the question of whether the subsequent owner may “step into the shoes” of the grantor under the doctrine of equitable subrogation, a doctrine considered and rejected by the lower court [and by the court of appeals in *Bainbridge, supra*].

Travelers Cas. and Surety Co. v. Village Homes of Colo., Inc.

Colorado Supreme Court, January 8, 2007

155 P.3d 369 (Colo. 2007)

CGL policy; construction defects; occurrence policy; claim of subsequent owner.

This is another Travelers case and a companion case to *Hoang v. Assurance Co. of America*, decided by the Colorado Supreme Court on the same day. In this case, Village Homes had a commercial general liability insurance policy covered by Travelers Insurance. The policy period of coverage was between August 1, 1995 to August 1, 1996. After the policy period had expired, the initial homeowners sold their homes to subsequent buyers who were not owners during the

policy period of coverage. These buyers discovered defects that were already existing, but undiscovered at the time of the purchase. The damage to each home was caused by an ongoing, progressive condition that existed during the policy period. Village Homes paid out damages to the subsequent purchasers.

Travelers denied coverage, and Village Homes sued under the policy for reimbursement. The parties stipulated that the total amount of property damage was \$200,000, and the trial court entered judgment in favor of Village Homes for that amount. The Court of Appeals affirmed the judgment.

The Colorado Supreme Court reiterates the factors from *Hoang v. Assurance Co. of America*: (1) the builder insured itself against liability for damage occurring during the policy period; (2) the damage to the property occurred during the policy period; (3) no exclusion to the policy rendered the insured's policy coverage inapplicable because of a change in the property's ownership; and (4) the builder was liable for the damage to the property. The only real issue before the court was the "Browder" issue: whether an insurer should be liable to cover the claim of a third-party claimant who acquired the property after the expiration of the insurance policy. As in *Hoang*, the Court finds the above factors to be satisfied and rules for the insured under the plain language of the policy.

In Re: Regan

Colorado Supreme Court, February 5, 2007

151 P.3d 1281 (Colo. 2007)

Mechanics' lien claimant not required to have perfected lien claim to make claim under Trust Fund Statute

The Supreme Court splits 4-3 on this question referred by the Tenth Circuit: Must a claimant have a properly perfected mechanic lien in order to assert a claim under the Trust Fund Statute, C.R.S. § 38-22-127? The majority answers in the negative.

Fowler & Peth supplied roofing materials to the Regan, a subcontractor. The roofing materials were incorporated into the improvements, a residential project. The general contractors had paid Regan, but Regan did not pay Fowler. Fowler chose not to file a mechanic lien. Regan's financial situation deteriorated, ultimately filing for bankruptcy.

The bankruptcy court held that Regan's debt to Fowler is non-dischargeable under Section 523 of the Bankruptcy Code because of Regan's failure to hold the funds in trust under C.R.S. § 38-22-127. *Fowler & Peth, Inc. v. Regan (In re Regan)*, 311 B.R. 271, 2004 Bankr. LEXIS 927 (Bankr. D. Colo. 2004). The federal district court, on appeal, reverses, and Regan appeals to the Tenth Circuit. That court in turn refers the question to the Colorado Supreme Court. In a majority opinion by Justice Martinez, the court notes that the mechanics' lien statute provides claimants with three potential sources of recovery: (1) file and foreclose a lien; (2) make a claim on a bond posted by the general contractor, if there is one; or (3) make a claim against a disburser (or your upstream contractor) under the Trust Fund Statute. The court notes that the bond statute, passed at the same time as the Trust Fund Statute, specifically requires compliance within the same time frames as perfecting a mechanics' lien. However, the Trust Fund Statute

has no such requirement. The court concludes from this that a perfected lien is not a condition to proceeding with a trust fund claim.

Justice Rice (joined by Justices Coats and Eid) dissents, arguing that the majority's construction of the statute removes the incentive to record and pursue mechanics' liens and misreads the statute. Section 127(1) provides: "All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, *who have a lien, or may have a lien, against the property.*" Violation of the statute is theft, under the statute. Justice Rice chides the court for ignoring a key phrase in the statute, *i.e.*, "or may have a lien." Under the majority opinion, she argues, this phrase is rendered meaningless.

Comment: While there is still plenty of incentive to perfect a lien, it is also likely that we, and the bankruptcy court, will be seeing a lot more of these claims, which also hold out the hope of triple damages and attorney fees for the winner, under the civil theft provisions in C.R.S. § 18-4-405.

Shams v. Howard

Colorado Court of Appeals, February 8, 2007

165 P.3d 876 (Colo. App. 2007)

Arbitrability of warranty claim; arbitration clause survived expiration of warranty agreement.

Mr. and Mrs. Shams bought a new house from Meadow View Custom Homes, LLC with a one year warranty against construction defects. Over a year after they bought the house, and after expiration of the warranty, the house was flooded. Shams sued Meadow View and Howard, a member and manager of Meadow View. Shams settled with all defendants but Howard who filed a motion to compel arbitration in response to the complaint, which alleged several tort claims as well as a Consumer Protection Act claim. The trial court denied the motion to compel arbitration, and Howard filed an interlocutory appeal.

The Court of Appeals reverses. The court starts by citing *R.P.T. of Aspen, Inc. v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. App. 1996) which held that an arbitration provision survived the termination of the contract by one of the parties. However, the court was unable to locate any Colorado law upholding an arbitration provision in a contract that had expired by its own terms. Therefore, the court reviewed law from outside Colorado and found support for sending this case to arbitration.

Having concluded that the arbitration clause survived the contract's termination, the court then analyzes whether this clause requires arbitration and concludes that it does. The court holds that the claims do not control whether the case should be arbitrated. Rather, it is the facts alleged that count. Here, the allegations in the complaint were all based on events that occurred during construction of the house, a time when the parties were subject to a construction contract which referenced the warranty agreement which, in turn, contained the arbitration clause. Finally, the court holds that the provision is broad enough to encompass the claims alleged here because it

required arbitration when the contractor denies “any” warranty claim. The case is remanded for the trial court to grant the motion to compel arbitration and stay the case pending the arbitration outcome.

Fire Ins. Exchange v. Monty’s Heating & Air Conditioning

Colorado Court of Appeals, February 8, 2007

2007 Colo. App. LEXIS 192, 2007 WL 416340

Subrogation; statute of limitations; Construction Defect Reform Act.

A home built by contractor burns to the ground. Fire Insurance Exchange pays the owner on its policy, and brings a subrogation claim against contractor for defects in the air conditioning system installed in the house. Is the subrogation claim covered by the ninety day period prescribed in the Construction Defect Reform Act, C.R.S. §13-80-104(1)(b)(II), or the two year period prescribed in subsection 1(a) of the statute? The two year statute is the more general of the two. The 90-day statute governs “all claims, including , but not limited to indemnity or contribution , *by a claimant* against a person who is or may be liable to the claimant for all or part of the claimant’s liability to a third person.” While this may *sound like* it fits a subrogation claim, the appeals court reverses the trial court and holds that the insurance company paying a claim is not a “claimant” – the 90 day statute only applies to those claims made by “a claimant” for recovery of the “claimant’s liability to a third person.” Close call for the insurance carrier, and “nice try” but a reversal for the contractor.

Denny Constr., Inc. v. City and County of Denver, Bd. of Water Comm’rs

Colorado Court of Appeals, February 22, 2007

2007 Colo. App. LEXIS 274, 2007 WL 529240

Construction contract; implied covenant of good faith and fair dealing applies when one party has discretion; lost profits for inability to bid on other public contracts too speculative; no costs awarded against government agency for breach of contract.

Denny contracted with Denver Water to construct a building. Denver Water thought the construction took too long and declared a default. Denver Water withheld \$260,000 as retainage under the contract and for unfinished work. Mechanics’ liens ensued. All claims settled before trial except cross claims by Denny and Denver Water against each other for breach of contract. The jury found for Denny and awarded \$1,063,000 in damages, of which, \$845,000 was for lost profits. The trial court denied Denny’s request for an award of costs.

The Court of Appeals reverses the award for lost profits and affirms on all other issues. The court affirms the trial court’s refusal to prevent from considering Denny’s claim that Denver Water breached the covenant of good faith and fair dealing in the construction contract holding that when one party has discretion in its manner of performance, it must exercise that discretion in good faith. The court also holds that Denny’s claim for lost profits was too speculative as a matter of law. The claim was based on the notion that Denny would have earned profits from future public project contracts if its bonding capacity had not been impaired by Denver Water’s actions in breaching the contract. Finally the court affirms the trial court’s ruling denying Denny costs because the government had not implicitly nor explicitly waived its sovereign immunity for such an award, even though this is a breach of contract case.

Thompson v. State Farm Fire & Cas.

Colorado Court of Appeals, March 8, 2007

165 P.3d 900 (Colo. App. 2007)

Property damage; homeowner insurance policy coverage; exclusion for water under ground.

The court of appeals affirms the trial court's finding that damage caused by eruption of an underground domestic water line is not covered under State Farm's "all risk" policy, which excludes losses arising from "water below the surface of the ground." The exclusion is not limited to naturally occurring water, because the policy at issue here has a "lead in" clause which excludes water damage loss "regardless of its cause or origin."

Ingold v. AIMCO/Bluffs, L.L.C. Apartments

Colorado Supreme Court, May 29, 2007

159 P.3d 116 (Colo. 2007)

nforceability of arbitration clause; intertwining doctrine.

This is a landlord and tenant case, outlined below, but is mentioned here for its possible impact on construction litigation. The Colorado Supreme Court overrules the "intertwining doctrine," applied in recent construction cases to require arbitrable claims to proceed with civil litigation with other non-arbitrable claims if the parties and claims are complex and "intertwined." *See, e.g., Eagle Ridge Condo. Ass'n v. Metropolitan Builders, Inc.*, 98 P.3d 915, 920 (Colo. App. 2004) (plaintiff's suit against multiple defendants, less than all of whom were subject to an arbitration agreement, precluded arbitration and required that all claims go to litigation). It orders the arbitrable claims to go to arbitration – even claims that the underlying contract was fraudulently induced. Only a claim that the arbitration clause of the underlying contract was obtained by fraud should be decided by the trial court.

J. A. Walker Co. v. Cambria Corp.

Colorado Supreme Court, May 29, 2007.

2007 Colo. LEXIS 447, 2007 WL 1532137

Enforceability of arbitration clause; intertwining doctrine; fraud in inducement.

This is a companion case to *Ingold*, above, in which the party opposing arbitration claimed that the arbitration clause of a construction contract was induced by fraud. In a decision by Justice Eid, the court holds that C.R.S. § 13-22-101 requires the trial court to determine this issue. Depending on the outcome, the underlying case may then go to arbitration or trial.

Andrews v. Picard

Colorado Court of Appeals, June 28, 2007

2007 Colo. App. LEXIS 1472, 2007 WL 1839886

Claim for negligent construction of house allowed along with breach of contract claim; economic loss rule not applicable.

Andrews hired the defendants to build a home. When the project did not go well, Andrews sued the defendants for defects alleging breach of contract and negligence. Before the case went to

the jury, the trial court directed a verdict on the negligence claim ruling that it was barred by the economic loss rule. The jury returned a plaintiff's verdict of \$40,000 on the breach of contract claim. The trial court later entered judgment in the amount of \$51,559.15 (the \$40,000 plus prejudgment interest), \$113,680.50 in attorneys' fees and \$23,401.10 in costs against Construction Alternatives. Andrews appealed the trial court's directed verdict on the negligence claim.

The court of appeals reverses. The court holds that a homebuilder has a duty to act without negligence in the construction of a home independent of the contract, citing *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 867 (Colo. 2005). Because the homebuilder has this independent duty, the economic loss rule does not bar a negligence claim. The court orders a new trial and holds that it may address both liability and damages. The court notes that the negligence claim may yield different damages because plaintiff may present different or additional evidence of damages; contract analysis uses a more restrictive foreseeability test; and punitive damages may be available. The court cautions against double recovery, however.

Dave Peterson Elec. v. Beach Mountain Builders

Colorado Court of Appeals, July 1, 2007

167 P.3d 175 (Colo. App. 2007)

Mechanic lien; splitting claim for relief; suit on debt; issue preclusion.

This case takes us into the tactics of counsel seeking to collect a debt for a home contractor against a homeowner. In the course of work on a home in Vail, three contractors recorded mechanic lien statements within the time allowed by statute. One, the electrician sued the homeowner for breach of contract, got a default judgment, and, recorded a judgment lien. A second contractor initiated a mechanic lien action, including the electrician as a co-defendant. When the electrician pleaded a cross-claim to enforce his mechanic lien, the plaintiff-contractor moved to dismiss on the grounds of issue and claim preclusion, citing the usual rules against splitting a cause of action.

The electrician first argues that the plaintiff should be barred from raising this "defense" for the first time in a motion to dismiss, because it was not pleaded in the plaintiff's answer to the electrician's cross-claim. He loses on that point, the court relying by analogy on *Bebo Constr. Co. v. Mattox & O'Brien*, 990 P.2d 72, 78 (Colo. 1000), which allowed a party to raise a collateral estoppel defense for the first time in a motion for summary judgment where both parties argue the merits of the defense in the motion and no party is prejudiced.

Of more interest is the holding on the substantive defense of claim preclusion. The court rejects the defense, noting the "long history" of allowing a creditor to (1) obtain a judgment and pursue a judgment lien (at which time the debt merges into the judgment), and (2) foreclose the lien of a deed of trust securing the debt. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1184-85 (Colo. 2003) (mortgagee of land may sue on note alone, or sue to foreclose alone, or do both simultaneously). Indeed, an 1894 decision of the Court of Appeals is dispositive in allowing a mechanic lien claimant to pursue the dual claims consecutively. *Marean v. Stanley*, 5 Colo. App. 335, 38 P. 395 (1894). The mechanic lien statutes support this as well. C.R.S. 38-22-124.

Weitz Co., LLC v. Mid-Century Ins. Co.

Colorado Court of Appeals, 8/9/07

2007 Colo. App. LEXIS 1517, 2007 WL 2264634

Insurance coverage for “ongoing operations” does not cover completed work.

Plaintiff general contractor sued insurance company in action arising out of defective construction of an office building. The roofing subcontractor had purchased an insurance policy that covered liability arising from “ongoing operations.” The general contractor was listed as an additional insured. The building owner discovered water damage several months after the completion of construction and filed suit two years after the subcontractor completed its work. The trial court entered summary judgment in favor of the insurer finding no coverage based on the language of the policy.

The court of appeals affirms. The court compares the term “ongoing operations” with the term “completed operations” both of which appear in the policy. The former term applies to the coverage at issue. The court analyzes the plain and ordinary meaning of the words and also reviews several insurance treatises and ultimately concludes that the policy does not provide coverage here because the damage arose after the subcontractor’s work had been completed.

5. CONTRACTS / SPECIFIC PERFORMANCE / FRAUD

BRM Constr., Inc. v. Marais Gaylord, L.L.C.

Colorado Court of Appeals 6/28/07

2007 Colo. App. LEXIS 1209, 2007 WL 1839799

Scope of arbitrator’s authority to decide whether condition precedent was met and whether that precluded arbitration; arbitrator’s order upheld.

Yet another challenge to an arbitration award fails. BRM contracted to build condominiums on land owned by Marais. Disputes arose at the end of the project with each party claiming the other owed it money. BRM filed suit against Marais and a mechanic’s lien against the property then moved to stay the litigation pending arbitration. The arbitrator awarded BRM over \$400,000. Marais appealed.

On appeal Marais contends that BRM failed to meet two conditions precedent to arbitrating. The court of appeals holds that the issue was properly decided by the arbitrator under the arbitration clause in the parties’ contract which stated that any “claim” arising out of the contract shall be decided by the arbitrator. “Claim,” in turn was defined as interpretation of contract terms. The court holds that the question of whether a dispute falls within the scope of the arbitration provision requires contract interpretation including the condition precedent argument. Therefore, the arbitrator properly decided the question and the court should not overturn that decision.

The court explains that when a party challenges arbitrability, the court must resolve one to three questions (depending on the answers). First, does the agreement contain a valid and binding arbitration provision? Second, if so, does the court or the arbitrator decide whether a particular dispute is within the arbitration provision? Third, if the court decides, then the court must

answer the question. Here, the parties agreed the arbitration provision was valid and binding. The arbitration provision in this case called for the arbitrator to decide whether the dispute at issue should be arbitrated and the arbitrator fulfilled that duty.

Svanidze v. Kirkendall

Colorado Court of Appeals, 8/9/07

2007 Colo. App. LEXIS 1515, 2007 WL 2254628

Corporate authority to transfer real estate; no requirement of shareholder approval for transfer; bona fide purchaser; properly executed deed voidable not void.

Plaintiff Mind Consortium, Inc. owned a bed and breakfast in Winter Park. Svanidze lived in Russia and was the corporation's sole shareholder. According to the articles of incorporation, Whitney Warren was vice president. She and her husband operated the B&B. In 2000, Warren and her husband hired a broker to sell the B&B at auction and Kirkendall was the winning bidder. In 2003, Svanidze and Mind Consortium filed a quiet title action against Kirkendall, Grand Victorian, LLC (the company he formed to hold the property) and the Citywide Banks which held a deed of trust on the property. The trial court granted summary judgment in favor of the defendants and plaintiffs appealed.

The court of appeals affirms and rebuffs three arguments asserted by defendants. Plaintiffs argue that the sale must be set aside because there was no evidence the sale was authorized by the shareholders of the seller. Referencing C.R.S. § 7-103-102(1)(d)-(e) the court holds no such evidence is required because a corporation has that authority unless restricted by the articles of incorporation. Further, the corporation had not recorded any documents that would have alerted third parties to any restrictions on corporate power to convey real estate.

Plaintiffs also point to C.R.S. § 38-30-144 which states that an instrument is "binding and conclusive upon the corporation as to any bona fide purchaser, encumbrancer, or other person relying on such instrument." The court holds that the phrase "relying on such instrument" refers only to "other person" and not the other two classes of parties listed in the same phrase. Purchasers and encumbrancers rely on such instruments by definition. Finally the court rejects the plaintiffs' argument that the sale should be set aside because it was procured by fraud. The court finds that the deed was not forged and complied with the requirements of C.R.S. §§ 38-10-106 and 38-30-113, Mind Consortium had not recorded any document limiting Warren's authority to convey title and the buyer and lender had no notice of any defect. Therefore the deed from the corporation was not void.

Gitlitz v. Bellock

Colorado Court of Appeals, 10/4/2007

2007 Colo. App. LEXIS 1943, 2007 WL 2874406

Irreparable harm element of preliminary injunction test supported by loss of management control of real estate development LLC.

Plaintiff and defendant were in the business of commercial and non-commercial real estate acquisition, development and resale. Gitlitz and Bellock established a number of limited liability companies to develop and hold real estate. Both were managers of each LLC and each party

owned a 49 per cent interest in each LLC. Gitlitz alleged in his complaint that Bellock had arranged for the improper election of a third manager which diluted Gitlitz' control and management of the LLCs. At the time Gitlitz filed his complaint, the third manager was engaged in negotiations with a third party over a \$40 million real estate contract. Gitlitz requested a temporary restraining order to prohibit further negotiations. The trial court granted the TRO but after a hearing on a preliminary injunction concluded that Gitlitz would not suffer irreparable harm and therefore dissolved the TRO and denied the preliminary injunction.

The court of appeals reverses. The court notes that *Rathke v. McFarlane*, 648 P.2d 648 (Colo. 1982) requires trial courts to make six findings before entering a preliminary injunction including finding that the movant will suffer irreparable harm. If money damages will cure the problem, the irreparable harm element is not satisfied. The court notes that whether loss of control of a company constitutes irreparable harm is question of first impression in Colorado. Thus the court reviews the law of other states and finds *Wisdom Import Sales Co. v. Lebatt Brewing Co.*, 339 F.3d 101 (2d Cir. 2003) helpful. The court eventually concludes that a contract right to manage and control a business may constitute irreparable harm; that monetary damages may be inadequate; and that a right to participate in management and control of a company has intrinsic value. Because this evaluation requires both contract interpretation and factual analysis and because the district court made no factual findings, the court of appeals remands for fact finding.

6. COVENANTS / COMMON INTEREST COMMUNITIES

Good v. Bear Canyon Ranch Ass'n, Inc.

Colorado Court of Appeals -- January 11, 2007

160 P.3d 251 (Colo. App. 2007)

Common interest community; restrictive covenants; amendment during initial term.

Good buys a home in Bear Canyon ranch, a common interest community of 50 home sites in Douglas County. The original 1993 covenants allow, in addition to a single family residence, either a guest house or caretaker residence. After Good's purchase, the association amends the covenant in 2002 to prohibit construction of the guest or caretaker structure. Good argues that the covenants may not be amended during their initial fifty-year term, relying on *Mauldin v. Panella*, 17 P.3d 837 (Colo. App.. 2000) and *Johnson v. Howells*, 682 P.2d 504 (Colo. App. 1984). The covenants here provide:

“Term: This Declaration and *any amendments or supplements to it* shall remain in effect from the date of recordation for a period of fifty (50) years. Thereafter, these Covenants shall be automatically extended for five (5) successive periods of ten (10) years each, unless otherwise terminated or modified as provided in this Article.”

Focusing on “thereafter,” Good argues that the covenants may not be amended until after the first 50 year term. The court disagrees. The article on amendments expressly anticipates amendments during the initial 50 year term, and the court relies on this to distinguish *Johnson* and *Mauldin*. By contrast, the provision in *Mauldin* provided:

“These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty (20) years from the date hereof *after which time* said covenants shall be automatically extended for a successive period of twenty years unless an instrument signed by sixty percent of the then owners of the property has been recorded, agreeing to change said covenants in whole or in part.”

In the instant case, and by contrast to Mauldin and Johnson, the terms “any amendments or supplements” contemplates amendments during the first 50 years. The court also notes, without really saying whether it is dispositive, that Good’s position is “inconsistent with” the Common Interest Ownership Act, C.R.S. § 38-33.3-217(1)(a)(II), which states: “If the declaration provides for an initial period of applicability to be followed by automatic extension periods, the declaration may be amended at any time in accordance with [the statute].” Neither does the CCIOA limit amendments to changes to “existing restrictions and covenants,” an argument derived from § 217(4.5) of the quoted statute. Finally, the court rejects Good’s due process challenge for lack of state action.

Woodward v. Bd. of Directors of Tamarron Ass’n of Condo. Owners, Inc.
Colorado Court of Appeals, February 8, 2007
155 P.3d 621 (Colo. App. 2007)

Restrictive covenants; modification of condo unit; breach of fiduciary duty for board’s improper approval of modifications; nuisance caused by modifications.

The Woodwards, owners of a condominium unit, sue the Tamarron Association of Condominium Owners, Inc. (TACO) and their neighbors, the Loudens, based on the association’s approval of (and the Loudens’ construction of) improvements to the Louden unit. The Woodwards contend that the Loudens’ improvements, which consisted of (a) installation of windows in a formerly blind wall facing the Woodwards and (b) construction of a deck, cause the Woodwards to suffer an increase in light and noise into their unit and a loss of privacy. The Woodwards assert claims against the board for breach of the condo covenants and breach of fiduciary duty. They also assert a nuisance claim against all the defendants. The district court grants summary judgment in favor of TACO and awards attorney fees.

In an opinion relying heavily on summary judgment procedure as well as substantive real estate law, the court of appeals reverses. The court cites well established law for the proposition that homeowners’ boards of directors must use their authority to enforce covenants in good faith and in a reasonable manner and must not be arbitrary or capricious. The court then notes that issues of reasonableness and good faith are particularly ill suited to summary judgment. The court then reviews the three factual bases for the Woodwards’ breach of covenants and fiduciary duty claims. The court agrees that summary judgment was appropriate for the first two, failure to give written approval and failure to give notice to the Woodwards, because the undisputed facts showed written plans were in fact approved and the covenants contained no requirement of notice to the Woodwards. However, the court reverses on the issue of whether the improvements were actually constructed in accordance with the plans and whether the improvements were substantially similar to other, previously approved plans. The evidence, in the court’s view, presents disputed issues of material fact. The court of appeals also reverses the district court on the nuisance claim, holding that the essence of the claim is whether the alleged interference is

unreasonable. This is a question for the judge. In light of these holdings, the court also reverses the attorneys' fee award.

Query: By the time this gets back to a decision in the trial court, the window and deck will have been there for three years – will the doctrine of relative hardship play a role?

Rancho Escondido Property Owners Ass'n v. Redstone Management Co.

Colorado Court of Appeals 8/9/07

2007 Colo. App. LEXIS 1516, 2007 WL 2264637

Lien priority; property owners association election of remedies; transcript of judgment precludes foreclosure of lien under declarations; CCIOA lien can be foreclosed.

Property owners' association sued one owner for several years' delinquent assessments. Dispute arose when lender whose deed of trust was recorded after some, but not all delinquencies had accrued sought a ruling from the court that its lien was superior to the association's liens. The association had sued the owner individually, obtained judgments and recorded transcripts of judgment several years after the deed of trust was recorded.

The court of appeals holds that the association's governing documents give the association the right to sue an owner individually or foreclose its assessment lien. When the association sued the owner, it elected its remedy and relinquished its right to foreclose its liens and hence the association's lien priority was based on the time of recording the transcript of judgment. The court points to the recording statute, C.R.S. § 38-35-109, to conclude that because the deed of trust was recorded first, it has priority over the later recorded judgment liens. On the other hand, the court states that the association might have liens under CCIOA that it could foreclose. The court holds that the association maintains the option of collecting the assessments by that method but was, of course, limited to collecting once on any single unpaid assessment. The court remands the case for further proceedings

7. EASEMENTS / ROADS

Tieze v. Killam

Colorado Court of Appeals, January 25, 2007

2007 Colo. App. LEXIS 101, 2007 WL 177677

Private condemnation of way of necessity; U.S. Forest Service inholding; alternate routes; federal special use permit.

This case presents a good summary of the legal and environmental hurdles one must overcome in order to build on a patented mining claim located entirely within federal lands. In 1993, Tieze purchases such a mill site, an inholding in Summit County completely surrounded by U.S. Forest Service land. An “. . . abandoned, unpaved mining road” (the “Itaska Route”) runs from the Webster Pass road (a public road) to the Itaska Mill Site owned by Killam, across the Killam property and through Forest Service land to the Tieze property. In 2000, Tieze began improving the Itaska Route without permission of the Forest Service or the Killams. He applied to Summit County for a minimum lot size variance for construction of a residence. This was conditionally

granted, upon a showing that he has access to a public road meeting minimum road standards (14' wide, appropriate road base, turnouts). Tieze then applied to the Forest Service for a special use permit under 16 U.S.C. §§3101 *et seq.*, the Alaska National Interest Land Conservation Act (ANILCA) to build such a road. This process includes meeting the requirements of a whole host of federal environmental statutes and the Federal Land Policy and Management Act, which are nicely categorized in the opinion. The necessary Environmental Assessment requires an outline of all possible routes of access. The EA listed six possible routes of access to the Tieze property, but selected the Itaska Route as best meeting the regulatory and statutory criteria. The special use permit was approved, conditioned on obtaining legal access across the Itaska Mill Site owned by Killam. Tieze then brought this action to condemn such a private way of necessity.

Killam defends by arguing that Tieze lacks necessity because federal law (ANILCA) provides a right to access. The condemnee may defend a private condemnation action by showing an alternate route over property owned by someone else. The acceptable alternate route must exist, and the prospective condemnor must have a present enforceable right to use it. The court here holds that the rights under federal law offered to an inholder do not give Tieze the present right to use any road. This legal defense requires a showing that the condemnor has alternate legal access over his own property or over the prospective condemnee's property by virtue of an existing common law easement. The lack of such existing right, or a presently enforceable easement across lands of third parties, means that Tieze has a right to condemn to gain legal access to his landlocked parcel.

8. ESTATES / PARTITION

No reported cases

9. FORECLOSURE, DEBTOR-CREDITOR, RECEIVERS, LENDER LIABILITY

Fisher v. 1st Consumers Funding, Inc.

Colorado Court of Appeals, February 22, 2007

160 P.3d 321 (Colo. App. 2007)

Mortgage broker; credit agreement statute of frauds; creditor.

The Fishers refinance their house with 1st Consumers, a mortgage broker. According to the Fishers, the broker agreed to provide loan proceeds exceeding the current loan balance, *i.e.*, providing a "cash out" of \$5,000. The Fishers planned to use the extra money to repair Mr. Fisher's truck which he used for his business. When the loan closed and the extra \$5,000 failed to materialize, the Fishers sued, asserting claims for fraud, breach of contract, breach of fiduciary duty, intentional interference with contract and violation of the Colorado Consumer Protection Act. 1st Consumers filed a motion for summary judgment on the basis that Fishers' claims were barred by the statute of frauds for credit agreements, C.R.S. § 38-10-124. Because the Fishers were unable to produce any written commitment from 1st Consumers to provide the \$5,000, the trial court granted the summary judgment motion.

On appeal, the Court of Appeals considers whether 1st Consumers falls under the statutory definition of a "creditor" and is therefore qualified for protection under the statute of frauds. It

does not. The court reviews § 38-10-124(1)(d) which lists a number of types of financial institutions to which the statute of frauds applies, including “mortgage companies.” However, the court concludes that mortgage brokers are excluded, relying in part on the definitions in C.R.S. § 12-61-906 (5) and (6). A mortgage broker is not a “creditor” because it is not a “financial institution” which offers to extend or extends credit under a credit agreement, and therefore is not entitled to the protection of the credit agreement statute of frauds. The court reverses the trial court’s grant of summary judgment and remands the case.

Fifth Third Bank v. Jones

Colorado Court of Appeals, July 12, 2007

168 P3d 1 (Colo. App. 2007)

Cashier’s check; risk of loss.

Who bears the risk of loss when a friend of a borrower sends a cashier’s check to borrower’s bank in order to pay off a mortgage loan that is in foreclosure? In 2001, pending foreclosure, bank receives a cashier’s check in the mail for payment on the owner-borrower’s account. The bank’s “loss mitigation representative” noted the receipt of the check (without noting the amount or the identity of the drawee or the identity of any endorsees) and forwarded it to the payoff department. The check was then lost. Bank notified the owner-borrower of the loss. Neither the bank nor the owner-borrower could produce a copy of the check. The rich aunt, who had provided the funds, is now dead. On disputed facts, the trial court finds at trial that the check was in fact received, and that it was “at least” for an amount sufficient to pay the debt. The appeals court affirms, holding that the trial court properly relied on C.R.S. §4-3-310(1)(a) in finding that the cashier’s check was “taken for an obligation” and therefore is to be treated as though it were a cash payment. The bank’s argument that the check was not “taken for an obligation” because the loan was in foreclosure is rejected. Title to a cashier’s check or money order passes to a depository bank upon delivery. The risk of loss is therefore transferred to the bank, and it, not the borrower, can avail itself of the remedies under C.R.S. §4-3-312 to seek redress from the bank obligated on the cashier’s check.

Ameriquist Mortgage Co. v. Land Title Ins. Co.

Colorado Court of Appeals, July 26, 2007

2007 Colo. App. LEXIS 1400, 2007 WL 2128203

Equitable subrogation; refinance; mistake.

For the student of lien priorities and the continuing struggle by courts to deal with the inherent conflict between the priority of liens as determined by our recording statutes and as modified by common-law equitable principles, this case is interesting reading. The court holds that a refinancing lender (Ameriquist) is entitled to equitable subrogation when its title agent (not a party here) failed to disclose the existence of a deed of trust on a prior home equity loan (owned by Land Title through a series of assignments). The facts are interesting, as much for what the court does not discuss as for those that are highlighted – and perhaps underlines the confusion created by our Supreme Court in the seminal case of *Hicks v. Londre, supra*.

Owners had the following liens on their upscale home in 2002 (rounded for clarification):

1st – Washington Mutual: \$72,000

2nd - Land Title home equity line (by assignment from lender): \$150,000

3rd – RE Services: \$260,000. [Upon issuance of this loan, Land Title agreed to subordinate its loan to the new loan for \$260,000 – which placed it behind Washington Mutual and RE for a total senior debt of \$332,000.]

In 2003, owners defaulted on the second and third liens. RE foreclosed, Land Title bought its deed of trust to protect its lien position, and was paid the value of the RE loan (approximately \$260,000) when a third party bidder purchased at the foreclosure sale. Land Title then commenced foreclosure on its deed of trust, and got a public trustee's deed following its bid of \$152,000. Owner did not redeem – for reasons discussed below. Land Title then sold the property to a third party for \$780,000.

In the meantime, owners went to Ameriquest during the RE foreclosure for a \$550,000 refinance. Ameriquest required a first lien position, and “retained” Northwest Title to close the deal and issue a loan policy of title insurance. The opinion recites a number of actions by Northwest Title prior to closing to review title, including its review of fraudulent statements to Ameriquest by the owners, but does not say (perhaps it is implied) that Northwest actually searched title, either through a tract system or by reference to the public records. In any event, assuming some effort was made to search title, the Land Title lien was not disclosed on the title work, and the new loan for \$550,000 closed. The Washington Mutual first lien of \$72,000 was paid, \$299,000 was paid to the public trustee to redeem the RE certificate of purchase, and the owners took “cash out” in the amount of \$149,000. As the court notes, with tongue in cheek, the owners “chose not to pay” the Land Title deed of trust.

Fortuitously, the Ameriquest deed of trust was not recorded for several months after the loan closing. As a result, it did not receive notices of the pending foreclosure by Land Title on the \$150,000 home equity line. When Ameriquest learned that a third party claimed title, it brought this action to quiet title in its lien and seeking first lien priority under the doctrine of equitable subrogation. The Court of Appeals affirms the finding of the trial court that Ameriquest had a valid first lien on the property under the doctrine of equitable subrogation. The decision does not describe why Land Title would not be prejudiced – a condition for equitable subrogation under the 2005 decision in *Hicks v. Londre*. After all, Land Title was initially junior to \$330,000 in liens, and Ameriquest's loan, subrogated to the senior lien position of Washington Mutual and RE, was for \$550,000. A finding of prejudice was probably avoided by a stipulation in the trial court that Ameriquest would only seek to recover from the net proceeds (after paying Land Title) of Land Title's sale to the third party investor. In other words, if subrogation is applied, Land Title is still paid in full and Ameriquest is paid “the major part” of its lien. Subrogation is held to be appropriate because Ameriquest's title agent made a mistake, Ameriquest was not negligent and Ameriquest had no actual knowledge of the intervening Land Title deed of trust.

Note: Dicta in the case about a holding in a 2007 Washington case that seems to support equitable subrogation even if a refinancing lender has actual knowledge of an intervening lien will only serve to create more litigation in this area of mortgage finance law. The Washington case quotes with favor language from a law review article by Nelson and Whitman to the effect that liberal application of equitable subrogation in all mortgage refinancings would save consumers money by preventing foreclosures and by reducing title insurance premiums. “. . . [A] liberal equitable subrogation doctrine can save billions of dollars by reducing title insurance premiums . . . These savings eventually benefit homeowners because title insurance premiums

are mostly passed on to them. . . .” Perhaps this judgment is better made by the legislature than a court of equity.

Green Tree Servicing, LLC v. U. S. Bank Nat’l Ass’n, N.D.

Colorado Court of Appeals, July 26, 2007

2007 Colo. App. LEXIS 13981, WL 2128201

Equitable subrogation; duty to release lien upon payoff; sophisticated lender; negligence.

In the aftermath of last year’s *Hicks v. Londre*, we get two more cases on equitable subrogation. In this case, borrower had a first mortgage with Chase and a home equity line secured by a second mortgage with U.S. Bank. Borrower sought to get a new loan to refinance these two loans. The new lender, Conseco (later assigned to Green Tree) got a title commitment reflecting the first as well as the second lien held by U.S. Bank. On or before closing, Conseco got an oral quote as to the payoff from U.S. Bank, but did not seek a written payoff statement. At the closing, it cut a check for the balance on the home equity line. The check was credited to the account, but was not accompanied by any letter instructing U.S. Bank to close its account. The record reflects that if U.S. Bank had received such a letter, it would have frozen the account, pending instructions from the borrower. Three weeks later, U.S. Bank sends a fax to Conseco inquiring whether the credit line should be closed and the lien released. It got no response. Conseco records its new deed of trust, without getting a release of the U.S. Bank trust deed. Borrower then draws an additional \$28,000 on the home equity line with U.S. Bank. She then defaults on that obligation as well as the Conseco loan. U.S. Bank forecloses. Conseco gets notice, but does not redeem.

Conseco, through its assignee Green Tree, filed a complaint to quiet title, seeking to void the U.S. Bank lien under C.R.S. §38-35-124, or in the alternative for an order declaring it senior to U.S. Bank under the doctrine of equitable subrogation. The first claim was dismissed, because the statute (which requires a lender to release its lien within 60 days of payment) does not provide anything other than a damage remedy, which was not requested, even assuming that U.S. Bank had a duty to release its lien. As to equitable subrogation, the trial court refused the equitable relief, finding that Conseco was a sophisticated lender, and was negligent in failing to protect its own interests, in the face of its actual knowledge of U.S. Bank’s intervening lien. Under the holding in *Hicks v. Londre*, 125 P.3d 452, 457-58 (Colo. 2005), equitable subrogation may be denied, even in circumstances where granting the remedy would not prejudice an intervening lienor, if “. . . the party seeking subrogation acted with knowledge, negligence, or a degree of sophistication such that application of the doctrine would be inequitable.” These rulings are affirmed by the Court of Appeals, with the court emphasizing the actual knowledge and negligence of Green Tree and its assignor.

Note: The court could just as well denied equitable subrogation because granting the remedy would prejudice U.S. Bank, as it would be junior to a new loan with a larger principal balance. *Hicks*, 125 P.3d at 456.

10. JUDGMENTS / FRAUDULENT TRANSFER

People v. Jensen

Colorado Court of Appeals, 10/18/07

2007 WL 3025302

Theft of real property; possession or physical control not necessary; exercising control over deed with intent to deprive grantor of his interest sufficient.

Defendant helped victim post bail by cosigning appearance bond. The victim gave defendant the warranty deed by which the victim acquired title to his house with the understanding the defendant would return it once the victim complied with the bond conditions. During execution of numerous documents for this transaction, victim signed a quitclaim deed conveying his house to the defendant's wife, but the victim claims he did so unknowingly. The quitclaim deed was later recorded. After the victim complied with the bond conditions, he asked for return of the warranty deed and reconveyance of the property, but the defendant refused. Defendant was then charged and later convicted by a jury of one count of theft of real property with a value of \$15,000 or more, a class three felony.

On appeal defendant contends he did not violate the theft statute (C.R.S. § 18-4-401(1)) because he never possessed or exerted physical control over the property. The court of appeals, however, concludes that the statute's phrase "obtains or exercises control" is satisfied by conveyance of real property through a quitclaim deed with intent to permanently deprive the grantor of his interest in the property. The defendant also argued that the quitclaim deed was either void or a lien. The court concludes that because of its conclusion, above, it does not have to address this issue. The court also does not explain why the defendant was convicted when the quitclaim deed conveyed the property to his wife.

No reported cases

11. LEASES / EVICTION

Copeland v. Lincoln

Colorado Court of Appeals, May 17, 2007

166 P.3d 245 (Colo. App. 2007)

Constructive eviction; leaking gas; statutory remedy not exclusive.

Under the common law, any disturbance of a lessee's possession by a lessor which renders the premises unfit for occupancy for the purposes for which they were leased, or which deprives the lessee of the beneficial enjoyment of the premises constitutes a constructive eviction, provided the lessee vacates the premises within a reasonable time. This case concerns a leased house in Larimer County. During a very cold stretch of weather, the tenants' carbon monoxide alarm activated. Subsequent inspection showed that the furnace was defective and needed to be replaced. Landlord was notified, and apparently promised to replace the furnace, but did not commit to a time. The original notice of defect was given on a Friday; tenant had partially vacated by the following Wednesday when landlord showed up with repair personnel. The parties did not contest that a constructive eviction had occurred, but landlord argued that tenant's exclusive remedy lay with C.R.S. § 38-12-104, a section of the security deposit statute that

provides for voiding of a lease and return of the security deposit if landlord fails to act within a specified time after receiving notice of a hazardous circumstance such as a gas leak. Specifically, the lease is void and tenant “may opt to vacate” if the repair is not accomplished within seventy-two hours of notice, excluding weekends and holidays.

Landlord changed the locks and seized certain goods and furniture that tenant had yet to remove, and sued for future rents. The court affirms the trial court’s ruling that a constructive eviction had occurred, and that the notice and remedy provisions of C.R.S. §38-12-104 are not exclusive and do not preclude a common law claim for constructive eviction.

Ingold v. AIMCO/Bluffs, L.L.C. Apartments

Colorado Supreme Court, May 29, 2007

159 P.3d 116 (Colo. 2007)

Enforceability of arbitration clause; intertwining doctrine.

Tenants vacate their Boulder apartment due to the foul smell caused by a ruptured sewer pipe and attendant mold and bacteria problems in the soil lying beneath the apartment. Tenants sue the landlord, its holding company, and its agent for eight different tort claims, as well as violation of the Colorado Consumer Protection Act and violation of the security deposit statute. Defendants move to dismiss for lack of subject matter jurisdiction, based on an arbitration clause in the lease which provides for arbitration of “[a]ll disputes between the parties concerning the provisions of this Lease . . .” The trial court agrees the claims must be arbitrated, and dismisses the claims against all Defendants without prejudice. Tenant brings an original proceeding to the Colorado Supreme Court.

At oral argument, the Defendants confessed error as to the dismissal of the claims against the landlord’s parent company and its agent, as they were not parties to the lease. The court affirms the trial court on the remaining claims against the landlord, holding that all claims against the landlord are subject to arbitration. This includes a claim for fraud in the inducement, because tenant did not argue that there was any misrepresentation as to the arbitration clause. Only the wrongful withholding of the security deposit claim is excluded from the court’s order, as that is a statutory claim not subject to arbitration.

Finally, although many of the same claims based on identical facts will be litigated against the parent company and the local property manager/agent, the court takes this opportunity to overrule the “intertwining doctrine” recognized in *Sandefur v. District Court*, 635 P.2d 547 (Colo. 1981). This is in accord with *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985) (intertwining doctrine inconsistent with text of Federal Arbitration Act), but against the trend of cases before our court of appeals, which has repeatedly followed the holding in *Sandefur*. See, e.g., *Eagle Ridge Condo. Ass’n v. Metropolitan Builders, Inc.*, 98 P.3d 915, 920 (Colo. App. 2004) (plaintiff’s suit against multiple defendants, less than all of whom were subject to an arbitration agreement, precluded arbitration and required that all claims go to litigation). The court sets forth standards under which a trial court should consider staying all or portion of pending litigation pending the completion of arbitration.

Hartsel Springs Ranch of Colorado, Inc. v. Cross Slash Ranch, LLC
Colorado Court of Appeals, September 6, 2007
2007 Colo. App. LEXIS 1752, 2007 WL 2493885
Evictions; contempt remedy.

Hartsel Springs Ranch leases land to Cross Slash Ranch for cattle grazing. CSR defaults on payments, and Hartsel brings a forcible entry and detainer action against CSR and certain agents of CSR. It gets a judgment for possession. Defendant removed its cattle. However, two months later the cattle were allowed to resume grazing. Hartsel obtains a contempt citation against CSR and certain of its agents, and the trial court finds the defendants in contempt, directing removal of the cattle and awarding attorney fees. As a matter of first impression, the court of appeals affirms, holding that the court's order for possession is "sufficiently directive and mandatory" to justify relief under the remedy of contempt and C.R.C.P. 107.

Red Junction LLC v. Mesa County Board of County Commissioners
Court of Appeals, September 20, 2007
2007 Colo. App. LEXIS 1853, 1007 WL 2728747
Property taxes; abatement; claim preclusion.

The court of appeals affirms a final order of the Board of Assessment Appeals, affirming the denial of the Board of County Commissioners of a second abatement-refund petition by a property owner in one tax year. The court holds that subsequent abatement petitions for a given property for the same tax year are barred by claim preclusion. Nothing in the property tax statutes either authorizes or prohibits multiple petitions in a given year. However, the court holds that the policy behind the doctrine of claim preclusion justifies its application to this type of administrative proceeding. The court agrees with the BAA that the taxpayer could have adjudicated all of its claims in the initial petition.

12. MALPRACTICE / PROFESSIONAL LIABILITY & CONDUCT

Alexander v. Anstine
Colorado Supreme Court, February 20, 2007
152 P.3d 497 (Colo. 2007)
Insolvent corporation; fiduciary duty to creditors; liability of counsel for aiding and abetting.

The case arose when a company that sold warranties for new homes discovered it had purchased fraudulent insurance policies making the home warranties worthless. The company's attorneys advised filing bankruptcy but the company decided to try to find replacement coverage. After taking a few steps in that direction with the help of the attorneys, bankruptcy proved inevitable. The bankruptcy trustee sued the company's president for breaching his fiduciary duties to the company's creditors. The suit also named the company's attorneys for aiding and abetting that activity. A jury awarded \$2 million in damages and found the attorneys one percent liable. The trial judge amended the verdict to hold the attorneys and the president jointly liable under C.R.S. § 13-21-111.5(4).

The court of appeals upheld the verdict and the trial court's ruling except for overturning the joint and several liability holding. The Supreme Court reverses, giving a careful review of the scope of duties owed by an insolvent corporation to its creditors. It is a limited, not a general, fiduciary duty. The court notes a statute and prior case allowing a claim against officers or directors that distribute corporate assets to themselves to the detriment of creditors – a preference. “Under the common law, a director of an insolvent corporation is deemed to be a trustee for it and its creditors and, as such, owes a duty to the corporation and its creditors not to divert corporate property for his or her own benefit.” The court concludes holds that the bankruptcy trustee did not have standing to bring the claims for breach of fiduciary duty. This also disposes of the aiding and abetting claims against the company's attorneys. The court, in addition, takes the unusual step of affirmatively vacating the portion of the court of appeals decision dealing with the liability of attorneys for aiding and abetting a client in a breach of fiduciary duty. So far so good – for now.

Note – in 2006, Colorado amended its corporate code to provide that directors do not have a fiduciary duty to creditors. C.R.S. § 7-108-401(5). This case pre-dates this statute, and the Court expresses no opinion as to whether this statute will apply to an insolvent corporation.

Hewitt v. Rice

Colorado Supreme Court, March 19, 2007

154 P.3d 408 (Colo. 2007)

Fraudulent transfer claim; counterclaims against counsel; malicious prosecution; *lis pendens* as a “proceeding.”

Rice, an attorney, successfully defends a mountain bank in a trial involving lender liability claims, and obtains a large judgment for the bank against Hewitt. See *Hewitt v. Pitkin County Bank*, 931 P.2d 456 (Colo. App. 1995). After several attempts at collection on the judgment fail, counsel learns that Hewitt has acquired apartment houses in Denver under a corporate name. Indeed, on further examination, it appears that Hewitt individually had acquired title to the properties at closing, then immediately conveyed title to a controlled entity. However, no lien attached, as no transcript of judgment had been recorded in Denver.

Counsel then brings a new action against Hewitt and his entity under the Colorado Fraudulent Transfers Act (CUFTA), C.R.S. § 38-8-101 *et seq.*, alleging *inter alia* a lack of reasonably equivalent value and the intent to hinder or delay creditors. A notice of *lis pendens* is recorded. Hewitt, armed with California counsel, counterclaims for slander of title, intentional interference, abuse of process, and recording a groundless and frivolous claim. No counterclaim is brought to expunge a spurious document under C.R.C.P. 105.1, nor is a motion filed under C.R.C.P. 105(f) to remove the property from the effect of the *lis pendens*. A year later, Hewitt pays the underlying judgment (in excess of \$90,000), and the bank files a motion to dismiss the fraudulent transfer claim and asks for “release” of its *lis pendens*. The counterclaims remained.

When Hewitt amended its counterclaims later to add counsel as counterclaim defendants, counsel withdrew. The bank then settles the counterclaims, paying Hewitt \$900,000 for a full release, but carving (former) counsel out of the settlement and release. The trial court then rules for counsel and dismisses the abuse of process and related tort claims on statute of limitations grounds.

Hewitt then sues counsel for malicious prosecution, alleging that, considering its large settlement, the CUFTA claims and the recording of the *lis pendens* had been terminated successfully in its favor. Typically, an element of a malicious prosecution claim is a favorable termination of a prior proceeding on the merits in favor of the malicious prosecution plaintiff, as well as malice, etc. This claim is dismissed by the trial court on a Rule 12 motion, the court noting that a settlement is not a “favorable termination.” The court of appeals affirmed. Hewitt argues on appeal that the “favorable termination” element should not apply in a malicious prosecution case based on the recording of a *lis pendens*, and that a “totality of circumstances” test should be adopted to allow a party that favorably settles a claim to recover for malicious prosecution.

As to the former claim, the court holds that an exception in the Restatement of Torts allowing malicious prosecution claims to proceed without favorable termination of a prior proceeding in cases where the “prior proceeding” is *ex parte* does not apply to a claim based on the recording of a notice of *lis pendens*. The Court holds that the recording of a notice of *lis pendens* is a nonjudicial proceeding. The Court notes that the effect of dropping the favorable termination requirement for a malicious prosecution claim would make it the functional equivalent of an abuse of process claim – which had already been dismissed because Hewitt was barred by the statute of limitations.

Finally, the court holds, in line with the weight of authority, that a party who settles a claim may not bring a malicious prosecution claim against the adversary’s counsel as a former “prevailing party.” In other words, in this context, a settlement cannot be “favorable termination” of a case for the purpose of a malicious prosecution action.

Note: Because counsel initially won on the basis of a motion to dismiss, no court has addressed the merits of the underlying CUFTA claim. Although it passes this author’s smell test, the counterclaims brought on several uncomfortable years of litigation for counsel.

13. PREMISES LIABILITY / TRESPASS / NUISANCE

Lombard v. Colo. Outdoor Educ. Center, Inc.

Colorado Court of Appeals, January 25, 2007

2007 Colo. App. LEXIS 98, 2007 WL 177686

Liability to invitee; actual knowledge of dangerous condition; building code violation.

A public school teacher attending a conference at a privately owned mountain camp falls while climbing a ladder to bunk space in her cabin. She is covered by worker compensation, and her employer sues the owner of the camp. The ladder was built as part of the cabin in 1981, pursuant to designs of an “architectural designer.” The plans were approved by the county, and a

certificate of occupancy was issued after inspections. There are 43 similar ladders in cabins throughout the camp, and the camp experienced no injuries in the 17 years prior to the teacher's fall. Experts opined that the ladder violated the building code in effect at the time, and that a stairway was required.

Question: Does this code violation in and of itself create liability under the premises liability statute, C.R.S. § 13-21-115(2), as a "dangerous condition about which the owner actually knew, or should have known"? No. The premises liability statute, being in derogation of common law, is strictly construed. The court refuses to morph "should have known" into a form of constructive knowledge triggered by the doctrine of negligence *per se*, and holds that negligence *per se* is precluded by the express language of the premises liability statute. In any event, the court adds, the property had been approved for occupancy by a county building inspector, establishing compliance with the law.

Hawley v. Mowatt

Colorado Court of Appeals, April 5, 2007

160 P.3d 421 (Colo. App. 2007)

Trespass; encroaching vegetation; damages; attorney fees; adverse possession claim.

The Hawleys sue their next door neighbor, Mowatt, for trespass. Mowatt's landscaping encroached onto the Hawley property. Mowatt counterclaims for adverse possession and trespass. The case is tried to a jury, which is unusual for an "equitable" case involving title to property. At the close of the case, the trial court directed a verdict against Mowatt on his adverse possession counterclaim. The jury finds for the Hawleys on the trespass claim and awarded \$15,000 in actual damages and \$15,000 in punitive damages. The trial court awards costs to the Hawleys but denies their motion for attorney fees.

The court of appeals affirms the trial court on all issues except the denial of attorney fees. The first issue addressed by the court is whether the Hawleys could recover trespass damages through the date of trial or only through the date they filed their complaint. Here, the trespass had continued through the date of trial; no Colorado cases have addressed the issue. The court distinguishes three Colorado Supreme Court cases that appear to limit damages to the time the complaint was filed, but the court of appeals concludes that the language of these cases is dicta or used in a different context. Cases from other states go both ways, but the court here decides that the Hawleys could claim damages through the date of trial.

The court next holds that trespass damages can include diminution in market value, costs of restoration, loss of use of the property and discomfort and annoyance. However, "pure" emotional distress damages are not appropriate. Finally, the court remands the case so the trial court can reconsider its decision to deny attorneys' fees. The court of appeals notes that Mr. Mowatt failed to present any evidence on several elements of his adverse possession claim. The court points out that this might support a finding that the counterclaim was groundless, entitling the Hawleys to attorneys' fees under C.R.S. § 13-17-102.

Antolovich v. Brown Group Retail, Inc.

Colorado Court of Appeals, 8/23/07

2007 Colo. App. LEXIS 1750, 2007 WL 2389808

Tax assessments admissible to prove real estate value; expert not required to be appraiser to testify to property values; trespass requires intent.

This case involved groundwater contamination to Denver's Cook Park neighborhood caused by the dumping of hazardous waste at the nearby Redfield Rifle Scope plant. The trial took three months in late 2003 and on appeal the court of appeals issues a lengthy opinion analyzing nearly a dozen issues, three of which deal with real estate law. In the first, the court holds that the trial court properly admitted county tax assessments as evidence of the value of the homes involved. The court chooses not to follow *Bankers Trust Co. v. International Trust Co.*, 113 P.2d 656 (1941) which held tax assessments to be unreliable indications of value. The court of appeals notes that the law has changed since 1941 and now requires tax assessors to determine the actual market value of the properties they evaluate.

On the next issue, the plaintiff homeowners challenge the trial court's decision to allow the testimony of an expert for defendant Brown who was not an appraiser but nonetheless testified regarding property values and criticized the homeowners' damages expert. The court holds that the witness qualified as an expert under *People v. Shreck*, 22 P.3d 68 (Colo. 2001) because of his qualifications and the evidence offered.

Finally, the court turns back the homeowners' argument that the trial court gave an erroneous jury instruction that required a finding of intent on the trespass claim. The homeowners argue that *Hoery v. United States*, 64 P.3d 214 (Colo. 2003) eliminated the requirement to prove intent in a trespass claim. The court reviews the *Hoery* case and others along with the Colorado Jury Instructions and concludes that intent is still an element of a trespass claim. The homeowners also object to the trial court's inclusion of the phrase "the usual course of events" in the jury instructions. The court cites the *Hoery* case which stated "a landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." The court reviews other cases as well and concludes that the instruction was not erroneous and any jury confusion was cleared up by the trial court's responses to jury questions during deliberations.

14. PROPERTY TAXATION AND ASSESSMENTS

Kenna v. Huber

Colorado Court of Appeals, June 14, 2007

2007 Colo. App. LEXIS 1114, 2007 WL 1704139

Conservation easement tax credit limitation; tenants in common; \$100,000 limit; retroactive.

Two married couples own land as tenants in common. In January, 2000, they donate a conservation easement worth \$154,700. They split the credit, with each couple taking a credit of

\$77,350. The Department of Revenue does not object in 2000 or for most of 2001; but in December, 2001, the Department issues a regulation limiting a conservation easement credit to a total of \$100,000 for tenants in common. When the Department issued notices of deficiency for 2000 and 2001, litigation ensued.

The Department and the taxpayers filed cross motions for summary judgment. The district court ruled in favor of the taxpayers, reasoning that the statute in effect at the time the Department promulgated the rule did not limit conservation easement credits to \$100,000 for tenants in common. The regulation was an improper extension of the statute, C.R.S. § 39-22-522, and thus, void.

The court of appeals agrees that the regulation is void, but remands the case for further proceedings. The court of appeals points out that the Department interpreted the statute in at least two different ways -- first allowing the tax credits, then reversing course with its regulation. The court also finds it significant that the statute mentions several classes of taxpayers for whom the \$100,000 limit applies, but tenants in common are omitted. A 2006 amendment to the statute, which sets forth tax credit limits for tenants in common, is noted as further proof that the prior statute did not apply to tenants in common. Finally, the court remands the case so that the district court can consider whether the 2006 amendment applies retroactively.

Skyland Metropolitan Dist. v. Mountain West Enterprise, LLC

Colorado Court of Appeals, June 14, 2007

2007 Colo. App. LEXIS 1118, 2007 WL 1704177

Calculation of availability of service fees; perfection of tax lien; voluntary payment rule; spurious lien claim asserted against metro district.

Developers and two metropolitan districts disagreed over the amount of taxes the developers should pay on several undeveloped lots. In particular, the dispute was over the assessment of “availability of service fees” (ASF) which are charged against an undeveloped lot before it is hooked up to utility service. The District sues to foreclose its asserted lien for the fees. The developers counterclaim for an accounting, damages for unjust enrichment and to remove a spurious lien pursuant to C.R.C.P. 105.1. After trial, the trial court enters judgment in favor of the District for approximately \$4,000, representing unpaid ASF and late fees. The trial court then entered an award of attorneys’ fees and costs in favor of the District in the amount of approximately \$140,000.

In a lengthy opinion, the court of appeals first considers a challenge by the developers to the court’s subject matter jurisdiction. They argue, based on the Special District Act, that special districts must enforce their lien in the same manner as one enforces a mechanic lien. The mechanics lien statute requires sending a notice of intent to record a lien. The district here did not follow this procedure, and the court sees no reason why it should. Tax liens are perpetual and always perfected, eliminating the notice requirement. (Ditto, we might add, for homeowner association assessments). The court then launches into an extended discussion of the proper method to calculate ASF, ultimately concluding the trial court erred in awarding judgment to the districts on these claims.

As for the developers' counterclaims, the developers had claimed unjust enrichment for payments they had made in the past. The court holds this claim is barred by the voluntary payment rule. The developers had made the payments without protest, not under duress and with full knowledge of the material facts. The court upholds the trial court's dismissal of the developers' spurious lien [sic] claim, finding it barred by the Colorado Governmental Immunity Act. Although the claim was asserted under C.R.S. § 38-35-109(3) [liability for recording a forged or groundless instrument, as opposed to C.R.S. § 38-35-201 dealing with the removal of spurious liens], the claim resembles the tort of slander of title, and as such requires notice to the public entity as required by the CGIA.

Red Junction LLC v. Mesa County Board of County Commissioners

Court of Appeals, September 20, 2007

2007 Colo. App. LEXIS 1853, 2007 WL 2728747

Property taxes; abatement; claim preclusion.

The court of appeals affirms a final order of the Board of Assessment Appeals, affirming the denial of the Board of County Commissioners of a second abatement-refund petition by a property owner in one tax year. The court holds that subsequent abatement petitions for a given property for the same tax year are barred by claim preclusion. Nothing in the property tax statutes either authorizes or prohibits multiple petitions in a given year. However, the court holds that the policy behind the doctrine of claim preclusion justifies its application to this type of administrative proceeding. The court agrees with the BAA that the taxpayer could have adjudicated all of its claims in the initial petition.

15. TAX SALES / TREASURER DEEDS

No reported cases.

16. TITLES / TITLE INSURANCE / QUIET TITLE ACTIONS

People v. Cohn

Colorado Court of Appeals, March 8, 2007

160 P.3d 336 (Colo. App. 2007)

Spurious lien; "counterstrike" mechanic lien; offering of false instrument for recording; intent to defraud.

Cohn records admittedly spurious mechanic liens against the properties of six members of a homeowner association board, stating on five of the lien statements a phony claim for \$1,000. The court holds that the evidence was sufficient to allow the case to go to a jury on charges of offering a false instrument for recording in the first degree, a felony, C.R.S. § 18-5-114(1). This requires proof that one records in the public records, with the intent to defraud, a written instrument relating to or affecting real property, knowing that the filing contains a material false statement or information. The key issue raised by the defendant on appeal was evidence of an intent to defraud. Where the defendant admitted that his liens were spurious, that he had not worked for the members of the board and that they owed him no money, and that the liens were recorded as a "counterstrike" to persuade the board to release a lien the association had filed

against property of the defendant's brother, the court finds sufficient evidence of intent to defraud, as the defendant sought to obtain a benefit to which he (or his brother) was not entitled. Defendant's admission that he knew the liens were "spurious" was sufficient to support an inference that he possessed an intent to defraud.

Calhan Chamber of Commerce v. Town of Calhan

Colorado Court of Appeals, May 3, 2007

166 P.3d 200 (Colo. App. 2007)

Quiet title; abandoned railroad line; municipality.

This case involves the ownership of former railroad property within a municipality. The Chicago, Rock Island and Pacific Railroad Company line originally went through the town of Calhan northeast of Colorado Springs. The Town held a patent to the underlying fee simple estate. Rock Island received a grant to build a rail line from the federal government under the authority of the General Railroad Right of Way Act of 1875. In 1980, the Interstate Commerce Commission recommended abandonment of the total Rock Island rail system, and the federal district court in Chicago approved the abandonment. What makes the case interesting is that the same court approved a 1984 motion allowing the sale of the disputed portion of the rail line by quit claim deed from Rock Island to a third party, and the Calhan Chamber of Commerce claims by subsequent deed from that party. The trial court enters summary judgment for the Town, finding that it owns the property in fee simple.

Under the Railroad Right of Way Abandonment Act, 43 U.S.C. § 912, when a court decrees abandonment of a railroad grant, title to the property located within a municipality automatically vests in that municipality. This vesting occurs regardless of whether the city has title to the underlying fee. Section 912 was enacted "to dispose of the federal government's reversionary interests in the railroad rights-of-way". The interest of a railroad under the 1875 Act is an easement, not a limited fee. The appeals court holds that the 1980 abandonment order and the 1984 order approving a sale are not inconsistent, as only a small portion of the sale land was located in a municipality. Finally, the court declines to apply the doctrines of estoppel and laches against the Town, and affirms the trial court.

Svanidze v. Kirkendall

Colorado Court of Appeals, 8/9/07

2007 Colo. App. LEXIS 1515, 2007 WL 2264628

Corporate authority to transfer real estate; no requirement of shareholder approval for transfer; bona fide purchaser; properly executed deed voidable not void.

See Section 5 for summary.

Hinojos v. Janzen

Colorado Court of Appeals, 10/18/07

2007 Colo. App. LEXIS 2035, 2007 WL 3025290

Quiet title action; abandoned railroad right of way; deed construction; extrinsic evidence; conveyance of grantor's entire interest.

In 2002 the Union Pacific Railroad abandoned some of its right of way in Morgan County and this scramble for title to the ground ensued. Multiple claimants appeared and the trial court sifted through chains of title stretching back to the 1880s. In the words of the court of appeals, the trial court issued “an articulate, thorough, and well-reasoned order” which the court of appeals affirms.

The court reviews a number of century old deeds which conveyed land around the right of way “subject to” or “excepting” the railroad. The court concludes that the language is ambiguous and therefore looks to extrinsic evidence. At the time of the deeds (in the early 20th Century) the law held that abandoned railroad rights of way reverted to the federal government. (The Supreme Court later reversed itself in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) holding that railroads held only an easement subject to the rights of the underlying property owner upon abandonment.) Thus, the court reasons, the landowners at the time understood that they could not convey the land underlying the right of way. Further, there was no evidence that the grantors intended to convey anything less than their entire interest in the property and no heir of any of the grantors had ever come forward to make a claim. Ultimately the court concludes that the landowner whose chain of title included conveyances of the southern part of the quarter quarter “except all land lying north and west of” the right of way owned the abandoned right of way.

Landowners to the north of the right of way had filed three notices of their interest in the disputed property and argued that the notices gave them “color of title.” The court rejects that argument stating the color of title refers to an attempted but defective conveyance. The notices were not conveyances but merely naked claims. Finally, the court disposes of the claim of a lessee from Union Pacific. The court holds that the leasehold terminated upon UP’s abandonment of the right of way.

17. ZONING / LAND USE CONTROL

***Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*
Colorado Court of Appeals, February 22, 2007
160 P.3d 297 (Colo. App. 2007)**

City’s decision on selling real estate subject to open meetings law, decision not judicial or quasi-judicial, no due process violation.

The Walsenburg city council decided to sell 2250 acres of ranch land. The gravel company made an offer and later another party made a higher offer with conditions. The gravel company’s complaint alleged that just before the council meeting addressing which offer to accept, the other party notified the mayor that they would remove the conditions in their offer. The council met in a closed session, then held the public meeting at which time council approved the higher offer.

The gravel company sued alleging that the council decided to accept the other offer in the closed meeting, then rubberstamped that decision in the open meeting. The trial court dismissed the complaint and the court of appeals reverses holding that the complaint stated a claim under the open meetings law. The court of appeals upholds the trial court’s dismissal of plaintiff’s claims

under C.R.C.P. 106(a)(4) because the council's actions were not judicial or quasi-judicial. The court of appeals also upholds the trial court's dismissal of plaintiff's due process claims based on the council's failure to accept plaintiff's offer because it was submitted first.

Colorado Mining Ass'n v. Bd. of County Comm'rs of Summit County

Colorado Court of Appeals, March 22, 2007

2007 Colo. App. LEXIS 487, 2007 WL 851745

Local government regulation of mining; Colorado Mined Land Reclamation Act; preemption.

In 2004, Summit County adopts amendments to its land use code, allowing mining and milling in certain zoning districts, provided that "adverse impacts of such operations are adequately mitigated." The amendments established "performance standards" for air quality, noise, and visual and scenic quality. One provision prohibits cyanide and other toxic or acidic ore-processing reagents in heap or vat leach applications. Another describes performance standards for designated chemicals and hazardous materials.

By the same token, the state's Mined Land Reclamation Act, C.R.S. § 34-32-101, *et seq.*, establishes a permitting scheme for mining operations and created the Mined Land Reclamation Board to set performance standards for reclamation plans. The question is whether Summit County's code provisions are preempted by the State's regulatory scheme. The trial court held that preemption applied to void both the cyanide ban and the local performance standards. The court of appeals agrees that the performance standards are pre-empted, but reverses as to the cyanide ban, holding that the latter is not a "reclamation standard," but rather a ban on certain types of mining.

The opinion contains a fine review of the law relating to preemption where potentially conflicting laws are enacted by various levels of government. In essence, local regulation may take place so long as the regulations do not "irreconcilably conflict" with a state scheme. Preemption is examined by looking at express language in a state statute favoring preemption, implied preemption by statutes showing a legislative intent to "occupy" a given field by reason of a dominant state interest, and Operational preemption. One judge dissents, agreeing with the trial court that the state's legislative scheme evidences an intent to make the development and regulation of a mining industry a matter of statewide concern. Another preemption case is headed for our Supreme Court, see *Town of Carbondale v. GSS Properties*, 140 P.3d 53 (Colo. App. 2005, *cert. granted* July 17, 2006).

JJR 1, LLC v. Mt. Crested Butte, a municipal corporation

Colorado Court of Appeals, March 22, 2007

160 P.3d 365 (Colo. App. 2007)

Protected view; CRCP 106(a)(4) deadlines; civil rights claim.

JJR owns a lot with unobstructed views of Crested Butte mountain. The court notes that it is an "absentee owner." A neighbor files for a building permit on its adjoining land. Notices of a public hearing to consider the permit application were properly sent and posted. The hearing was for the purpose of approving "design review" under the local ordinance, which provides:

“. . . in order to preserve the natural beauty of the town and to ensure that growth and development is in accordance with the wishes of the residents and property owners thereof and to obtain the following objectives all [new construction] shall be subject to design review, *taking into account the following concepts*: . . . (2) To ensure that the location and configuration of structures are visibly harmonious with their sites and surrounding sites and structures, and do not *unnecessarily block scenic views* . . .”

JJR did not attend the meeting, of which it had no knowledge, and the permit was granted. JJR later discovers the construction project, which threatened to block its view of the mountain. JJR seeks review under CRCP 106(a)(4) and demands a declaratory judgment that approval of the permit was an abuse of discretion, in light of the ordinance quoted above. These two claims were properly dismissed because JJR missed the 30-day deadline in Rule 106. The court also properly dismissed a section 1983 civil rights claim on summary judgment, as the above ordinance did not give JJR a vested property right in its unobstructed view. The design review ordinance only requires that the blocking of an existing view “be considered.” Finally, the court affirms the trial court’s dismissal of a facial challenge to the constitutionality of the town’s notice provisions on vagueness grounds.

City Council of the City of Cherry Hills Village v. South Suburban Park and Recreation Dist., Colorado Court of Appeals, March 22, 2007
160 P.3d 376 (Colo. App. 2007)

Exclusion of municipal property from metropolitan district; fair market value payment.

Cherry Hills Village, at an election held under C.R.S. § 32-1-502, voted to seek exclusion from the South Suburban Parks and Recreation District; and, after the election, filed a petition in the district court for exclusion from the District. The District defended on the basis that Cherry Hills could not provide comparable services; in the alternative, it sought damages based on the fair market value of District facilities within the municipality. The appeals court affirms the trial court’s ruling that Cherry Hills could provide for comparable services for its citizens, but reverses the trial court’s damage award on technical grounds and remands for further findings. Although the statute directs the trial court to craft an exclusion plan that is “fair and equitable” and references fair market value of facilities as one factor to be considered, this is not a minimum requirement, and the trial court is not required to reimburse the District on that basis. Since the trial court implicitly held to the contrary, the matter is remanded for further findings.

Droste v. Bd. of County Comm’rs of the County of Pitkin,
Colorado Supreme Court, May 14, 2007
159 P.3d 601 (Colo. 2007)

Development moratorium; statutory interpretation; implied power.

This case involves whether a county can impose a moratorium on zoning approvals under C.R.S. § 30-28-121 for longer than six months if it holds a public hearing. The trial court and the Court of Appeals said yes, and the Colorado Supreme Court affirms.

We reviewed the decision of the court of appeals in 2005. *Droste v. Bd. of County Comm’rs*, 141 P.3d 852 (Colo. App. 2005). The Droste family owns a large parcel of land in Pitkin County. In

2003, after denying several development applications by the Droste family, the county passed an emergency ordinance creating a temporary moratorium on approving development applications. The stated purpose was to allow time to study what zoning and development regulations would be required to comply with the state's requirement that a master plan be created for the county by January 2004. The ordinance recited that 60 days should be sufficient time for the study and provided that the moratorium remain in effect "until formally terminated" by the county. The county ultimately decided to end its moratorium after ten months. The Drostes sued the County to challenge the moratorium, and the trial court granted summary judgment in favor of the County. The Court of Appeals affirms.

The Colorado Supreme Court affirms and holds that the moratorium of ten-months duration, confirmed through a public hearing and adopted in connection with a master plan, is authorized by the Land Use Enabling Act, C.R.S. § 29-20-101 et seq. The court relies on the broad authority for land use regulation in the Act, along with C.R.S. § 30-28-107, which mandates comprehensive studies for a master plan, to give the county implied authority to adopt temporary moratoria for a reasonable period of time sufficient to prepare master plans.

The court holds that the six month limit in § 30-28-121 only applies to temporary emergency rules enacted without a hearing, whereas the Land Use Enabling Act necessarily implies the authority to adopt moratoria for a longer period of time. The court limits its holding by noting that the length and conditions of the moratorium are subject to the protection of property owners against uncompensated takings as provided in C.R.S. §§ 29-20-201 to 204.

Justice Eid dissents, criticizing the majority for ignoring the rule that counties have only those powers that are expressly granted to them by the Colorado Constitution or by the general assembly. The Land Use Enabling Act has a provision stating that where other procedural or substantive requirements for land use planning are provided by law, such requirements should control. C.R.S. § 29-20-107. It follows that the 6 month limit in C.R.S. § 30-28-121 should control.

Justice Eid notes that the hearing for the temporary moratorium in this case was conducted *after* the moratorium was adopted. More importantly, the length of a "reasonable time" adopted by the majority has little resemblance to the 6 month limit mandated by statute. If the counties need a temporary moratorium longer than six months to protect the environment before they finish a master plan, they should get it from the Colorado legislature, not the judiciary.

Jackson & Co. (USA), Inc. v. Town of Avon

Colorado Court of Appeals, June 28, 2007

166 P.3d 297 (Colo. App. 2007)

Modified duplex used for short term rentals violated plat and ordinance prohibiting lodging uses.

Jackson & Co. purchased a duplex lot in the Wildridge subdivision in Avon and constructed a building with six separate individual bathroom-bedroom suites. The building had one kitchen. Jackson obtained a business license for "short term lodging" and advertised the property for short term rentals with a preference for weekly stays. Several months after Jackson completed the

building and began renting it Avon passed an ordinance defining a “lodge” as a building with a common kitchen occupied by paying guests for 31 days or less. Jackson filed a declaratory judgment action alleging that its use of the property was a lawful nonconforming use. Avon counterclaimed for ordinance violations and for a permanent injunction. The trial court ruled in favor of Avon and Jackson appealed.

Sierra Club v. Billingsley

Colorado Court of Appeals 6/28/07

166 P.3d 309 (Colo. App. 2007)

Rule 106(a)(4) challenge; deference to agency; Open Records Act; no sanction to agency wrongfully withholding document except attorneys’ fees and costs.

Sierra Club sued the Boulder County Board of Adjustment over its approval of a special use permit allowing a cement plant to burn used tires for fuel. The cement plant had obtained a permit to burn the tires in 1990 and did so until 1993. In 1996, Boulder County amended its Land Use Code to provide that special use permits would lapse under certain conditions. In 2002 the cement plant notified the County that it planned to resume burning tires. Billingsley, on behalf of the County notified the cement plant that its permit had not lapsed because the 1993 amendment did not apply retroactively. Sierra Club appealed that decision to the Board of Adjustment (BOA) which upheld Billingsley’s decision.

The Sierra Club then appealed to the district court under Rule 106 (a)(4). The district court ruled that the 1993 amendment did apply and remanded the case for a factual determination of whether the period of inactivity was sufficient to cause the permit to lapse. Billingsley investigated and concluded there had not been complete inactivity. On appeal, the BOA again affirmed and this time the district court did too. The court of appeals affirms concluding that the zoning provisions at issue are ambiguous but the BOA’s interpretation is reasonable and thus the court defers to that reasonable interpretation.

The other issue on appeal is whether Billingsley violated the Colorado Open Records Act by not disclosing certain documents regarding the matter. The County claimed attorney-client privilege on some documents and Sierra Club complained that the County did not produce all documents that it should have and that it did not produce a privilege log describing the withheld documents. Three years after the initial document request, the County produced additional documents prompting Sierra Club to allege that the outcome of the administrative hearing might have been different if it had been able to present the withheld documents. The court of appeals holds that the Open Records Act contains no such remedy and besides, these documents would not have made a difference. The court holds that the only sanction a court may levy against a government agency for wrongfully withholding documents is an award of attorneys’ fees and costs.

The court of appeals affirms. The court reviewed the Wildridge subdivision plat from 1981 and found that the lot owned by Jackson was designated for a “duplex dwelling unit.” The plat went on to state that “dwelling” excluded hotels and lodge units. Likewise, a 1979 Avon ordinance in effect at the time the subdivision plat was recorded excluded hotels and lodge units from its definition of “dwelling.” The court found that Wildridge was intended to be a residential area and Jackson’s operation was a business and not compatible.

Bd. of County Comm'rs for Larimer County v. Gurtler

Colorado Court of Appeals 8/9/07

2007 Colo. App. LEXIS 1520, 2007 WL 2264636

Assessing fines for failure to comply with order of contempt for violating land use code; due process does not require hearing where party fails to raise factual issues.

In 2003 the County sued Gurtler for operating a junkyard in violation of the county land use code. After a bench trial, the court ordered Gurtler to remove certain items and screen others from view. Four months later, the court held another hearing and found Gurtler had willfully violated the prior order, set a deadline for compliance and established fines for each day he failed to comply after the deadlines. Gurtler's appeal from those orders ended in affirmance. In 2006 the County filed a motion for entry of judgment and the trial court did so in the amount of \$147,800.

In this appeal, the court holds that most of the grounds raised by Gurtler were disposed of in the prior appeal and the court refuses to revisit those issues. The court also rejects Gurtler's argument that the trial court violated his due process rights by failing to hold a hearing before entering judgment. The court also rejects that claim holding that he was entitled to a hearing only if his response to the County's motion raised a genuine issue of material fact regarding his compliance with the court's order. Because Gurtler failed to do so, the court affirms the trial court's judgment

Reeves v. City of Fort Collins

Colorado Court of Appeals, 10/4/07

2007 Colo. App. LEXIS 1946, 2007 WL 2874396

Rule 106(a)(4) challenge to city's action; standing; land use code classified those who submit comments and appear at hearings as "parties in interest."

Reeves challenged a decision of the Fort Collins City Council in approving a development project eight blocks from his house. In a rule 106(a)(4) action, the district court dismissed Reeves' complaint for lack of standing because he was not the applicant, not an adjacent land owner nor an owner within the 750 foot "notice area." On appeal, the court of appeals reverses.

The court reviews the Fort Collins Land Use Code and notes that it creates a class of persons denominated "parties in interest." A person can become a "party in interest" by appearing at a hearing or submitting comments. Reeves alleges he did both. Further, Reeves alleges that the city council acted arbitrarily and capriciously and abused its discretion when it approved a project that violated the applicable height restrictions. Based on its interpretation of the land use code and the facts alleged by Reeves, the court concludes that Reeves has a legally protected interest in ensuring the lawfulness of a development project and therefore has standing to challenge the city's actions.

Fbs/Gpa