

REAL PROPERTY LAW – 2009 Annual Survey of Colorado Law

For Continuing Legal Education in Colorado, Inc. (publication pending)

Frederick B. Skillern, Esq.

Montgomery Little & Soran, PC

Greenwood Village

FREDERICK B. SKILLERN, ESQ. is a director and shareholder in the law firm of Montgomery Little & Soran, PC, practicing in real estate and related litigation, mediation, arbitration, and appeals, and serves as an expert witness in cases dealing with real estate, professional responsibility, and attorney fees. Before joining Montgomery, Little & McGrew in 2003, Mr. Skillern was in private practice in Denver, specializing in real estate and business litigation with Carpenter & Klatskin, P.C. and Isaacson, Rosenbaum, Woods & Levy, P.C. He served as a district court judge for Colorado's Eighteenth Judicial District from 2000 through 2002. Mr. Skillern is a regular speaker at continuing legal education seminars and is currently serving as chairman of the CBA Real Estate Law Section Council. He is the author and continuing editor of a chapter on the law of future interests in Krendl's *Colorado Methods of Practice* (4th ed., West, 1998), and is the author of four chapters on the Colorado court system and civil trial practice in the 5th edition of that treatise. He has served on the Civil Rules Committee of the Colorado Supreme Court since 1987 and has been a member of the CBA Title Standards Committee since 1995. Mr. Skillern is a graduate of Dartmouth College and received his law degree at the University of Colorado in 1976, where he served on the board of editors of the *University of Colorado Law Review*.

Mr. Skillern would like to thank Michael Milstein, Esq. of Foster, Graham, Milstein & Calisher LLP for his work in the preparation of several early versions of this paper, which were derived from his presentations at the 2009 Case Law Update at the CBA/CLE Real Estate Symposium in Keystone, Colorado, and the Fall Update in October, 2009.

BROKERS

Agreement to Compensate Unlicensed Broker; Finder's Fee

In *Amedeus Corp. v. McAllister*,¹ the Colorado Court of Appeals applied the familiar rule that a person who is not licensed as a broker may not recover a commission, even if the fee is couched as a “finder’s fee” or a consultant fee. In this case, a landowner refused to pay two business consultants an agreed-upon finder’s fee for introducing the landowner to a buyer. The introduction led to the purchase of the landowner’s real property.

The court held that any agreement to compensate the consultants was illegal and unenforceable because the business consultants were not licensed real estate brokers. The court did not recognize a distinction between a consultant or a “finder” who merely introduces a prospective buyer to a seller in a real estate transaction, and a real estate broker who closes a transaction as a broker for the buyer or seller. The legislative history of C.R.S. § 12-61-101(2) shows an intent to enlarge and extend the definition of real estate broker to include the full spectrum of activities related to the sale of real estate. A “real estate broker” includes one who, in consideration of compensation by fee, commission, salary, or anything of value or with the intention of receiving or collecting such compensation, negotiates the sale or purchase of real estate or a business or a business opportunity when such act or transaction involves, directly or indirectly, any change in the ownership or interest in real estate or in a business or business opportunity that owns an interest in real estate. The term “negotiate,” as it pertains to licensing, includes the act of merely bringing two parties together for a real estate transaction.

BOUNDARIES AND ADVERSE POSSESSION

Adverse Possession; Mineral Rights Pass with Decree; Rights to Oil and Gas Royalties

The court of appeals does a splendid job of summarizing the law of adverse possession in a familiar fact setting containing a special twist. In *Beaver Creek Ranch, L.P. v. Gordman*

¹ *Amedeus Corp. v. McAllister*, 2009 Colo. App. LEXIS 221 (Feb. 19, 2009).

Leverich LLLP,² two ranches (Rinehart Ranch and Youberg Ranch) were divided by a barbed wire fence erected in the early 1900s. Leverich owned the Rinehart Ranch. Beaver Creek owned the Youberg Ranch. Beaver Creek's old fence, dating from at least the 1940s, encroached on approximately 167 acres of Rinehart Ranch property. The fence encroachment started in 1949 when the Bureau of Land Management (BLM) commissioned a resurvey that resulted in a substantial shift of the legal boundary line between the two ranches. The fence was never moved to reflect the BLM resurvey.

As early as 1978, Rinehart repeatedly advised Youberg (principal of Beaver Creek) that the fence line was not on the boundary between the ranches. Rinehart threatened legal action if a definitive agreement to relocate the fence could not be reached. Youberg responded to Rinehart by letter in 1981, stating, "I don't want any of your land." *Id.* at *4.

The plot thickened when Leverich (successor to Rinehart) entered into a lease agreement with EnCana to allow oil and gas extraction from the disputed property. The EnCana well was located on property to which Leverich held paper title, but located entirely on the Youberg Ranch side of the fence. EnCana construction crews destroyed part of the fence to obtain access for drilling equipment. Beaver Creek commenced an action to quiet title to the disputed property, including the EnCana well site, based on adverse possession. The district court entered judgment in favor of Beaver Creek, determining it had acquired title to the disputed property by adverse possession. The district court found that the adverse possession began in 1949 upon the completion of the BLM resurvey. The court of appeals affirmed based on this finding. Since title passes after the running of 18 years of adverse possession, anything stated in the 1981 letters between the parties was irrelevant, as title had already vested in Beaver Creek's predecessor by that date.

Although a government resurvey cannot impair the rights of private landowners acquired under the original survey,³ there was evidence in the record that Rinehart knew the fence encroached on her land when she first purchased the property in 1954. Thus, the evidence supported the district court's finding that adverse possession commenced in 1949.

² *Beaver Creek Ranch v. Gordman Leverich LLLP*, 2009 Colo. App. LEXIS 1009 (May 28, 2009).

³ 43 U.S.C. § 772; *Everett v. Lantz*, 252 P.2d 103, 107-108 (Colo. 1952).

To add to the spoils for the adverse possession, the court held that title to any mineral rights passed with title to the surface under adverse possession if the rights had not previously been severed. Beaver Creek, therefore, was entitled to recover damages for any sums paid to Leverich under the EnCana lease, including restitution in the amount of all royalty payments, a signing bonus, and additional sums for damage to the surface.

Adverse Possession of Water rights; Abandonment

In *Archuleta v. Gomez*,⁴ Archuleta brought suit against his neighbor, Gomez, seeking damages and an injunction to restore water rights and delivery of such irrigation water to his land through existing ditches. Gomez argued that he was the owner of the dedicated water rights under a claim of adverse possession.

In Colorado, water rights, like interests in real property, may be adversely possessed. However, adverse possession of a water right can only occur after such water has been diverted from a stream or aquifer pursuant to adjudicated water rights. Prior to such diversion, all water in the stream or aquifer belongs to the public, dedicated to the use of the people of Colorado, and subject to appropriation.

In order for Gomez to succeed on his claims of adverse possession, he had to prove the recognized elements of adverse possession. He also had to demonstrate that he made beneficial consumptive use of such water. Mere interception and diversion of the deeded irrigation water, even if all other elements of adverse possession were present, was not sufficient. Furthermore, such beneficial consumptive use of the water had to be in an amount above that which the claimant (Gomez) had available to him, and which was actually used, under his own decreed water rights during the statutory period.

The Colorado Supreme Court also noted that in order for Archuleta to succeed on his claims for injunctive relief and restoration of the water rights and ditches, he had to make a factual showing that he did not abandon all or a portion of his dedicated water rights to the stream. A presumption of abandonment requires (1) non-use for the statutory period (ten years), and (2) the intent to abandon. Once abandoned, water rights cannot be revived through an injunctive action or through a claim of adverse possession.

⁴ *Archuleta v. Gomez*, 200 P.3d 333 (Colo. 2009).

Ultimately, the supreme court held that neither Archuleta nor Gomez sustained their burdens of proof in the injunction or adverse possession actions, and remanded the case to the district court (Water Division) for further inquiry and quantitative findings as to (1) the beneficial consumptive use of the water actually made by the parties; (2) how much, if any, was adversely possessed by Gomez; and (3) how much, if any, had reverted to the stream as a result of abandonment by Archuleta.

REAL ESTATE AND CONSTRUCTION CONTRACTS

Fraud; Economic Loss Rule; Independent Duty

In a tort action related to a public works project, the court of appeals in *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*,⁵ affirmed the dismissal of a general contractor's claims against the city's project manager (Kitzman) and its engineer design professionals (C&B) for post-contractual concealment of certain design deficiencies relating to drainage. The court based its holding on the economic loss rule.

The district court granted the engineers' motion, concluding that the claims against these defendants were barred by the economic loss rule. The district court concluded that the "post-contractual" duties alleged by Hamon were encompassed within the implied covenant of good faith and fair dealing in the design professionals' contract. The district court dismissed the contractor's claims for fraudulent concealment and negligent misrepresentation because the duties that the defendants allegedly breached were "encompassed within the contract." *Id.* at *8.

The court of appeals affirmed, rejecting Hamon's argument that a claim for fraud in the performance of a contract necessarily is based on an independent duty. It is the source of the duty allegedly breached that controls the application of the economic loss rule. Claims of fraud relating to the performance of a contract are barred by the economic loss rule unless they are based on an independent duty. C&B and Kitman both had contractual duties to consider change orders and the cause of delay in good faith. Thus, the fraud claim alleged by Hamon was based

⁵ *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 2009 Colo. App. LEXIS 715 (April 30, 2009).

on duties that did not differ from contract duties. The duty to refrain from deliberate concealment of material facts existed only because of the parties' interrelated contracts.

The conclusion that there was no independent duty is reinforced by decisions involving disputes between parties to construction contracts. In *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004), the Colorado Supreme Court held that contracts between various parties involved in a project must be considered as a whole, and that the economic loss rule applies when the claimant seeks to remedy an economic loss that arises from interrelated contracts.⁶

The court of appeals concluded that (prior to the existence of the contracts) C&B had no duty as a matter of law to inform Hamon (during the bidding process) of flaws in the drainage design. The court of appeals analyzed the difference between non-feasance and malfeasance. C&B's alleged failure to disclose was non-feasance because there was no duty to inform Hamon. In cases of non-feasance (like an alleged failure to disclose), the injured party must show the existence of a special relationship where the party was committed to performance of an undertaking. No such relationship existed in this case.

Misrepresentation by Developer; Authority of Arbitrator; Attorney Fee Award Contingent on Specific Findings

Homeowners brought claims against a developer for negligent misrepresentation and violations of the Colorado Consumer Protection Act, arising out of undisclosed plans to build an unsightly structure near a series of new homes. The case, *Treadwell v. Village Homes of Colorado*,⁷ was subject to arbitration by the terms of the respective contracts of each homeowner. The arbitration clause provided that arbitration was mandatory, and that the arbitrator could award fees to the prevailing party if it found that the conduct of the losing party was egregious. The matter went to arbitration, and the arbitrator awarded more than \$500,000 in damages on the various claims, and then awarded \$150,000 in attorney fees. The developer paid the damages but challenged the fee award in court, arguing that the arbitrator exceeded her authority because she did not make a finding that the conduct of the developer was "egregious."

⁶ The policies underlying the application of the economic loss rule to commercial parties are unaffected by the absence of a one-to-one contractual relationship. Contractual duties arise just as surely from networks of interrelated contracts as from two-party agreements. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004); *Makoto USA, Inc. v. Russell*, 2009 Colo. App. LEXIS 1899 (Nov. 25, 2009) (dismissing civil theft claim based on breach of contract under the economic loss rule in context of an asset purchase agreement).

⁷ *Treadwell v. Village Homes of Colorado*, 2009 Colo. App. LEXIS 1901 (Nov. 25, 2009).

The court of appeals held that the district court properly confirmed the award, including the fee award.

An arbitrator need not follow the law when ruling on the merits, but the scope of the arbitrator's authority is governed by the terms of the contract for arbitration. This presents a dilemma for arbitrators, which the court characterized in this way:

The line between the unreviewable merits of arbitral awards and the enforceable limits upon arbitrators' powers is most easily blurred where arbitrators must interpret and apply contractual language. Because parties do not empower arbitrators to misconstrue contracts, losing parties could always claim the arbitrators exceeded their powers by failing to follow the contractual preconditions to the challenged awards.

Id. at **5-6.

The panel came down on the side of confirmation of the ruling, based on its sense that there was evidence by which the arbitrator could have made the finding. A dissenting opinion by Judge Gabriel thoroughly explores the issues and the state of Colorado law on this delicate subject, arguing for a remand to the arbitrator for further findings. Left unstated is the next curious point: What about the fees for the appeal?

COMMON INTEREST COMMUNITIES AND COVENANTS

Unsigned Declaration; Statute of Frauds Applies to Declaration of Covenants

In *Abril Meadows Homeowner's Association v. Castro*,⁸ the developer filed (1) a declaration of protective covenants (unsigned), and (2) a plat consisting of two lots (signed and acknowledged). The developer sold one of the two lots. The developer/HOA then claimed that the purchasers of the lot violated several covenants, and the HOA began imposing fines against the purchasers and filed a lien against the purchasers' property for \$601,226. The fines and lien

⁸ *Abril Meadows Homeowner's Association v. Castro*, 211 P.3d 64 (Colo. App. 2009).

were reduced to \$115,910 by the HOA. The HOA commenced an action to foreclose its lien and sought a judgment for \$263,025 against the purchasers.

The district court held that the declaration, although unsigned, was enforceable because (1) the plat was signed, (2) the purchasers' deed referenced the declaration, and (3) the purchasers were aware of the declaration. The district court found that the purchasers violated the declaration when they constructed an addition to their tool shed without HOA approval; however, the district court reduced the fines against the purchasers to \$100, finding the amount imposed by the HOA to be unconscionable. The district court denied the HOA's request for attorney fees and awarded costs *to the purchasers* because the purchasers had offered \$1,000 to settle prior to trial.

The court of appeals reversed. An unsigned declaration is unenforceable because it contravenes the requirements of C.R.S. § 38-33.3-201. A common interest community is created only by recording a declaration executed in the same manner as a deed. A deed requires the signature of the grantor. C.R.S. §§ 38-10-106 and -108. The statute of frauds requires the contract for sale of any interest in land to be in writing. C.R.S. § 38-10-108. When a declaration is filed without the declarant's signature, it is invalid. A developer's signature on the plat is not a substitute for a signature on the declaration. Subdivision plats must be signed separately. C.R.S. § 30-10-410. A reference to the declaration in the deed, and the purchasers' awareness of the declaration, does not compensate for the absence of a signed declaration. The court of appeals remanded the case for further proceedings, including the purchasers' request for attorney fees under C.R.S. § 38-33.3-123.

CCIOA — Development Rights; Time Limit Requirement

The complexity of the law surrounding common interest communities has made it especially important that developers attend carefully to the issues of phasing their development, and particularly the reservation of future development rights. In *Miller v. Curry*,⁹ the purchasers of a lot in a residential subdivision brought suit against the HOA and developer, claiming that they were attempting to wrongfully apply recorded covenants applicable to an original filing to owners of property in a new filing. The purchasers sought a declaration that the developer had

⁹ *Miller v. Curry*, 203 P.3d 626 (Colo. App. 2009).

violated certain provisions of CCIOA by failing to reserve “development rights” as to the later filing.

The purchasers argued that references to “subsequent filings” in the original declaration constituted development rights that were not properly reserved. The court of appeals agreed, finding that the “subsequent filings” language referred to lots that were not yet created; thus, they constituted development rights. Under CCIOA, development rights must be properly reserved by affixing a time limit within which the rights must be exercised. The filing declaration, however, did not include the statutorily required time limits, and the court held that the defendants failed to properly reserve the development rights.

The original declaration contained indicators that the developer may create additional units. While additional lots were contemplated at the time of the filing of the declaration, those lots were not yet part of the association, and had yet to be created. Therefore, they represented units that could be created in the future, making them “development rights.” According to the court of appeals, if the development rights had been properly reserved, then they would have become subject to the declaration of covenants.

The fact that the original covenants had a provision for automatic renewal for successive periods of 10 years after an initial 25-year term did not suffice as a “time limit” for the exercise of future development rights. CCIOA requires that a declarant reserve development rights and include a time limit within which each of those rights must be exercised. Since the covenants failed to impose any limit, the court of appeals concluded that the developer failed to properly reserve its development rights.

The court of appeals indicated that the district court on remand should consider the developer’s contention that purchasers were estopped from asserting any breach of CCIOA because they sat idly by while the developer developed and sold many of the lots within a new plat. “If the trial court determines that the defense of laches is not applicable, then it should order the development rights in filing 3 void ab initio.” Presumably, this means that the lots in the third filing are not subject to the covenants, but does not mean that the subdivision plat for this filing is void. A holding declaring the plat to be void would introduce a host of unpleasant and expensive problems for the homeowners.

CCIOA — Conveyance of Unit by Association; Requirement of Approval of 67 Percent of Owners; Contract and Lis Pendens Not Spurious Documents

In *Platt v. Aspenwood Condominium Association*,¹⁰ a homeowner association initiated a renovation project that included creating and selling two new condominium units out of property that was part of the general common elements. In 2006, the Platts entered into a contract with the HOA to buy one of the new units. The contract was not approved by a 67 percent vote of the unit owners in the HOA. The HOA believed that 67 percent of the owners had to vote *to approve* the contract with the Platts.

The Platts sued the HOA for breach of contract, anticipatory breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation. The Platts also recorded a notice of lis pendens. The association moved to have the contract declared void, to have the lis pendens be released as a spurious document pursuant to C.R.C.P. 105.1 and C.R.S. § 38-35-201(3), and for an order requiring the Platts to show cause why the lis pendens should not be released. The issue was whether the contract was void because less than 67 percent of the unit owners in the HOA voted to ratify in accordance with C.R.S. § 38-33.3-312.¹¹ The district court concluded that the contract was void and dismissed all of the Platts' claims, but found that the Platts' lis pendens was not spurious.

The court of appeals reversed. Although C.R.S. § 38-33.3-312 requires a 67 percent vote of property owners in the association to convey common elements, the contract was not void. Under the statute, the court found as a matter of first impression that the contract only became unenforceable if it was not approved in writing by 67 percent of the members before closing. Because the contract was not ratified by the requisite number of unit owners in the HOA, the contract was not enforceable. However, under C.R.S. § 38-33.3-312(5), it is the “purported conveyance,” not the agreement to convey, that is void for non-compliance with the approval requirement. The “conveyance” would be a transfer of title. Because the contract was not void, but must merely be “ratified,” the district court erred in dismissing the Platts' other claims

¹⁰ *Platt v. Aspenwood Condominium Association*, 214 P.3d 1060 (Colo. App. 2009).

¹¹ Common elements may be conveyed by the association if 67 percent of the owners agree. C.R.S. § 38-33.3-312. A contract to convey is not enforceable against the association until approved, executed, and ratified. *Id.* Any conveyance without compliance with this statute is void. *Id.*

against the association. “Here, Aspenwood could enter into the Contract with the Platts, but it could not also ratify the Contract. . . . [T]he unit owners were required to ratify the Contract to render it enforceable.” *Id.* at 1065. Because interpretation of C.R.S. § 38-33.3-312 is a matter of first impression in Colorado, the recording of a notice of lis pendens was appropriate. The Platts could advance a rational argument, based on the facts and law, to support their claim.

Necessary Parties to Litigation Over Enforcement of Covenants

Under what circumstances must *every* member of a common interest community be named as a party to litigation involving covenants where each member has an enforcement right? The supreme court has accepted certiorari in ***Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Estates Owners Association***,¹² on the following issues:

- Whether the court of appeals incorrectly concluded that the defendant did not waive its right to raise the need for indispensable parties by failing to raise the issue in a timely matter.
- Whether the court of appeals decision is not in accord with the basic intent of the Colorado Common Interest Ownership Act., *e.g.*, section 38-33.3-311, CRS.
- Whether court of appeals incorrectly concluded that the interests of the homeowners were not adequately represented.
- Whether the court of appeals decision that lot owners are indispensable parties is contrary to public policy, unduly chilling the rights of litigants and rendering cases excessively cost prohibitive.

¹² *Clubhouse at Fairway Pines, LLC v. Fairway Pines Estates Owners Association*, 214 P.3d 451 (Colo. App. 2008) (all owners in subdivision are necessary parties), *cert. granted* 2009 Colo. LEXIS 789 (Aug. 31, 2009).

Common Interest Community Defined; “Other Real Estate” Need Not Be Commonly Owned; Amendment of Covenants

In *Hiwan Homeowners Association. v. Knotts*,¹³ the protective covenants for the Hiwan subdivision in Evergreen were set to expire in 2013, unless they were amended or extended. The Association for Hiwan filed a petition pursuant to C.R.S. § 38-33.3-217(7), seeking court approval of certain amendments, including an amendment of the 2013 sunset provision. The trial court denied the petition because the Association did not obtain the number of votes for amendment of the covenants required by statute. However, the trial court expressly found that the Colorado Common Interest Ownership Act (CCIOA) applied to Hiwan, and that the Hiwan subdivision was a common interest community as defined by statute. Certain homeowners opposed to the continuation of the covenants appealed this ruling, arguing that the declaration does not provide for the assessment of fees for the maintenance of “other real estate” because the community has no property (*i.e.*, greenbelts, streets, or recreational facilities) that is owned by all members of the association. The trial court and the court of appeals rejected this argument, holding that Hiwan is a common interest community under C.R.S. § 38-33.3-103(8) because the owner of a unit in Hiwan is (1) obligated by a declaration, (2) to pay for maintenance or improvement, (3) of other real estate.

The courts reasoned that nothing in the definition of “other real estate” requires commonly owned land. The requirements in the covenants that the homeowners in the Hiwan subdivision pay mandatory fees to the Association for maintenance and improvement of real property throughout the subdivision is sufficient to bring Hiwan within the definition of “common interest community.” Specifically, the Association hired Forest Service agents to conduct annual surveys to identify trees that should be removed, paid for community-wide clean-ups, and enforced the covenants to require removal of objectionable landscaping, all of which were deemed to fall within the definition of “maintenance and improvement.”

Easement; Scope of Use by Dominant Estate; Recovery of Attorney Fees by Non-member of Association Under CCIOA

¹³ *Hiwan Homeowners Association. v. Knotts*, 215 P.3d 1271 (Colo. App. 2009).

Cody Park Property Owners' Association, Inc. v. Harder,¹⁴ offers a different twist on the typical rule that the scope of use of an easement by the holder of the dominant estate may not be expanded without the consent of the servient estate. In this case, the private road in question, named Cody Road, served all of the owners of Cody Park. Harder was one of the owners in the subdivision. Harder granted an easement across his lot to Heitsman, a neighbor whose parcel did not lie within Cody Park, so that Heitsman could access Cody Park Road. The owners' association for Cody Park objected, blocked the gate from the Harder's access to Cody Park Road, and sued the Harders and Heitsmans. The two property owners prevailed in the district court and in the court of appeals. Why? Because the covenants and the plat for Cody Park state that Cody Park Road is "for public access," and contain a dedication of the road to Fremont County. The county never accepted the dedication, and the court concluded that the road remains private, but further concluded that the association had no legal basis to stop an owner from allowing a non-association member from using the road. In essence, the association by its covenants grants permission to the general public for use of its road.

The court affirmed an award of attorney fees in favor of the Heitsmans, as a prevailing party in the litigation, under C.R.S. § 38-33.3-123, even though the Heitsmans were not members of the association. The statute applies to any action brought by the association to enforce its declaration. The plat and covenants are all part of the declaration, and the association, in its complaint, alleged "The Easement violates the Covenants by granting use of the non-county roads in the Subdivision to persons who are not 'tract owners.'" *Id.* at *17. The Heitsmans may not have had standing to enforce the covenants, but they were not excluded from protection by the statute.

EASEMENTS AND PUBLIC ROADS

Condemnation of Private Way of Necessity

¹⁴ *Cody Park Property Owners' Association v. Harder*, 2009 Colo. App. LEXIS 1894 (Nov. 25, 2009).

In a 2008 case, *Story v. Bly*,¹⁵ the court of appeals affirmed a decree in favor of a landlocked owner for condemnation of a private way of necessity. The court held under C.R.S. § 38-1-102(1) that the petitioner adequately described the land she sought to condemn. Although she did not provide a legal description until a hearing on her request for immediate possession, she attached a map to her petition that supported her verbal description. The easement was properly granted in perpetuity rather than limited to the petitioner's personal use because the easement was considered to be appurtenant to the petitioner's property.

The Colorado Supreme Court has accepted the case for review on these issues:

- Where the Petition in Condemnation did not identify the scope of the condemnor's uses and purposes and lacked a legal description of the easement being acquired, whether the court of appeals erred in ruling the Petition was adequate.
- Where the court of appeals acknowledged "no expert here could find comparable sales of driveway easements," and where it was undisputed that the Income Method cannot be applied, whether the panel erred in precluding the jury from hearing valuation evidence based on the only remaining appraisal method, the Cost Method, and the cost of constructing the driveway.

Moving Location of Easement; Declaratory Judgment Action Under Roaring Fork Club v. St. Jude's

Farmer's Reservoir and Irrigation Co. (FRICO) operates and maintains a ditch that passes under Highway 93 through a culvert owned by CDOT. Boulder owns the land on both sides of Highway 93 and operates the land as part of its municipal open space program. The FRICO ditch passes through the open space. Boulder maintains a hiking trail beside the ditch. In 2004, Boulder entered into a license agreement with CDOT that permitted Boulder to divert the hiking trail through the culvert, thereby alleviating the danger of trail users crossing Highway 93.

¹⁵ *Story v. Bly*, 217 P.3d 872 (Colo. App. 2008), *cert granted*, 2009 Colo. LEXIS 976 (Oct. 13, 2009).

FRICO objected to the design of the proposed trail through the culvert, which was large enough to handle equestrian traffic, contending it would create new maintenance problems that could threaten the flow of water through the culvert.

Boulder, as licensee of the owner of the servient estate, filed a declaratory judgment action pursuant to the decision in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001),¹⁶ seeking authority to modify the location of FRICO's ditch easement. In *Roaring Fork Club*, the court adopted § 4.8(3) of the *Restatement (Third) of Property: Servitudes* (2000), which states:

Unless expressly denied by the terms of an easement, . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or
- (c) frustrate the purpose for which the easement was created.

In *City of Boulder v. Farmer's Reservoir and Irrigation Co.*,¹⁷ the court of appeals reversed the lower court's decision in favor of Boulder. The court agreed with Boulder that it had standing to bring the action as a licensee of CDOT. However, the court of appeals reversed the decision in favor of Boulder on the merits, concluding that the district court's determination that FRICO's operation and maintenance of the ditch would not be adversely affected by the

¹⁶ In *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1231, 1237-38 (Colo. 2001), the Colorado Supreme Court adopted a section of the *Restatement (Third) of Property: Servitudes*, allowing the owner of a servient estate to make reasonable changes to the location or dimension of an easement if the changes do not, among other things, increase the burdens on the owner of the easement in its use and enjoyment. Consent of the owner of the easement is required, or, in the alternative, the owner of the servient estate must obtain a declaratory judgment from a court authorizing the changes to the easement in advance of any changes.

¹⁷ *City of Boulder v. Farmer's Reservoir and Irrigation Co.*, 214 P.3d 563 (Colo. App. 2009).

proposed alterations was clearly erroneous. The court noted these adverse impacts (among others) on FRICO's water rights, which the court found to be undisputed:

- As a result of the trail extension, FRICO will be unable to get its equipment through the culvert, and this impediment would cost FRICO an additional day's time to complete the required maintenance.
- . . .
- Piers like those contemplated in Boulder's design of the trail extension create eddies in the flow of the water through the culvert that result in the deposit of silt, trash, and debris in the culvert.
- Ice forms against structures like the piers contemplated by the design of the trail extension.
- Should the area underneath the trail extension become blocked with debris or ice, the only way to clear that area would be to shut down the ditch and have FRICO personnel remove the obstructions by hand.
- Were FRICO to be required to shut down the ditch during cold, freezing conditions, it would take approximately one week to restart the ditch, and as a result, FRICO would potentially lose "hundreds of acre feet of water."
- Were FRICO to fail to shut down the ditch in a situation like that described above, it could face liability for damage to neighboring properties resulting from maintenance issues such as overtopping of the ditch.

The portion of the judgment granting Boulder the authority to construct the trail extension was reversed.

Public Road; R.S. 2477 Road Across Public Domain; Acceptance of Federal Grant by Public Use

In *Camp Bird Colorado, Inc. v. Board of County Commissioners of the County of Ouray*,¹⁸ an owner of five mining claims served by two different roads — a forest service road and a “road segment” that crossed all five claims — sought a quiet title decree against the county to declare that the road segment was not a public road. In the 1870s, the county had adopted resolutions that “declared” that the road segment was a public trail. This declaration was recorded. In the decades that followed, the road segment was used by members of the general public. The county argued that it had, at a minimum, established a public road by adverse use, C.R.S. § 43-2-201(1)(c). The mine owners argued that a 1983 action quieting title to the five patented claims terminated any right of the county because the county had been named as a party in the 1983 action and did not prove up its interest in the road. They also argued that the 1870s “declarations” were insufficiently precise to describe the course of this particular road, and therefore gave no notice of its actions.

The trial court rejected all of these arguments, and the court of appeals agreed. The 1983 pleadings did not express any claim relating to public roads, and the county was named as a party for its tax deeds on different parcels. Next, the court of appeals held that a public road was created under the road segment under R.S. 2477, the federal law that offered lands in the public domain to the people for roads actually used by the public.¹⁹ Public use of the road segment, commencing in the 1870s, was sufficient to accept the federal grant. Because the road segment was a public road by virtue of the county’s declarations and the public use, the court of appeals did not need to address whether the public obtained the right-of-way by adverse possession (which was the basis for the trial court’s decision).

ESTATES

¹⁸ *Camp Bird Colorado, Inc. v. Board of County Commissioners of Ouray County*, 215 P.3d 1277 (Colo. App. 2009).

¹⁹ Rev. St. § 2477 (1866), U.S. Comp. Stat. 1918, § 4919, 43 U.S.C. § 932 (repealed 1976), provides: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” Subsequent public use (prior to 1976) is generally sufficient to create a public road in this manner. “[T]he statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from ‘use by those for whom it was necessary or convenient.’ It is not required that ‘work’ shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices.” *Leach v. Manhart*, 102 Colo. 129, 77 P.2d 652, 653 (1938).

Inter Vivos Conveyance to Fiduciary; Presumption of Undue Influence

In *Krueger v. Ary*,²⁰ the supreme court considered the presumption of undue influence that arises when an elderly person conveys her real property to her caregiver. If a party seeks to void a conveyance based on a grantee's undue influence over a grantor, that party has the burden of proving the conveyance was subject to undue influence. However, if the party can show the grantee was a fiduciary to the grantor or had a confidential relationship with the grantor, either relationship raises a rebuttable presumption that the grantee unduly influenced the grantor and that the transaction was unfair, unjust, and unreasonable. Once raised, these presumptions shift the burden of going forward to the party seeking to uphold the conveyance. In *Krueger*, the court clarified, and partly overruled, its decision in *Hilliard v. Shellabarger*, 210 P.2d 441, 442 (Colo. 1949), in which it held that these facts shift the burden of proof, rather than the burden of going forward. If the party seeking to uphold the conveyance offers sufficient rebutting evidence, the questions of the grantee's influence and the transaction's fairness must be resolved as questions of fact.

Beneficiary Deed; Requirement that Grantor Be a Natural Person

In one of Colorado's first cases dealing with the beneficiary deed statute, *Fischbach v. Holzberlein*,²¹ the court of appeals considered whether a trust may grant a beneficiary deed. In a dispute among trust beneficiaries, summary judgment for two of the decedent's trust's beneficiaries was proper because beneficiary deeds, purporting to grant property to a trustee and one of the decedent's sons, were not valid under C.R.S. §§ 15-15-401 through -415. The mother established a trust and named herself as sole trustee and sole beneficiary during her lifetime. She named her son, Richard, as her successor trustee, and her children, Richard, Timothy, and the two plaintiffs, as equal beneficiaries upon her death. The mother then transferred two parcels of real property into the trust. In 2005, the mother, as trustee, signed two beneficiary deeds, purporting to grant Richard title to one property and Timothy title to the other, effective upon the

²⁰ *Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009).

²¹ *Fischbach v. Holzberlein*, 215 P.3d 407 (Colo. App. 2009).

mother's death. This left two of her children out in the cold, so to speak. Mother died in 2007. After her death, Richard, as the trustee, executed quitclaim deeds, naming Timothy and himself as the respective owners of the two properties.

The other two would-be heirs filed a complaint as beneficiaries of the trust, alleging that the beneficiary deeds were void. The court of appeals affirmed the district court's decision that the statute authorizing beneficiary deeds does not permit a trust to be a grantor in a beneficiary deed. C.R.S. § 15-15-401(1) defines a beneficiary deed as a deed, subject to revocation by the grantor, that conveys an interest in real property and that contains language that the conveyance is to be effective upon the death of the grantor. In accordance with C.R.S. § 15-15-402(1), the transfer of real property by a beneficiary deed shall only be effective upon the death of the owner. Language in the statute stating that the transfer takes place at the death of the grantor means the grantor must be a natural person and not an entity. Therefore, the beneficiary deeds executed by the mother were invalid as a matter of law. The court went on to hold that any defect in the beneficiary deeds could not be cured by reformation.

Authority of One Co-trustee to Convey Trust Property; Execution of Will by Co-trustee Not Sufficient to Terminate Trust

In a matter of first impression in Colorado, *Ritchey v. McCreath (In re Estate of McCreath)*,²² involved the effectiveness of two different attempts by a settlor to terminate a trust. Here, the attempts by a co-trustee (who was also the settlor) were held to be void. The mother, as settlor, designated her daughter in 1992 as co-trustee of a trust that owned the family's farm. In the trust document, the mother reserved the right to revoke the trust at any time. The mother, as trustee of the trust, executed, delivered, and had recorded a quitclaim deed in 2001, conveying the farm and all mineral interests to the daughter free and clear of the trust. In 2005, the mother executed a last will and testament, revoking all prior wills and trusts. All of this was challenged by the mother's two sons, Elton and Milford. The court of appeals held, first, that the quitclaim deed was not effective to transfer the mother's interest in the farm to her daughter free of the trust. Where two or more individuals hold title to real property as co-trustees, any deed

²² *Ritchey v. McCreath (In re Estate of McCreath)*, 2009 Colo. App. LEXIS 1962 (Dec. 24, 2009).

purporting to convey that property must be executed by all of the trustees. Second, the trust agreement was not revoked by execution and delivery of the will. A will is ambulatory in nature and does not have effect upon execution and delivery. Although under limited circumstances a will may have more than one function,²³ *Ritchey* was not such a case. The trust agreement could have provided the trustee with the power to terminate the trust in a last will and testament. It did not, and this particular will was ineffective to terminate the trust as a matter of law.

FORECLOSURE, DEBTOR-CREDITOR, RECEIVERS, LENDER LIABILITY

Equitable Subrogation; Transfer of Subrogee Rights to Subsequent Owner and Mortgagee by Warranty Deed Under Derivative Subrogation

The 2005 decision of the Colorado Supreme Court in *Hicks v. Londre* (“*Hicks II*”),²⁴ has engendered much discussion and has created a new awakening of the old and venerable doctrine of equitable subrogation. Because the subject property was sold shortly before the court’s ruling in *Hicks II*, a new case was ripe immediately upon entry of the court’s decision. That new case is now making its way up the appellate ladder. In *Hicks v. Joondeph* (“*Hicks III*”),²⁵ 205 P.3d 432 (Colo. App. 2008), *cert. granted* 2009 Colo. LEXIS 343 (April 13, 2009, argued Dec. 4, 2009), the court of appeals wrestled with an interesting and unique question: What happens to the rights of an owner of property (Londre) that has been held to be equitably subrogated to a position senior to an intervening lienor (Hicks) when Londre sells his property to Joondeph, who has full knowledge of the prior-recorded lien of Hicks and of Hicks’s pending foreclosure claims? Does Joondeph succeed to the rights of Londre, notwithstanding his actual knowledge and the operation of Colorado’s recording act? And does Joondeph’s mortgagee, CitiMortgage, likewise “leap frog” ahead of Hicks in priority to succeed to the subrogated first-priority position of Chase?

The question is unique, and complex, in part because of the holding in *Hicks v. Londre* that an owner may have a subrogated lien right on his own property. Does the subrogation right

²³ See *Taylor v. Wilder*, 63 Colo. 282, 165 P. 766 (1917).

²⁴ *Hicks v. Londre* (“*Hicks II*”), 125 P.3d 452 (Colo. 2005).

²⁵ *Hicks v. Joondeph* (*Hicks III*), 205 P.3d 432 (Colo. App. 2008), *cert. granted*, 2009 Colo. LEXIS 343 (April 13, 2009, argued Dec. 4, 2009).

of Londre pass to his purchaser by virtue of the language in the deed that all legal and equitable interests are conveyed to the grantee (Joondeph)? Perhaps more importantly, does the grantee's mortgagee (CitiMortgage) piggyback on the warranty deed in like manner to assume the first lien priority that Chase had been awarded by equitable subrogation in *Hicks v. Londre*? Does Hicks, who recorded his judgment lien years earlier, remain in junior position permanently, behind all subsequent mortgagees, even though both CitiMortgage and the Joondephs had actual knowledge of the Hicks lien when their closing occurred in 2005? Does it matter that Londre sold the property for a \$500,000 profit, and that Joondephs's new mortgage loan is larger than the former loan of Chase? What is the nature of the Londre equitable interest? Is it an equitable lien on his own property, protected by a judicially adopted exception to the doctrine of merger?

The trial court in this case found that the doctrine of derivative subrogation, adopted in a federal case in New Jersey involving the IRS, applies to advance the Joondephs and CitiMortgage ahead of Hicks in order of lien priority. It reasoned that all of the rights of Londre and his mortgage lender passed to Joondeph and his lender CitiMortgage because the warranty deed conveys all equitable rights of the grantor (Londre). Hicks was therefore determined to have a judgment lien junior to the rights of the Joondephs and CitiMortgage, though his lien had attached to the property more than four years prior to the sale to Joondeph.

The court of appeals reversed, holding that there is no basis in Colorado law for applying derivative subrogation in this context. The court held that there is no Colorado authority for "derivative subrogation." Priority is not conveyed by deed (there is no basis to conclude that a judgment granting equitable relief attaches to land and can be conveyed by deed). Rather, priority is controlled by the Colorado Recording Act.²⁶ Equitable subrogation is a narrow exception to the Colorado Recording Act and is granted only if the criteria set forth in *Hicks II* are satisfied.²⁷ The equitable subrogation in *Hicks II* was only between the litigants. The *Hicks II* court's findings of equitable subrogation to the Chase deed of trust cannot be conveyed to CitiMortgage. CitiMortgage would need to seek its own equitable subrogation determination in a separate action, subject to the rules set down in *Hicks II*.

There is more to come. The Colorado Supreme Court has accepted certiorari on the case once again, stating the issues as:

²⁶ C.R.S. § 38-35-109.

²⁷ These criteria are outlined in the discussion of *Ameriquest*, below.

- Whether the court of appeals' refusal to apply the doctrine of derivative subrogation — the right of property owners to transfer equitable subrogation rights, by way of warranty deed, to subsequent purchasers — improperly deprives property owners of their equitable subrogation rights and unjustly results in the conveyance of a diminished estate.
- Whether, if this court declines to follow the doctrine of derivative subrogation, this court should abandon the rule that a lender's actual knowledge of intervening liens prevents that lender's ability to enforce the obligation it satisfied under the doctrine of equitable subrogation.
- Whether, if the court abandons this rule, [the Joondephs] may equitably subrogate to the senior lien position on the property.

Equitable Subrogation; Land Title Insurance Corp. v. Ameriquest Mortgage Co.

Land Title Insurance Corp. v. Ameriquest Mortgage Co., 207 P.3d 141 (Colo. 2009), involved a property called Blackacre, which was encumbered by three deeds of trust. The second lien deed of trust started a public trustee foreclosure. The property owners refinanced through Ameriquest; Ameriquest intended its new loan to be secured by a first position deed of trust and for the proceeds from the loan to pay off all three encumbrances on the property. Ameriquest's loan proceeds were disbursed as follows: (1) \$71,347.02 to pay off the first position loan, (2) \$299,102.15 to the public trustee to redeem (paying off the second position deed of trust), and (3) \$149,564.73 to the owners. Nothing was paid to the loan secured by the third lien deed of trust, which was held by Land Title.²⁸

Shortly after the Ameriquest loan was closed, Land Title started a public trustee foreclosure. Ameriquest did not record its new deed of trust until after Land Title's notice of election and demand was recorded. Land Title was the successful bidder at the foreclosure sale. Ameriquest learned about the Land Title foreclosure one day before the end of the 75-day

²⁸ The property owners made misrepresentations that the loan secured by the third deed of trust had been satisfied, and Ameriquest's closer made errors.

owners' redemption period²⁹ and failed to timely file a notice of intent to redeem the property. Land Title assigned its certificate of purchase to its sister entity, Title Acquisitions, to whom the public trustee's deed issued. Title Acquisitions spent \$66,000 refurbishing the property and then sold the property to a third party for \$784,000. Title Acquisitions' net proceeds from the sale were just over one-half million. Ameriquest claimed that it should advance ahead of Land Title and its successors under the doctrine of equitable subrogation. The trial court and the court of appeals agreed, but the supreme court reversed, holding that this would undermine the provision of the foreclosure statute to the effect that a public trustee deed extinguishes all junior encumbrances that fail to redeem.

Although Ameriquest recorded its deed of trust before the foreclosure sale, recording the deed of trust did not sufficiently put Land Title on notice that Ameriquest was claiming equitable subrogation rights. Ameriquest's deed of trust made no reference to any claimed subrogation rights, nor did it explain that the proceeds of the loan secured by its deed of trust were used to satisfy the senior liens against the property. A reasonable purchaser at the foreclosure sale therefore had no way to know that Ameriquest would be claiming a senior lien. Instead, a reasonable purchaser would have believed the Ameriquest deed of trust was a junior lien extinguished by the foreclosure. According to the *Restatement*,³⁰ § 7.6 of the *Restatement (Third) of Property (Mortgages)*, a party seeking to enforce claimed subrogation rights must "publicly assert subrogation to the mortgage paid" or risk being barred from another party's claim of prejudice from detrimental reliance. In this case, Land Title detrimentally relied on the record state of title when it bid on the property with the reasonable belief it would be able to resell the property free and clear of all encumbrances.³¹ The fact that Title Acquisitions invested money refurbishing the property further reflects the detrimental reliance by Land Title.

Deed of Trust; After-Acquired Title; Lien on Interest of One Co-tenant; Priority Under Colorado Recording Act

²⁹ The Land Title foreclosure was prior to the 2006 amendment of the foreclosure statutes, effective January 1, 2008.

³⁰ *Restatement (Third) of Property (Mortgages)*, § 7.6.

³¹ The supreme court listed other examples of detrimental reliance that may result from delay in recording an equitable subrogation interest, such as sale to an innocent purchaser, refinance by an innocent lender, or a sale of the mortgage on the secondary market.

The court of appeals in *Premier Bank v. Board of County Commissioners of the County of Bent*,³² addressed the interesting question of whether a deed of trust with warranties of title conveys after-acquired title, so that its lien attaches upon subsequent acquisition of title by the grantor. This case began with a deed of trust to the bank granted only by the husband with respect to property owned in joint tenancy with the wife. The husband and wife then jointly executed a deed of trust in favor of Bent County. To complete the puzzle, the wife then deeded her interest back to the husband. The husband then “amended” his deed of trust with the bank, borrowing additional sums.

No one contested that the bank was in first position as to the undivided interest formerly owned by the husband, in the amount of the original deed of trust. However, the bank lost in its claim to first lien position on the entire fee. The bank argued that when the wife conveyed her interest to the husband, the after-acquired property statute came into play, with its priority as to the entire fee relating back to the date of the bank’s original deed of trust. The county argued that even if the after-acquired property statute applies to deeds of trust, it does not allow priority to relate back to a date prior to acquisition of title by the grantor, since that would undermine the system of race-notice priority under Colorado’s Recording Act, C.R.S. § 38-35-109. The county further argued that the bank’s lien was only in first position on the one-half interest owned by the husband when the husband executed the bank’s deed of trust and that the county’s lien was in first position as to the undivided one-half interest of the wife.

The district court agreed with the husband, but the court of appeals reversed. However, the analysis is difficult to track, and may lead to confusion in later cases. For example, the court first reasoned that the after-acquired property statute applies only to a warranty deed, and not to the lien created by a deed of trust. This is contrary to the understanding of a lot of real estate lawyers. The court then offered that the deed of trust only had “quitclaim” language, without stating whether the deed of trust had warranties of title, which may suggest that they agreed that the issue turns on the presence of warranties of title. In any event, this is *dicta*, as the court then determined that, regardless of whether the bank’s lien actually attached to the interest

³² *Premier Bank v. Board of County Commissioners of Bent County*, 214 P.3d 574 (Colo. App. 2009).

represented by the wife's former interest, it would not in any event be senior to the county's lien under the operation of the Recording Act.

C.R.S. § 38-30-104 does not trump lien priorities set according to race-notice. Race-notice is the "linchpin" of Colorado real estate law. Its purpose is to enable a buyer or mortgagee, by analysis of the chain of title, to determine exactly what it is acquiring. In effect, the deed of trust that is granted prior to acquisition of title is a "wild deed" as to the interest not owned at the time of the grant.

JUDGMENTS AND FRAUDULENT TRANSFER

Revival of Judgment Lien; Necessary or Indispensable Parties, C.R.C.P. 19; C.R.C.P. 54(h)

In *Hicks v. Joondeph*, a case proceeding parallel to the equitable subrogation case of the same title (discussed above), the court of appeals faced a fairly common issue that has yet to come before the appellate courts in Colorado. J obtained a judgment against O1, who owned Blackacre. J recorded a transcript of the judgment, imposing a judgment lien under C.R.S. § 13-52-102. The lien was good for six years, unless it was revived by the court under the procedures in C.R.C.P. 54(h) within the six-year period. O1 sold to O2 without disclosing the lien. While extended litigation was pending in a separate case regarding lien priorities and subrogation, O2 sold to O3. J started a new declaratory judgment and judicial foreclosure action against O3 (*Hicks III*, discussed above). J then went to court in the original action in which he obtained a judgment, seeking revival under C.R.C.P. 54(h). Following the rule, he served O1, but not O3, who had not previously been a party to that action. O1 defaulted, and the judgment was revived by the district court. J recorded a transcript reflecting the revival, which extended the lien for another six years. O3 learned of the revival, and moved to intervene to have the order set aside on due process grounds. O3 presented no substantive defense to the underlying judgment. The district court allowed O3 to intervene, but denied the motion to render void the revival. The court of appeals held that the trial court properly denied the motion to set aside the order of revival, which would have terminated J's lien, on the basis that O3 was not an indispensable party to the judgment revival action. Since O3 purchased Blackacre with actual knowledge of the existence

of the lien, and with knowledge that the lien could be revived, O3 was in the same position after revival as it was before. O3 (and its mortgagee) have petitioned for certiorari review.

Revival of Judgment Lien; Foreign Judgments

In *Wells Fargo Bank v. Kopfman*,³³ the court of appeals ruled that a domesticated out-of-state judgment must be revived in Colorado under Colorado procedural law.³⁴ In the case of an Arizona judgment that had been domesticated in Colorado, this meant filing a motion to revive the judgment here, not in Arizona, and recording a new transcript of judgment that reflected the revival order. The court held that statutory requirements for obtaining and extending liens must be strictly construed, and that substantial compliance does not suffice.³⁵

The Colorado Supreme Court has accepted certiorari review³⁶ on these issues:

- Whether the court of appeals erred in holding that a judgment creditor who has domesticated a foreign judgment and established a judgment lien on Colorado real property under section 13-52-102, C.R.S., (2008), must revive that judgment in the foreign court, re-domesticate that judgment, and record a new transcript of judgment issued by a Colorado court.
- Whether the court of appeals erred in adopting a strict compliance standard for Colorado's judgment lien and recording statutes and should have instead adopted a substantial compliance standard.

This is the second judgment revival case the court has taken on in the past three years.³⁷ Perhaps the statute, C.R.S. § 13-52-102, or the implementing rule need some work.

³³ *Wells Fargo Bank v. Kopfman*, 205 P.3d 437 (Colo. App. 2008), *cert. granted*, 2009 Colo. LEXIS 416 (April 27, 2009).

³⁴ C.R.C.P. 54(h); C.R.S. § 13-52-102.

³⁵ For a similar holding involving the registration of federal judgment from another district, see *Trans-Exchange Corp. v. World's Largest Pearl Co.*, 2009 U.S. Dist. LEXIS 110633 (D. Colo. Nov. 6, 2009) (limitations period of the registering jurisdiction applies to the revivor of final judgments).

³⁶ *Wells Fargo Bank v. Kopfman*, 2009 Colo. LEXIS 416 (April 27, 2009).

³⁷ See *Robbins v. Goldberg*, 185 P.3d 794 (Colo. 2008) (judgment of revival *nunc pro tunc* to a date within limitations period if court delay causes limitation period to lapse).

Piercing the Veil of a Limited Liability Company; Liability of Managers Under Common Law Trustee Doctrine

In *Sheffield Services Co. v. Trowbridge*,³⁸ two limited liability companies obligated themselves to construct certain infrastructure improvements in a subdivision agreement with Broomfield. The companies did not make the required improvements, and Broomfield declared a breach of the subdivision agreement.

Later, the companies entered into contracts to sell subdivision lots to Sheffield. Before the closings, Sheffield knew that the companies had not completed the subdivision agreement requirements. After closing of one of the contracts, the companies received a letter that Broomfield would withhold building permits if the companies failed to comply with the subdivision agreements. The companies and their managers did not disclose the Broomfield letter or the ongoing non-compliance with the subdivision agreements to Sheffield prior to the second closing.

After the second closing, Sheffield learned about the Broomfield letter and performed the obligations under the subdivision agreement to mitigate its damages. Sheffield then filed suit against the companies and their managers for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, fraudulent concealment, and wrongful attempt to deplete the LLCs' assets.

The district court entered judgment against the two LLCs on the breach of contract and good faith and fair dealing claim, and dismissed the remaining claims. The court of appeals reversed in part, holding that the individual managers of the companies could be held liable under common-law theories analogous to the piercing of the corporate veil.

The court held that C.R.S. § 7-80-107(1) does not prohibit the court from applying the common law veil-piercing doctrine against a manager of a limited liability company, even if he or she is not a member. C.R.S. § 7-80-107(1) provides as follows:

In any case in which a party seeks to hold the *members* of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under

³⁸ *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

which the corporate veil of a corporation may be pierced under Colorado law.

The court of appeals concluded that § 7-80-107 does not expressly preclude the district court from holding a *manager*, under common law veil-piercing doctrine, personally liable for an LLC's improper actions. The creation of a statutory remedy does not bar preexisting common law rights.

The court of appeals further held that the fiction of an LLC may be disregarded and the *managers* held personally liable if equity so requires, thereby extending the veil-piercing doctrine beyond just members. The court of appeals reached this conclusion by extending the holding in the 1984 case of *LaFond v. Basham*,³⁹ (from the context of a corporation to an LLC). Allowing an LLC manager to hide behind the LLC's cloak of limited liability would potentially promote injustice, protect fraud, or defeat legitimate creditors' claims.

Finally, the court of appeals held that the managers of an LLC may be held personally liable under the common law "trustee doctrine," which provides that directors of an insolvent corporation must avoid favoring their own interests over the interests of creditors. The court of appeals extended the holding in these wrongful preference cases⁴⁰ to managers of a limited liability company. The court of appeals did not decide the issue of whether C.R.S. § 7-80-606 (which gives the insolvent LLC a remedy to recover certain distributions made to a member) can be used by creditors to pursue claims against members⁴¹ who received distributions (the LLCs' members were not parties to the action).

LEASING AND EVICTION

Recovery of Damages for Unpaid Rent and Other Damages in an FED Action

A number of tenants in commercial eviction cases have been arguing that complete contract damages cannot be recovered in an FED action brought under C.R.S. §§ 13-40-101, *et*

³⁹ *LaFond v. Basham*, 683 P.2d 367, 369-70 (Colo. App. 1984).

⁴⁰ *Crowley v. Green*, 365 P.2d 230, 232-33 (Colo. 1961); *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1369 (Colo. App. 1993).

⁴¹ The LLCs' members were not parties to the action.

seq. The theory is, presumably, that such an action in the district court is designed to be an expedited proceeding to obtain possession of property. Presumably, to recover all appropriate damages for past rent and other remedies allowed under the lease, the landlord should bring a second, independent civil action. Landlords balk, in part because the eviction action is a civil action and in part because of the risk of running afoul of the doctrine of claim preclusion. This issue has now been addressed in the court of appeals in ***Renco Associates v. D’Lance, Inc.***,⁴² which may provide some guidance for the trial courts in future cases.

In *Renco Associates*, when the landlord obtained a judgment for possession and set the trial for damages for past and future obligations under a lease, the tenant filed a motion *in limine* to limit the landlord’s presentation of damages to the reasonable rental value of the use of the premises during the period of unlawful detainer, arguing that those were the only damages recoverable in an FED action. The landlord responded that it was entitled to recover past-due rent in an FED action by statute.⁴³ The landlord submitted an offer of proof regarding its damages that calculated the damages suffered during the period of unlawful detention as \$2,042.29, and its total damages, including past-due rent, as \$87,263.10. The district court concluded that because the character of the proceeding was an FED action, the landlord’s damages were limited to the reasonable rental value of the use of the premises for the period of unlawful detainer. The court of appeals reversed. C.R.S. § 13-40-110 provides that a plaintiff may seek in its complaint: “the amount of rent due, the rate at which it is accruing, the amount of damages due, and the rate at which they are accruing and may include a prayer for rent due or to become due, present and future damages, costs, and any other relief to which plaintiff is entitled.” The court distinguished the holding in *Behr v. Burge*,⁴⁴ relied upon by the plaintiffs, as that case did not involve a landlord claiming damages under a lease.

⁴² *Renco Associates v. D’Lance, Inc.*, 214 P.3d 1069 (Colo. App. 2009).

⁴³ C.R.S. §§ 13-40-110(1) and -115(2).

⁴⁴ *Behr v. Burge*, 940 P.2d 1084, 1089 (Colo. App. 1996). The court in *Behr* held, in an action by a tax sale purchaser to evict a former owner, “The amount of damages a prevailing plaintiff may recover in an F.E.D. action is the reasonable rental value of the premises during the time the other party continued an unlawful detainer.” *Compare Schneiker v. Gordon*, 732 P.2d 603 (Colo. 1987) (measure of damages upon termination of lease).

The district court abused its discretion when it determined that the landlord could not recover past due rent and precluded the landlord from presenting such evidence.⁴⁵

Eviction; Criminal Activity as Basis of Claim; Preponderance of Evidence; Discovery Allowed in FED Action in the Interest of Fairness

The scope of pretrial proceedings, including discovery, is addressed by the Colorado Supreme Court in *Miles v. Fleming*.⁴⁶ In *Miles*, the tenant filed her answer and the county court conducted an evidentiary hearing on the issue of possession. At the hearing, the landlord's only admissible testimony concerning criminal activity was that she was "suspicious" because she had been unable to access the premises on several occasions and observed "new merchandise" in the tenant's garage. The county court found that there was sufficient evidence to show the landlord had reasonable grounds to believe criminal activity was being conducted on the premises and granted the landlord restitution of the premises. The district court (acting in appellate capacity) affirmed, and the tenant's writ of certiorari was granted.

Every lease includes an implied condition that the tenant and his or her guests or invitees will not commit certain enumerated criminal acts. C.R.S. § 13-40-107.5. Article 40 of title 13 provides a quick mechanism for resolving possession disputes between landlords and tenants. However, the statutory scheme is also designed to ensure tenants are not evicted without due process. In an eviction proceeding, the landlord must prove the occurrence of criminal activity by a preponderance of the evidence (the same burden required to prove violation of any other lease condition).

The provision in the HUD Section 8 lease referring to "a determination by the landlord that criminal activity has occurred" was never intended, and cannot be interpreted, to permit eviction based on the owner's evaluation alone. The court must determine whether criminal activity has actually been proved by a preponderance of the evidence. In the absence of sufficient proof of a violation of the lease (in this case, criminal activity), the granting of a writ of

⁴⁵ The plaintiff in this case did not seek damages for future rent, but the arguments should be the same based on the plain language of the statute.

⁴⁶ *Miles v. Fleming*, 214 P.3d 1054 (Colo. 2009).

restitution to the landlord based on the owner's subjective, "reasonable" grounds to believe the lease was violated was error.

The supreme court also found that there was nothing in the statutory scheme for an eviction that prohibits the court from ordering the plaintiff to plead with greater specificity when the allegations in a complaint for eviction are inadequate or permitting discovery where greater trial preparation is needed in the interests of fairness.

MALPRACTICE AND PROFESSIONAL LIABILITY

Appraiser Negligence; Necessity of Expert Testimony

In a lengthy opinion in *Hice v. Lott*,⁴⁷ a panel of the court of appeals affirmed a summary judgment order dismissing a malpractice claim against two appraisers. The dispute concerned two appraisals relied upon by a buyer of property that appraised a structure as a modular rather than a "mobile" home. After purchasing the home, the buyer hired another appraiser, who advised that the structure was originally a mobile home and was worth substantially less than the valuation figures offered by the defendant appraisers. The buyer sued for negligence. She offered an expert disclosure from a licensed installer of manufactured homes who was also a real estate broker. The district court dismissed the case on summary judgment because the plaintiff failed to produce a report of an expert in appraising. The issues involved in distinguishing modular and mobile homes, and the valuation of each, were sufficiently complex that an expert in the defendant's line of work was necessary in order to opine as to the standard of care. Mere reliance on USPAP standards, adopted in Colorado by regulation, was not sufficient. This was a close case. The expert offered by the plaintiff was no doubt more knowledgeable about the subject of modular home construction than most. However, that was not the precise question, which was: What would a reasonable appraiser do in handling this assignment?

Lawyer Liability for Negligent Non-disclosure; Conflict of Interest

⁴⁷ *Hice v. Lott*, 2009 Colo. App. LEXIS 1903 (Nov. 25, 2009).

For the first time in Colorado, a court has recognized the tort of negligent non-disclosure. In *Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C.*, 2009 U.S. Dist. LEXIS 64029 (D. Colo. 2009),⁴⁸ the federal district court held that a law firm may be liable to a non-client for failing to exercise reasonable care to put all material facts in context when making a presentation regarding the facts of a transaction. However, it appears that the lawyers in this case actually had an attorney-client relationship with the plaintiffs and that recovery might be had under ordinary principles of negligence.

PREMISES LIABILITY, TRESPASS, AND NUISANCE

Premises Liability Act; Statutory Defenses Apply

In *Union Pacific Railroad Co. v. Martin*,⁴⁹ the Colorado Supreme Court returned a measure of normalcy to premises liability litigation, holding that the Premises Liability Act, C.R.S. § 13-21-115, did not prevent a defendant from presenting a defense based on comparative fault and other similar statutory provisions. The court held that although the premises liability statute is the sole codification of landowner duties in tort, the comparative negligence and pro rata liability statutes, C.R.S. §§ 13-21-111 and -111.5, do not prescribe additional or different duties of care or alter the grounds for recovery in any way. Because §§ 13-21-111 and -111.5 do not conflict with § 13-21-115, the trial court erred in striking the defendants' comparative negligence defenses. This decision qualifies the court's earlier decision in *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004), holding that the Premises Liability Act abrogated all common law doctrines relating to the standard of care of landowners. The lower courts in this case took this to mean that only defenses specifically mentioned in the Act could be asserted by the landowner.

By definition, naturally accumulated snow and ice on sidewalks result from natural, not human causes. Accordingly, in *Woods v. Delgar Ltd.*, 2009 Colo. App. LEXIS 1311 (July 23,

⁴⁸ *Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C.*, 2009 U.S. Dist. LEXIS 64029 (D. Colo. 2009). The federal district court relied on *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 236-37 (Colo. 1995) (holding an attorney may be liable for negligent misrepresentation to a non-client when the attorney acted on behalf of the client for the purpose of inducing the non-client to enter a business transaction with the client) (adopting the *Restatement (Second) of Torts* § 552 (1977)).

⁴⁹ *Union Pacific R.R. Co. v. Martin*, 209 P.3d 185 (Colo. 2009).

2009), the court clarified that, in Colorado, the owner or occupant of premises abutting a public sidewalk does not have a common law duty to pedestrians to keep the public sidewalks abutting its property clear of naturally accumulated snow and ice. The owner or occupant of adjacent property may be liable to a pedestrian when it constructs or maintains a canopy in such a manner that it creates an artificial discharge and accumulation of water upon the sidewalk, which, when frozen, makes the use of the sidewalk dangerous. In order for a duty to exist, there must be some “affirmative act” of the tenant causing the discharge of water onto the sidewalk; the natural discharge of water from melting snow on the awning did not suffice. Although a municipality may require a property owner to keep sidewalks clear of snow, at risk of a fine or punishment, the negligence per se doctrine applies only when the enacting body, whether a municipal government or the Colorado General Assembly, specifically states that a property owner will be civilly liable for violation of the ordinance or statute.

PROPERTY TAXATION AND ASSESSMENTS

In *Gerganoff v. Board of Assessment Appeals*,⁵⁰ the court of appeals held that an award of costs to a property owner who successfully prosecuted an appeal before the Board of Assessment Appeals (BAA) was mandatory by statute. Where the board awarded no money for costs, the court of appeals remanded the case to the board for further findings.

An award of costs under C.R.S. § 39-8-109 is mandatory. The amount of the award, however, is discretionary. Because there were no findings of fact in support of the BAA’s order denying an award of costs, the court of appeals could not determine if the BAA believed it had discretion to award costs (which would have been error) or if it awarded costs in the amount of zero (which, depending on the findings, could have been within its discretion).

Property Tax; Agricultural Classification; Two Years Prior Use as Farm or Ranch

⁵⁰ *Gerganoff v. Board of Assessment Appeals*, 2009 Colo. App. LEXIS 1675 (Sept. 17, 2009).

In *Aberdeen Investors, Inc. v. Adams County Board of County Commissioners*,⁵¹ the court of appeals affirmed a ruling by the Board of Assessment Appeals affirming Aberdeen's attempt to qualify as agricultural real property for tax purposes. Aberdeen bought 220 acres in Commerce City. It leased the land to a cattle company for grazing purposes on July 1, 2005, and the property was used for grazing from that date forward through 2006 and 2007. The county assessed the land as vacant land rather than agricultural land, arguing that the land had not been used for grazing during *all* of the years 2005 and 2006. Under C.R.S. § 39-1-102(1.6), the property must have been "used the previous two years . . . as a farm or ranch." The statute does not say that the land must be so used *continuously* during the prior two years to qualify for agricultural status.

Tax Abatement; Taxpayer Conduct

In *Boulder County Board of Commissioners v. HealthSouth Corp. and Board of Assessment Appeals*,⁵² the Colorado Supreme Court accepted certiorari review on these issues:

- Whether a taxpayer has a statutory right to a tax abatement and refund when the taxpayer overstated assets by including false entries on tax schedules used for property valuation.
- Whether the equitable doctrine of unclean hands prevents a taxpayer from receiving a tax abatement and refund when the taxpayer overstated assets by including false entries on tax schedules used for property valuation.

⁵¹ *Aberdeen Investors, Inc. v. Adams County Board of County Commissioners*, 2009 Colo. App. LEXIS 1906 (Nov. 25, 2009). To qualify as "agricultural land" under C.R.S. § 39-1-102(1.6), the land must (1) be presently used as a farm or ranch, (2) have been so used during the two-year period prior to the assessment, (3) have been classified or eligible for classification as agricultural land during the 10 years preceding the assessment year, and (4) continue to have actual agricultural use. "Ranch" is defined as "a parcel of land which is used for grazing livestock for the primary purpose of obtaining a monetary profit." C.R.S. § 39-1-102(13.5).

⁵² *Boulder County Board of Commissioners v. HealthSouth Corp. and Board of Assessment Appeals*, 2009 Colo. LEXIS 1216 (Dec. 14, 2009).

TAX SALES, TREASURER DEEDS, AND CONSERVATION EASEMENT TAX CREDITS

Conservation Easement Tax Credit Act; One Credit Per Donation; Tenants in Common

In *Huber v. Kenna*,⁵³ the Colorado Supreme Court resolved a statutory interpretation question on the original statutory limit of a \$100,000 state tax credit “per donation” of a conservation easement. Although any ambiguity in the statute was clarified by statutory amendment in 2006, this case involved the 2002 tax year and has been slowly working its way through the courts.

Two married couples purchased a single property as tenants in common, and subsequently donated a conservation easement. The two couples split the value of the donated easement (\$154,700), and each couple claimed a tax credit⁵⁴ of \$77,350 on their Colorado tax returns.⁵⁵ In 2003, the Colorado Department of Revenue (Department) issued notices of deficiency to the couples on the grounds that their tax credits exceeded the \$100,000 limit “per donation.”⁵⁶ The couples argued that the statute allowed for a \$100,000 credit per couple, while the Department argued that the statute allowed only an aggregate of \$100,000 credit per donation. The district court granted summary judgment in favor of the couples, and the court of

⁵³ *Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009).

⁵⁴ C.R.S. § 39-22-522.

⁵⁵ The 1999 Conservation Easement Tax Credit Act created a state income tax credit, up to a maximum of \$100,000, for taxpayers who encumber their property with a conservation easement. Shortly after this case came before the trial court, the statute was amended to clarify this issue to limit the claim to a single donation for a single entity or group of co-tenants.

⁵⁶ C.R.S. § 39-22-522(4)(a)(III)(b) now reads as follows as a result of a 2006 amendment:

For income tax years commencing on or after January 1, 2000, *in the case of a joint tenancy, tenancy in common, partnership, S corporation, or other similar entity or ownership group* that donates a conservation easement as an entity or group, the amount of the credit allowed pursuant to subsection (2) of this section shall be allocated to the entity’s owners, partners, members, or shareholders in proportion to the owners’, partners’, members’, or shareholders’ distributive shares of income or ownership percentage from such entity or group. For income tax years commencing on or after January 1, 2000, but prior to January 1, 2003, the *total aggregate amount of the credit allocated to such owners, partners, members, and shareholders* shall not exceed one hundred thousand dollars. . . .” (emphasis added).

appeals affirmed, holding that the \$100,000 credit applied to each couple, interpreting the statutory language to allow a credit to “each taxpayer.”

The Colorado Supreme Court reversed. The court held that the \$100,000 limit in the 1999 statute applied to “each donation,” holding that the Department of Revenue correctly issued the notices of deficiency to the couples because the \$100,000 limit applied in the aggregate. In order to reach the contrary conclusion and affirm the appellate court’s holding, the court would have to read the “per donation” language of the statute to mean “per member of a tenancy in common per donation,” which would be at odds with the actual statutory language. This would also, the court could add, open the state coffers up to unlimited credits. The court relied on the law of cotenancy to find that a tenancy in common may be donated only in its entirety, as one single donation.

TITLES AND TITLE INSURANCE

Spurious and Frivolous Documents; Private “Land Patent”

In the case of *Hamilton v. Noble Energy, Inc.*,⁵⁷ 220 P.3d 1010 (Colo. App. 2009), a landowner unilaterally recorded a “Declaration of Land Patent” declaring himself to be the owner of the severed mineral interest and sued Noble Energy to establish himself as the lawful owner of the minerals. Apparently, this ruse has been tried in other states, according to the cases cited in this decision. The argument of these “protesters” goes like this: only the U.S. government can sell public land, and it does so by patent. Because the original patent conveyed title from the federal government, no state, including Colorado, had authority to allow subsequent encumbrances on that title. Once real property is conveyed through a land patent, the grantee’s rights in the property are fixed. It follows, as night follows day, that only another land patent, such as the plaintiff’s “Declaration of Land Patent,” could convey “perfect title” in the mineral interests at issue here.⁵⁸ The court of appeals said “no,” and awarded attorney fees for this frivolous action.

⁵⁷ *Hamilton v. Noble Energy, Inc.*, 220 P.3d 1010 (Colo. App. 2009).

⁵⁸ The recorded declaration reads: “If this land patent is not challenged within sixty days (60), in a court of law by someone, or by the government, it then becomes my/our property.” *Id.* at 1011.

ZONING AND LAND USE CONTROL

Regulatory Impairment of Property Rights Act

The court of appeals in *Wolf Ranch, LLC v. City of Colorado Springs*,⁵⁹ addressed the question of whether the city's imposition of drainage fees (or, more precisely, its refusal to exempt Wolf Ranch from those fees) impaired the property rights of Wolf Ranch, triggering a violation of the Regulatory Improvement of Property Rights Act (RIPRA), C.R.S. §§ 29-20-201 through -205. Wolf Ranch owned approximately 1,900 acres located within the City of Colorado Springs. The Colorado Springs City Council promulgated ordinances dating back several decades regulating drainage and control of flood and surface waters. The ordinances apportion drainage infrastructure costs among all property within a particular drainage basin and require the City Council, by resolution (legislative action), to set per-acre drainage fees for each basin. Wolf Ranch requested an exemption from the Cottonwood Creek drainage fee (then \$9,315 per acre) to develop approximately 1,600 acres as a "closed basin," not subject to applicable drainage fees. The city Drainage Board denied the exemption request. Wolf Ranch appealed the decision to the City Council, which also denied the exemption request. Wolf Ranch filed an action in district court, claiming the city failed to meet its burden of proof under RIPRA that the imposition of drainage fees on Wolf Ranch was "roughly proportional" to the impact of the proposed use of Wolf Ranch. The district court concluded Wolf Ranch had not adequately preserved the "rough proportionality challenge" at the municipal level. Both parties appealed the judgment.

RIPRA enhances constitutional protections against taking of property through certain local land use decisions, codifying the *Nollan/Dolan*⁶⁰ line of decisions. C.R.S. § 29-20-203(1), the provision at issue here, provides:

⁵⁹ *Wolf Ranch, LLC v. City of Colorado Springs*, 207 P.3d 875 (Colo. App. 2008), *aff'd*, 2009 Colo. LEXIS 1167 (Dec. 14, 2009).

⁶⁰ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property. *This section shall not apply to any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government.* (emphasis added)

The court of appeals stated there were two threshold questions that must be answered affirmatively in order to trigger RIPRA: (1) Was the action one “imposing conditions upon the granting of land-use approvals”? and (2) Did the local government “require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis”? *Wolf Ranch*, 207 P.3d at 879.

The court of appeals held that RIPRA was not triggered because there was no individualized exaction. The amount of the Cottonwood Creek drainage fee was determined formulaically under legislation applicable to a broad class of property owners, and Wolf Ranch was subject to the same per-acre fee that applied to all developers within the Cottonwood Creek basin.

On certiorari, the supreme court affirmed.

Zoning; Lack of Zoning Map; Insufficient Secondary Proof as to Zoning District

In *Board of County Commissioners of Elbert County v. Rohrbach*,⁶¹ an interesting case highlighting the difficulty of enforcing local land use decisions that date back several decades, the Rohrbauchs started operating a compost facility in 2005 on their 80-acre parcel in Elbert County. The Board of County Commissioners initiated an action to enjoin the composting operations, claiming the composting was not a permitted use by right under the county zoning regulations. The Rohrbauchs challenged the validity of the zoning regulations.

The court of appeals held that the trial court erred in granting the injunction because the county failed to prove that the Rohrbauchs' parcel was zoned. The current zoning regulations for the county were adopted in 1983, based on a map dated July 5, 1983. However, the county could not find that map. The board tried to establish the parcel's zoning classification using historical maps, and the trial court relied on a map attached to the repealed 1974 zoning regulations. However, there was no evidence in the record to show that those maps were adopted or incorporated into the new zoning regulation. Lack of a zoning map is, according to the court, an issue of first impression in Colorado. The court could not ascertain the zoning adopted by the county because the text of the 1983 regulation relied on the lost map. There was no authority allowing for "secondary proof" of the content of the regulation.

The court of appeals expressed no opinion on the effect of this decision on other parcels or the validity of the county's other zoning regulations.

Annexation; Library District

Under Colorado law, when a library district is formed, an existing governmental unit within the district's boundaries can elect to participate. In *Board of Trustees of the Town of Wellington v. Board of Trustees of the Fort Collins Regional Library District*,⁶² the Town of Wellington elected not to participate in the Fort Collins Regional Library District at the time the

⁶¹ *Board of County Commissioners of Elbert County v. Rohrbach*, 2009 Colo. App. LEXIS 1567 (Sept. 3, 2009).

⁶² *Board of Trustees of the Town of Wellington v. Board of Trustees of the Fort Collins Regional Library District*, 216 P.3d 611 (Colo. App. 2009).

district was formed. Consequently, the boundaries of the Library District did not include any portion of the town.

Thereafter, the town planned to annex land within the district. The Town of Wellington filed a declaratory judgment action seeking a determination that, upon annexation, the land would automatically be removed from the Library District. The district court agreed with the town (and the town's ordinances applied in the newly annexed land).

Land properly included in the Library District at the time of its formation cannot be removed merely through annexation by a nonparticipating municipality. As a general rule, existing municipal ordinances apply to newly annexed areas. However, as the court of appeals held, the Library Law (C.R.S. §§ 24-90-101 to -119) permitted the town to remove property from the district only through compliance with C.R.S. § 24-90-106.5. Therefore, the town's nonparticipation in the district did not remove the areas later annexed by the town. The trial court's decision was reversed.

Eminent Domain; Compliance with Local Zoning and PUD Ordinance

In a 4-3 decision by Justice Hobbs arising out of unincorporated Boulder County, ***Board of County Commissioners of the County of Boulder v. Hygiene Fire Protection District***,⁶³ the supreme court sided with a special district in a conflict with the county over local zoning regulations. Specifically, the court held that a statutory county could not refuse to process the land use application (a "location and extent review") of a fire protection district pursuant to C.R.S. § 30-28-110(1) of the County Planning Act because the district did not first seek to modify an existing planned unit development governing the property under the procedures set out in C.R.S. § 24-67-106(3)(b) of the Planned Unit Development Act. The former statute codifies the long-standing rule that political subdivisions with special statutory purposes, including special districts, have a different relationship to county zoning authority than is otherwise applicable to private developments. "This provision requires a political subdivision to apply to the county for location and extent review for a proposed public project, but the governing body of the political subdivision ultimately has authority to override county

⁶³ *Board of County Commissioners of Boulder County v. Hygiene Fire Protection Dist.*, 221 P.3d 1063 (Colo. 2009). Justice Martinez writes for the dissent, joined by Justices Coats and Eid.

disapproval of the project.”⁶⁴ Here, a local fire protection district announced its intent to annex a parcel of land for a new fire station. However, the county was in the process of approving a PUD calling for private development of the parcel, and the county preferred that the City of Longmont provide fire protection services for the parcel.

Municipal Annexation Act Exceptions for Unilateral Annexation of “Enclaves”; Railroad Right-of-Way Not a “Public Right-of-Way”

In *Sinclair Marketing, Inc. v. Commerce City*,⁶⁵ the court of appeals addressed an issue of first impression involving the right of a city under the Municipal Annexation Act to unilaterally annex land that has been an “enclave” within the municipality for more than three years. An exception to this right bars the annexation where “any part of the municipal boundary . . . surrounding such enclave consists at the time of the annexation of . . . public rights-of-way, including streets and alleys, that are not immediately adjacent to the municipality on the side of the right-of way opposite to the enclave.”⁶⁶ It was argued that the statute addresses a concern that municipalities may annex various rights-of-way, including railroad rights-of-way, in order to create a pretext for unilaterally annexing enclaves. The court in *Sinclair* held, for the purpose of this statute, that a railroad right-of-way is not a public right-of-way, and that this exception was not triggered by the annexation in question here. The court reasoned, *inter alia*, that while railroads serve a public purpose, their rights-of-way are almost always private property rights, whether they consist of an easement or a fee simple estate.

SPURIOUS LIEN

Spurious Document Claim; Brought and Served as Counterclaim; Jurisdiction; Appearance at Hearing

⁶⁴ C.R.S. § 30-28-110(1).

⁶⁵ *Sinclair Marketing v. Commerce City*, 2009 Colo. App. LEXIS 1940 (Dec. 10, 2009).

⁶⁶ C.R.S. § 31-12-106(1.1).

In *Shyanne Properties, LLC v. Torp*,⁶⁷ 210 P.3d 490 (Colo. App. 2009), the plaintiffs, who had invested with the defendants, filed an action against the defendants for recovery of their money and recorded several notices of lis pendens against properties allegedly acquired with Shyanne's money. The defendants filed a petition in the same action for the removal of the lis pendens as spurious documents. The spurious document claim was not formally denominated as a "counterclaim," as allowed by C.R.C.P. 105.1. The plaintiffs did not respond to the petition. At the show cause hearing, the plaintiffs' counsel did not contest the petition and did not object to the court's order stripping the lis pendens from the properties. The district court concluded that the various notices of lis pendens were spurious documents pursuant to C.R.S. §§ 38-35-109(3) and -204, and that the defendants were entitled to an award of attorney fees and costs pursuant to C.R.C.P. 105.1(d).

The court of appeals rejected Shyanne's contention that the court lacked jurisdiction to award attorney fees and costs because Shyanne did not file a response to the petition and because the defendants did not serve the petition pursuant to C.R.C.P. 4. C.R.C.P. 105.1(d) provides that the court may enter judgment in favor of the petitioner and against the respondent for the petitioner's costs, including reasonable attorney fees, if (1) following the show cause hearing, the court determines that the lien or document is spurious and declares it invalid; or (2) no response to the petition has been filed and the petition has been personally served upon the respondent in accordance with C.R.C.P. 4(e) or (g). The district court held a show cause hearing, which both parties attended. The court therefore had jurisdiction, and service under C.R.C.P. 4(e) or (g) was not necessary.

Slander-of-Title Claim; Attorney Fees for Groundless Claim

The landowner in *Munoz v. Measner*⁶⁸ filed an action to determine ownership of real property and to recover damages for trespass. The district court bifurcated the quiet title and trespass claims. Munoz prevailed on the claim relating to title to the real property; the court of

⁶⁷ *Shyanne Properties, LLC v. Torp*, 210 P.3d 490 (Colo. App. 2009).

⁶⁸ *Munoz v. Measner*, 214 P.3d 510 (Colo. App. 2009), *cert. granted*, 2009 Colo. LEXIS 794 (Aug. 17, 2009).

appeals affirmed that decision.⁶⁹ During the appeal of the title claim, Munoz amended the complaint to add claims for nuisance, slander of title, and outrageous conduct. The slander of title claim was dismissed on summary judgment. The district court later issued an order directing Munoz to show cause why the remaining claims should not be dismissed for failure to prosecute. The district court dismissed the remaining claims at the show cause hearing. Measner then filed a motion to recover attorney fees and costs under C.R.S. § 13-17-102(4). Measner provided individualized reasons (including evidence at a hearing on the motion and via post-hearing briefing) why attorney fees and costs should be assessed with regard to each dismissed claim. The district court denied Measner's motion, citing the totality of the circumstances surrounding the case.

The court of appeals held that the district court abused its discretion when it denied the motion for fees. When requested, a court is required to evaluate each claim or defense individually, as substantially frivolous or groundless, to determine whether attorney fees should be awarded under C.R.S. § 13-17-102(4). Where part of an action is alleged to be substantially frivolous or groundless, a court must review that part of the action in accordance with the factors enumerated in C.R.S. § 13-17-103(1). The court should be guided by the § 13-17-103(1) factors in determining whether to deny a claim for attorney fees. The request for attorney fees must be supported with "individualized reasons." Further, because an award of costs for claims dismissed for failure to prosecute is mandatory under C.R.S. § 13-16-113(1), the district court erred in denying the defendants' request for costs.

The supreme court has accepted the case for review on this issue:

- Whether the court of appeals properly reversed the trial court's denial of attorney fees pursuant to section 13-17-102(4), C.R.S. (2008), because the trial court did not use the factors laid out in section 13-17-103(1), C.R.S. (2008), to assess whether attorney fees were warranted.

ARBITRATION, MEDIATION AND ADR

⁶⁹ *Munoz v. Measner*, 2005 Colo. App. LEXIS 144 (Feb. 3, 2005) (not selected for official publication).

Arbitration; Delegation of Determination of Jurisdiction to Arbitrate to Arbitrator by Express Agreement

In *Ahluwalia v. QFA Royalties, LLC*,⁷⁰ Ahluwalia and QFA entered into franchise agreements for three Quizno's restaurants in California. The first franchise agreement (2001 agreement) included a "California Rider" requiring submission of all disputes to arbitration. The second and third agreements (2004 agreements) contained provisions identifying the Denver District Court as the forum to resolve any disputes between the parties. Ahluwalia breached the franchise agreements, and QFA filed a demand for arbitration.

Ahluwalia did not raise the issue of arbitrability in his answer and participated in the arbitration for months without objection. Ahluwalia asserted, in a prehearing brief, that arbitration should be limited to the breach of the 2001 agreement. At the arbitration hearing, Ahluwalia stated he was not submitting to the arbitrator's jurisdiction regarding claims that were not subject to arbitration. The arbitrator concluded that all three agreements were subject to arbitration. QFA prevailed in the arbitration. Ahluwalia filed a motion in the Denver District Court to vacate the arbitration award. QFA filed a cross-motion to confirm the arbitration award. The district court declined to vacate the arbitration award and entered judgment on the award.

On appeal, the court of appeals held that the Federal Arbitration Act (FAA) controlled because the franchise agreements involved interstate commerce. The standards applied to vacating an arbitration award under the FAA are different from Colorado law.⁷¹

Ahluwalia did *not* waive his objection concerning arbitrability by participating in the arbitration because Ahluwalia clearly and explicitly reserved the right to object to arbitrability. Thus, he had the right to challenge the arbitrator's authority in court.

The question of arbitrability is typically an issue for judicial determination, unless the parties clearly and unmistakably provide otherwise. In this case, the parties agreed in the 2001 agreement that the AAA Commercial Arbitration Rules would apply. Those rules (at the time of

⁷⁰ *Ahluwalia v. QFA Royalties, LLC*, 2009 Colo. App. LEXIS 73 (Feb. 5, 2009).

⁷¹ Courts applying the FAA recognize "manifest disregard of the law" as one reason for vacating an arbitration award. Colorado courts have declined adopt this standard. *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo. App. 2004). Under Colorado law, arbitration awards are not open to review on the merits, and the arbitrator is the final judge of both fact and law. *Id.* at 66. Under state law, a court must vacate an award when an arbitrator exceeds his or her authority; an arbitrator exceeds his or her authority when the arbitrator "refuses to apply or ignores the legal standard agreed upon by the parties for resolution of the dispute." *Id.* at 66.

the arbitration) stated that the arbitrator had the power to determine his or her own jurisdiction. Thus, the parties delegated the power to determine arbitrability to the arbitrator. This included the power to determine whether all three franchise agreements were subject to the arbitration clause in the 2001 agreement. The court of appeals found numerous state and federal decisions supporting that delegation of this determination to the arbitrator was appropriate. Therefore, the district court properly applied a deferential standard to the arbitrator's decision.

The arbitrator's finding that all three agreements were subject to arbitration was not disturbed. The arbitration clause in the 2001 agreement stated that it applied to "*any claims arising out of or related to . . . this Agreement or any other agreement between Franchisor and Franchisee.*" The arbitrator found that this language applied to the 2004 agreements. Ahluwalia argued that the forum selection and integration clauses in the 2004 agreements superseded the 2001 arbitration clause. However, the arbitrator had authority supporting his conclusion that the arbitration clause was not nullified by subsequent agreements containing forum selection and merger clauses. Thus, the district court properly declined to disturb the arbitrator's decision, as there was no manifest disregard of the law.

STATUTORY CHANGES CONCERNING REAL PROPERTY

The 2009 legislative session had no dramatic changes in law regarding real property. Attention was paid primarily to a variety of "clean up" measures. The following are some of the highlights. Since a detailed review of each statute is beyond the scope of this paper, the reader is urged to go to the text of each new law for a complete review of any changes in existing law.

1. The Notaries Public Act⁷² was extended for an additional nine years, with a new "sunset provision now set for 2018. The duties of notaries to keep accurate journals is expanded to include all notarial acts, not just the acknowledgement of documents affecting title to real property.
2. Mortgage brokers are now "mortgage loan originators," under changes to the registration and licensing scheme adopted in HB 09-1085.⁷³ The act conforms Colorado's regulatory scheme for mortgage brokers to recent federal legislation, and requires loan originators to be licensed with the state and to be registered with the

⁷² SB 09-111, amending provisions of C.R.S. §12-55-101 et seq. effective July 1, 2009.

⁷³ Amending C.R.S. §38-40-105, 12-61-113, and 24-34-104(42)(k).

- nationwide mortgage registration system. The law tightens enforcement and discipline standards, requirements for the posting of a surety bond, and maintenance of errors and omission insurance.
3. Criminal penalties for violations of statutes relating to real estate appraisals are tightened, with most Class 3 misdemeanors now punished as Class 1 misdemeanors, and with second and subsequent violations punishable as Class 5 felonies.⁷⁴
 4. The equity skimming statute is tightened⁷⁵ a bit by removing the affirmative defense that underlying mortgage defaults have been cured, in prosecutions of landlords who collect rent on property after foreclosure of a deed of trust or mortgage on behalf of “any person other than the owner.”
 5. Homeowner associations governed by the Common Interest Ownership Act must prepare reserve studies and specific plans for repair and replacement of common interest community improvements.⁷⁶ An internal study by the board is sufficient.
 6. Non-married couples have access to Designated Beneficiary Agreements,⁷⁷ by which two persons may designate each other as the beneficiary of the other for probate and other purposes, by use of statutory forms, which are enforceable in the absence of a marriage license, or a will, trust, power of attorney or other superseding legal authority with conflicting provisions.
 7. County assessors have beefed up authority to search for and tax owners of furnished rental properties.⁷⁸ An assessor “must” discover and assess taxable personal property and provide the owners with a personal property schedule.

⁷⁴ HB 09-1183, revising C.R.S. §12-61-712,

⁷⁵ HB 09-1227, amending C.R.S. §18-5-802

⁷⁶ HB 09-1359, amending C.R.S. §38-33.3-209.5 and 38-33.3-117, and is applicable to “pre-existing communities.”

⁷⁷ HB 09-1260, adopting C.R.S. §15-22-101 et seq.

⁷⁸ HB 09-1110, amending C.R.S. § 39-5-125(1).