2010-2011 CASE LAW UPDATE – A TOUR THROUGH COLORADO'S RECENT CASES IN THE REAL ESTATE ARENA

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INTRODUCTION

This annual survey of Colorado case law relating to real estate covers cases decided and reported by our appellate courts from July 1, 2010 to July 1, 2011. Important cases in the last month will be summarized, as time allows, in a Supplement to be distributed at the Symposium.

Where a Pacific citation (West) is available, it is given; otherwise we simply give the date, and a citation to the LEXIS legal research system. The full text of all cases can be conveniently located in the Colorado Lawyer, on the Colorado Bar Association's web sites, ***www.cobar.org/coappcts/ctappndx.htm*** and ***www.cobar.org/coappcts/scndx.htm**,* or through LEXIS and WESTLAW.

The cases are placed in chronological order by subject. Unless otherwise noted, "supreme court" means the Colorado Supreme Court, and "court of appeals" means the Colorado Court of Appeals. I have included a statement of the issues for real estate cases in which the supreme court has accepted review by writ of certiorari. It is always fascinating to keep an eye on "what it is" that catches the eye of our top court.

Some effort has been taken to present these cases in a way that real estate experts and non-specialists alike will get something out of this presentation, and so that this summary may be useful as a research tool. Any opinions expressed here and in today's presentation are strictly my own, and are given only to make the subject matter and its presentation more interesting. I am well aware that even a careful reader of these many cases will never know as much about the dispute giving rise to the reported case as the counsel that actually fought the fight at trial and on appeal. So, I ask for your forgiveness for any errors in my reporting or interpretation.

This is a year-long effort, and I offer a special "thank you" to my assistant, Vicki Fields, for her careful and diligent editing of this paper. Thanks also goes to our summer clerk, Candyce Choi of the University of Colorado School of Law, who helped summarize the late surge of June, 2011 cases.

This is my twelfth case law presentation before this incredible gathering. Thanks to all of you for a wonderful experience; these presentations have been a highlight of my career. Your comments are appreciated.

Fred Skillern
July 14, 2011

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1. ARBITRATION, MEDIATION AND ADR

E-21 Engineering, Inc. v. Stock & Associates, Inc.
Colorado Court of Appeals, August 6, 2010
__ P.3d ____, 2010 Colo. App. LEXIS 1074
Arbitration agreement; no signature required.

The engineering company sends a subcontractor a letter of intent to enter into a formal subcontract. The subcontract includes a provision for mandatory arbitration. Neither party signs the subcontract. After the subcontractor applies for a bond and takes a few preliminary steps toward performance, the engineering company informs the subcontractor that it was rescinding the letter of intent. The subcontractor seeks arbitration, and files an action to compel arbitration. The trial court accepts the engineering company's argument that no agreement to arbitrate existed between the parties, largely because there was no signed contract. The court of appeals reverses, holding that the lack of signature does not invalidate an otherwise enforceable agreement to arbitrate, because common-law contract principles allow formation of contracts without the signatures of the parties bound by them. The arbitration statutes do not have a statute of frauds as such. C.R.S. § 13-22-206(1), requiring that an arbitration agreement be contained in *a record*, does not specifically require that the written instrument be signed by either or both parties.

In addition, the case notes another important statute that can be counter intuitive for some. If X sues Y, Y's counterclaim, if it qualifies as a compulsory counterclaim, may be brought even if it would be otherwise barred by the statute of limitations. C.R.S. § 13-80-109. This can be an important consideration to consider in bringing a lawsuit that may invite a counterclaim.

Taubman Cherry Creek Shopping Center, LLC v. Neiman-Marcus Group, Inc.
Colorado Court of Appeals, September 16, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1351
Arbitrability.

This case concerns the apportionment of taxes among tenants in a shopping center, and a common issue in the world of arbitration – whether the arbitrator or the court decides whether the dispute goes to arbitration. If an agreement says that an arbitrator decides the latter issue, that portion of the dispute is decided by an arbitrator. If the agreement is ambiguous, the court decides. Here Neiman, as tenant, sought relief by means of arbitration. Taubman, as landlord, sought a stay, and the trial court agreed. However, the court of appeals reverses on this procedural issue, and sends the case back for arbitration.

The underlying dispute revolves around a lease provision providing that the landlord will bill each tenant an amount for taxes for common areas consistent with the apportionment calculated by the assessor, if there is one. If the assessor does not apportion the taxes separately by shopping center parcel, the landlord will attempt an

apportionment, subject to arbitration by demand of the tenant. A key fact issue is whether the landlord should have reduced Neiman's share of the common area impositions to make up for the fact that a "tie-back credit" was assigned only to Taubman's parcel.

2. BOUNDARIES AND ADVERSE POSSESSION

No reported cases.

3. BROKERS

CB Richard Ellis, Inc. v. CLGP, LLC
Colorado Court of Appeals, July 22, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1050
Broker commission; garnishment; distribution of sales proceeds to principals of company; fraudulent transfer.

CB Richard Ellis acts as listing broker for land owned by CLGP. CLGP is a company with two principals, one of whom is an attorney. At some point prior to contract the principals of CLGP decide to take over negotiations with the buyer. The principals advise the broker that they believe that the commission should be cut in half. Ultimately, a sale to the buyer is closed for $2 million. At 6%, the commission would be $177,000. The seller, CLGP, sets aside $200,000 from the proceeds to cover the contingent liability to the broker.

Broker sues for the full commission, and the matter is submitted to arbitration. CLGP pays its attorneys from the $200,000 fund, which reduces the "fund," and Broker ultimately prevails at arbitration, getting an award, with interest at the contract rate of 12% and attorney fees, of $395,000. The Broker recovers only $44,000 from the fund by garnishment, and then issues a writ of garnishment to the principals of CLGP. When they deny liability, broker traverses the garnishment, arguing that the distributions from the fund were constructively fraudulent under C.R.S. § 38-8-106(1). Under that statute, a creditor may show that the debtor did not receive reasonably equivalent value for the transfer and that the transfer rendered the debtor insolvent. Considering other ways to prove a fraudulent transfer, the court of appeals phrases the factual issues accordingly. First, under § 38-8-105(1)(b)(I), was the $200,000 reserve asset "unreasonably small" in relation to the potential debt that the LLC owed the broker? Second, under § 38-8-105(1)(b)(II), should the principals of the LLC have known that the LLC would incur a potential debt beyond its ability to pay when the debt came due? Third, under § 38-8-106(1), was the LLC insolvent at the time of the distribution or did it become insolvent because of the distribution?

The court examines these factors at length and holds, in a fact-specific ruling, that the trial court's findings were supported by facts in the record, largely because the fund was

deemed to be large enough to pay the claim of broker at the time it was created, and because the seller "reasonably believed" that the claim would be reduced or compromised.

4. COMMON INTEREST COMMUNITIES, COVENANTS AND CCIOA

Meyerstein v. City of Aspen
Colorado Court of Appeals, March 17, 2011
__ P. 3d __, 2011 Colo. App. LEXIS 407
Deed restrictions; rent control covenant; Colorado's Anti-Rent Control Statute; retroactive application of statute; Section 1983 claim; statute of limitations.

Meyerstein acquires property subject to certain deed restrictions and a PUD which contained certain requirements for provision of employee housing and subjected certain units to rent controls. As part of the PUD approval process, deed restrictions were placed on the property requiring, among other things, that certain units be reserved for affordable housing. Meyerstein purchased the property on September 15, 2005. Thereafter, the Authority issued a notice of violation (NOV) to him, alleging that he failed to comply with the deed restrictions.

After the City and the Aspen Pitkin County Housing Authority threatened an action, Meyerstein brought a declaratory judgment action seeking a judgment that the deed restriction was an illegal rent control provision. He sought a ruling that retroactive application of the rent control statute was unconstitutional. He sought review under Rule 106(a)(4) and sought damages, as well as claims under the federal civil rights law, 42 U.S.C. § 1983, and a claim for an illegal taking. The district court entered judgment against Meyerstein on a number of grounds, including the statute of limitations.

The court reverses in part and holds that factual issues preclude summary judgment on Meyerstein's claim that the deed restriction contained an illegal rent control provision. The statute, C.R.S. § 38-12-301(2), as amended in 2010, expressly allows for the imposition of deed restrictions controlling rents pursuant to a voluntary agreement between a governmental entity and a property owner. Neither party had an opportunity in the trial court to introduce evidence as to whether Meyerstein's predecessor voluntarily entered into an agreement with the city; it was unclear whether Colorado's anti-rent control statute, C.R.S. § 38-12-301(2), applied to this case.

The court holds that the anti-rent control statute, to the extent that it applies to acts arising before passage of the statute in 2010, is not unconstitutionally retroactive. The legislature, in enacting the statute*, sought to clarify existing law and is thus remedial in nature*. The court's decision gives a thorough and clear discussion of this important rule.

The court affirms dismissal of most of the damages claims, holding that the inverse condemnation claim and the civil rights claim were time-barred under C.R.S. § 13-80-

108(1) because the owner brought the action more than two years after acquiring the property. One aspect of the civil rights claim – involving a claim that Aspen officials interfered with Meyerstein's negotiations with the St. Regis Hotel – involved actions within the prescriptive period and may be pursed on remand.

K9 Shrink v. Ridgewood Meadows Water and Homeowners Association
Colorado Court of Appeals, June 9, 2011
___ P.3d ___, 2011 Colo. App. LEXIS 840
Homeowner association; amendment of covenants in court proceeding; canine activity covenant; claim preclusion.

Plaintiffs, K9 Shrink, LLC ("K9Shrink") and Gail Clark, who operated K9Shrink on her property, appeal the trial court's entry of summary judgment in favor of Ridgewood Meadows Water and Homeowners Association ("HOA"). Clients of K9Shrink brought their dogs to Clark's home where she counseled the owners to help them communicate with their dogs. However, Clark's home was subject to Ridgewood's covenants. The HOA determined that K9Shrink's activities constituted commercial pet-related activity prohibited by the Covenant, as amended in 2007. In response, Clark sought a declaratory judgment that the Amendments were unenforceable and an injunction prohibiting Ridgewood from enforcing the Amendments against Plaintiff. The HOA counterclaimed, seeking an injunction to prevent plaintiffs from conducting commercial pet-related activity. The trial court found for the HOA, denying Clark's claim for declaratory judgment regarding enforceability of the Covenant; the court also enjoined Clark "from operating any commercial pet-related activity," including K9Shrink, on her property.

The court of appeals affirms. The court found that issue preclusion barred Clark's challenge to the validity of the restrictive covenant. She had received notice, under section 38-33.3-217(7)(d), C.R.S. (2010), of a 2007 district court proceeding to amend the Covenant's declarations to prohibit commercial pet-related activity. Clark chose not to appear at that time. The language of the restrictive covenant is clear and unambiguous. Accordingly, the permanent injunction against Clark was appropriate. The record supports a finding irreparable harm suffered by the Ridgewood neighbors by Clark's continuing violation of the covenant.

5. CONDEMNATION, EMINENT DOMAIN

City of Colorado Springs v. Andersen Mahon Enterprises, LLP
Colorado Court of Appeals, July 22, 2010
__ P.3d__, 2010 Colo. App. LEXIS 1051
Eminent domain; final offer; pre-judgment interest; attorney fees under C.R.S. § 38-1-122(1.5).

In part II of this eminent domain case, Colorado Springs appeals the trial court's order awarding attorney fees to landowner Andersen Mahon. Fees awarded were 28.5

percent higher than the City's final written offer of $1.2 million. Andersen Mahon then moved for an award of attorney fees pursuant to C.R.S. § 38-1-122(1.5) because the condemnation award, when combined with pre-judgment interest, exceeded the city's final offer by 30 percent. On appeal the court reverses, holding that prejudgment interest is separate from the "award by the court," within the meaning of C.R.S. § 38-1-122(1.5). The phrase in this statute, "award by the court," means only the commission's award, not the valuation award plus prejudgment interest. Because the actual verdict did not exceed the 130 percent threshold of the last written offer by the City, landowner does not get its fees.

City of Steamboat Springs v. Johnson
Colorado Court of Appeals, August 5, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1076
Eminent domain; greenbelt easement; summary judgment.

Landowner appeals the district court's partial summary judgment order in a condemnation case. Steamboat Springs decided to construct a new highway on what once was greenbelt area. To do so, it obtained a judicial decree that it owned the greenbelts, condemned or acquired property owners' appurtenant rights to restrict use of that area to anything but greenbelts, and acquired adjoining properties. The district court granted the City's motion for partial summary judgment as to the value of most of Johnson's interests, including Lot 4 and the greenbelt interests.

Johnson argues that summary judgment is unavailable in takings cases because property owners have a constitutional right to require that a jury determine the amount of compensation. The court disagrees. The summary judgment rule, C.R.C.P. 56, plainly applies to eminent domain proceedings.

The court holds that there was no genuine dispute as to the value of Lot 4, and summary judgment was appropriate. Johnson's servitude, limiting use of the greenbelt area to specific uses, is solely for the benefit of Lot 4. The value of that lost interest depends on any diminution of the value of Lot 4. Because the court did not consider before and after values of Lot 4, the case is remanded to determine the proper amount by which loss of the greenbelts diminished the value of Lot 4.

Bly v. Story
Colorado Supreme Court, October 18, 2010
241 P.3d 549 (Colo. 2010)
Private condemnation of way of necessity; necessity of metes and bounds description in original pleading; easement valuation.

In this private condemnation action for a non-exclusive access easement across an existing driveway, the Colorado Supreme Court affirms the court of appeals' judgment that condemnor Story's petition for condemnation adequately described the easement she sought and its purpose. It also affirms the court of appeals' holding that the trial court did not abuse its discretion by excluding evidence of the easement's value based

on the cost of constructing a new road over the course of the existing driveway, although the evidence would be admissible.

Condemnor owns a forty-five acre, landlocked parcel in Jefferson County. The parcel has no public or private means of access. She filed this petition for condemnation pursuant to Section 38-1-102, C.R.S. (2010). The Blys moved to dismiss the petition for failure to adequately describe the easement sought and for failure to delineate the purposes for the easement. The trial court denied the motion and granted Condemnor's petition on its merits. In the jury trial to determine just compensation for the partial taking, the trial court excluded the Bly's expert testimony regarding the cost of constructing a new road where the existing driveway sits. The trial court determined the evidence was not relevant to the market value of the nonexclusive access easement over the existing driveway. The trial court granted Story's petition for condemnation, and a jury awarded the Blys $3,300 for the easement and $9,200 for damages to the residue. The court of appeals affirmed the trial court on both issues, and the supreme court affirms as well in a 5-2 decision.

The court holds that C.R.S. § 38-1-102 does not require a petitioner to provide a metes and bounds legal description of the property or to specify the particular uses for which the property is to be condemned. It also holds that valuation evidence based on the cost of constructing a new road across the existing driveway was admissible, but that the trial court's exclusion of that evidence was not an abuse of discretion.

The Glenelk Association, Inc. v. Lewis
Colorado Supreme Court, November 8, 2010
Petition for Writ of Certiorari GRANTED

Summary of Issue:

- Whether the court of appeals erred by deciding that the condemnor had proved necessity and scope of the proposed easement without examining the purported "practical use of the property" for which the taking is claimed to determine whether the taking is "indispensable" to that use.

Department of Transportation v. Gypsum Ranch Co.
Colorado Supreme Court, November 30, 2010
244 P.3d 127 (Colo. 2010).
Eminent domain; mineral rights.

In *Gypsum Ranch Co. v. Board of County Commissioners*, 219 P.3d 365 (Colo. App. 2009), the court of appeals held that CDOT did not own the mineral estate underlying property acquired by CDOT in condemnation for highway purposes. The supreme court reverses and remands the case for further proceedings. The court holds that the court of appeals misconstrued the statutory scheme that existed prior to 2008. S.B. 08-041 added language to two different sections of the condemnation statutes, specifically limiting the department's authority to acquire through condemnation any mineral resources beneath land acquired for highway purposes. First, the General Assembly

added an additional subsection to section 43-1-208, the provision authorizing the commission to acquire land for highway purposes, barring it from acquiring "any interest in oil, natural gas, or other mineral resources beneath land acquired as authorized by this section except to the extent required for subsurface support." *See* § 43-1-208(4). Second, in section 209, the provision automatically imputing the right to subsurface support to any acquisition for highway purposes, it added the limiting language, "except that no right to oil, natural gas, or other mineral resources beneath such real property shall be acquired by a governmental entity through condemnation unless the acquiring authority determines that such acquisition is required for subsurface support." *See* C.R.S. § 43-1-209.

The question then becomes whether these provisions are to be applied retroactively. In the absence of any clear indication to the contrary, statutory enactments are presumed to be intended to change the law and to do so only prospectively. Although the court of appeals found in the bill's summary, and what it referred to as the bill's heading, an intention to merely clarify an existing limitation on the condemnation power of governmental entities, the supreme court holds that "nothing in the body of the enactment itself suggests such an intention." A court's objective in interpreting statutes "must be to determine legislative intent, as expressed in the language the enacting body has chosen to use in the statute itself," even in the face of a contrary statement or inference of intent in the bill's title or other preliminary statements. This sort of "fine line" decision making may drive counsel crazy in future cases turning on legislative intent, and is a must read for appellate counsel.

In a dissent, Justice Eid points out that section 38-1-105(4) provided that at the time of the condemnation, "[n]o right-of-way or easement acquired by condemnation shall ever give the [condemnor] any right, title, or interest to any vein, lodge, lode, or deposit found or existing in the premises condemned, except insofar as the same may be required for subsurface support." She would hold that this limitation on the condemnation of a right-of-way generally applied to the Department's condemnation for state highway purposes; therefore CDOT had no authority to condemn any mineral estate, "except insofar as the same may be required for subsurface support."

6. CONTRACTS, PURCHASE AND SALE, CONSTRUCTION

Whiting Oil and Gas Corporation v. Atlantic Richfield Company
Colorado Court of Appeals, September 2, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1223
Option to purchase mineral rights; Statutory Rule Against Perpetuities (USRAP); application of the statutory rule to non-probate cases; reformation; unconstitutionally retrospective legislation.

This case presents an interesting introduction to the Colorado version of the Uniform Statutory Rule Against Perpetuities, or USRAP. In this action concerning the exercise by Whiting of an option to purchase mineral rights, Atlantic Richfield claimed that the

option was void under the rule against perpetuities, as it called for exercise of the option more than 21 years after the original contract. Whiting Oil invoked the reformation provisions of the uniform act, C.R.S. § 15-11-1106(2), which mandates that the court, in the event a property interest runs afoul of the common-law rule against perpetuities as it existed prior to USRAP's adoption in 1991, reform a "disposition" to insert a savings clause that "preserves most closely the transferor's manifested plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the non-vested property interest or power of appointment was created." The trial court granted this relief, inserting a savings clause terminating the option 21 years after the death of the principal officers of one of the parties.

On appeal, Atlantic Richfield argues first that the statute does not apply to a commercial transaction, as the provision is found in the probate code and the contract for an option is not akin to a "plan of distribution" by a "transferor." The court rejects this argument. Indeed, the statutory rule is designed to apply only to "donative" transfers made after passage of the statute in 1991. For these transfers, its provisions generally "limit the application of the rule against perpetuities to donative transfers of property, thereby freeing commercial transactions from the rule's arcane vesting requirements." *Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 748 (Colo. App. 2009) (quoting Krendl, 2A COLO. METHODS OF PRACTICE § 72.27, at 187 (5th ed. 2007)). However, section 1106(2) by its terms applies to "all transactions" which were subject to the common law rule as it existed prior to 1991, the effective date of the statute. The reformation provision in section 1106(2) does not exclude from its application "nondonative transfers" or any other kind of transfer, such as the option in this case, and the trial court did not err when it reformed the option pursuant to the Act. The court notes that some states, in their adoption of the uniform act, created a broader "exclusion" for application of the act to nondonative transfers, such that no part of the statutory scheme would apply to an arms-length commercial transaction. Colorado did not take this path, and reformation applies to commercial transfers, such as options and leases, created prior to 1991 and that extend more than 21 years into the future.

ARCO also contended that the trial court's application of the reformation provision to the option was unconstitutionally retrospective because it took away ARCO's vested rights in the mineral rights – by allowing Whiting to exercise its option! In general, retroactive statutes that affect property rights are constitutional if their intent is procedural and remedial, rather than affecting a vested property right. Here, the court holds that the legislative intent was strictly remedial, and that its application did not take away or impair any vested interests of Atlantic Richfield. In the words of the court, ARCO "had no vested interest in its contractual agreement not being enforced." It follows that the trial court properly invoked the statutory remedy of reformation – a very helpful case of first impression in this difficult area of the law.

AC Excavating, Inc. v. Yale
Colorado Court of Appeals, September 2, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1218, *certiorari granted*
Preference of one creditor over another; trust fund statute; civil theft.

Plaintiff AC Excavating appeals the trial court's judgment in favor of defendant Yale on an alleged violation of the trust fund statute, C.R.S. § 38-22-127, and the civil theft statute, C.R.S. § 18-4-405. Yale owned 44% of Antelope Development, LLC, which was formed to develop a residential golf course community in Bennett. AC was hired to do grading work on the development's residential lots. It ultimately received only a portion of the money it was owed when Antelope ran into financial trouble.

Yale was a 44 percent shareholder in Antelope. Learning that the company had only $100,000 and faced construction bills in excess of $250,000, he put approximately $175,000 of his own funds into the company. Did this make him a "disburser" under C.R.S. § 38-22-127? The proceeds of his capital infusion were applied to general business expenses and some of the outstanding subcontractor invoices, but AC was not paid in full.

Later in 2006, Yale foreclosed on a series of municipal bonds held as collateral for loans he had made to Antelope before assuming the role of sole manager. Yale withdrew $50,000 from the Antelope account to cover the interest on the municipal bonds. Because it was not paid, AC sued Yale for violations of the trust fund and civil theft statutes. The trial court entered judgment in favor of Yale, but the appeals court reverses.

Under section 127, a contractor cannot use any of the funds on a project to pay corporate overhead, compensation, or other expenses unless and until the suppliers and laborers are paid in full. Even though Yale's loans to Antelope were not construction loans, but rather could be characterized as general purpose survival loans for the company, Yale loses. The statute covers "all funds disbursed" on a construction project, not just construction loans. The "intent" of the disburser is irrelevant, in the court's mind.

Moreover, Yale may be liable for civil theft when he withdrew $50,000 from the Antelope account to pay its debt to him rather than pay the subcontractors. The court remands to the trial court for a determination whether Yale knowingly used the money in such a manner as to permanently deprive AC of its use or benefit. Some may say, ". . . but it's his money!" In effect, the court holds Yale liable for paying himself as a creditor over other creditors, known as a "preference," which in the corporate context has been characterized as a breach of fiduciary duty. See *Collie v. Becknell*, 762 P.2d 727, 729 (Colo. App. 1988) (directors of an insolvent corporation are deemed to be trustees for it and its creditors and owe a duty to the creditors not to divest corporate property for the director's own benefit and thus defeat another creditor's claim). See also C.R.S. § 7-108-401(5) (2006) (after 2006 directors and officers of corporations owe no fiduciary duties to its creditors).

Note, this case has prompted much discussion in various circles, and the supreme court accepted the case for review on May 23, 2011.

Summary of Issues:

- Whether all funds made available to the developer of a construction project, including an owner's voluntary loans or capital contributions, are subject to the Colorado Trust Fund Statute, section 38-22-127, C.R.S. (2010), thereby requiring those invested funds to be held in trust for subcontractors.

- Whether the court of appeals erred when it remanded the issue of whether petitioner was liable for civil theft under section 18-4-401, C.R.S. (2010).

Loveland Essential Group v. Grommon Farms
Colorado Court of Appeals, September 16, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1356
Breach of warranty; tenant; damages and attorney's fees.

Buyer sues Seller when he learns that a portion of an RV park that he purchased is subject to a lease. H sues the seller for fraud, breach of deed warranties, and breach of the purchase and sale agreement. For a breach of a contractual warranty against encumbrances, Buyer is entitled to claim diminution in the property's fair market value caused by the existence of the lease, even if he knows of the encumbrance prior to his closing on the purchase. The trial court found that damages were limited to the fair rental value of the property to the expiration of the lease term, found that the tenant's lease established the fair rental value, and concluded that Buyer suffered no damage. The appeals court holds that it was error to not consider other elements of damage, and remands for further findings, which will include a determination of whether Buyer offered evidence at trial of the difference between the fair market value of the property with and without the lease.

The court recites the general rule on damages for breach of warranty. "[I]n the event of a breach of this covenant, where the purchaser has paid to remove an encumbrance or has the right to do so unilaterally, the necessary reasonable expense to cure the defect (not exceeding the amount the purchaser paid the covenantor for the property) is the proper measure of damages. . . . But in the absence of such expense or the unilateral right to pay to extinguish the encumbrance, the measure of damages is the diminution in the property's fair market value caused by the encumbrance's existence (again, not to exceed the purchase price). In determining this amount, the fact finder must consider not only the unexpired term of the lease, but any term for which the tenant may, at its sole option, extend the lease, if the fact finder determines that extension is more likely than not. In either event, consequential damages may also be awarded."

Further, the court holds that Buyer is not entitled to attorney's fees as a result of a fee-shifting clause in the purchase and sale agreement, or on the breach of deed warranty, because (1) the language in the contract is limited to a hold harmless, or indemnification, provision, and a breach of the covenant against encumbrances in a deed only allows a recovery for fees in actions to clear title. The court holds that fees incurred in buyers' attempts to evict the tenant were "not necessary to clear title" and are not recoverable.

***Day v. Stascavage*.**
Colorado Court of Appeals, November 10, 2010
__ P.3d__, 2010 Colo. App. LEXIS 1663
Derivative action; limited partnership; Special Litigation Committee; incomplete investigation.

HMC, Ltd. is a Colorado limited partnership formed to invest in real property in the Town of Parachute. Two limited partners, Day and Barnes, brought derivative claims against general partners Rader, Stascavage, and Morse arising out of the sale of real property owned by the partnership to a general partner. The general partner purchased the property at the value set by the county assessor, $258,000. The limited partners claim that the property was worth between $1 million and $4 million. The claims pleaded were for breaches of fiduciary duty and civil theft.

The trial court appointed a Vail attorney to serve as a "special litigation committee" to advise the court on whether the partnership should bring the claims in question. The attorney filed a lengthy report recommending against such a claim. The trial court dismissed the derivative action, and that order is reversed on appeal. While the court holds that the attorney was independent and qualified, it holds that the attorney should have had the property appraised. The court reasoned, "Despite spending some thirty hours (including general legal research) and writing a fourteen-page report (including general legal discussion), the SLC conducted no independent investigation into this critical point. In a case that cried out for an expert appraisal of the property's value, *cf. Curtis v. Nevens*, 31 P.3d 146, 152 (Colo. 2001) (listing 'the use of experts' as one factor bearing on adequacy of investigation), the SLC sought an appraisal." The trial court had reasoned that the property had been sold several years before the litigation committee was appointed. The court of appeals notes that appraisers regularly perform retrospective appraisals which are used in a variety of legal contexts.

Colorado follows New York's approach, which provides that a court "may not second-guess [the SLC's] business judgment in deciding not to pursue the derivative litigation." However, the court must determine that the litigation committee "employed reasonable procedures" in its analysis.

Hildebrand v. New Vista Homes II, LLC
Colorado Court of Appeals, November 10, 2010
__ P.3d__, 2010 Colo. App. LEXIS 1667
New home construction; negligence; contract disclaimers; damages based on repair costs or market value.

This is a residential construction defect case in which the jury returned a verdict for homeowner against builder, New Vista, for $540,000. This figure represented the cost of repair to the structure. The trial court, however, directed a verdict in favor of Reeves, a principal in New Vista. Plaintiff sued Reeves for negligence in the selection of a geotechnical firm that performed the soil analysis. Whether an individual defendant approved of, directed, actively participated in, or cooperated in the corporation's

negligent conduct usually is a question of fact for the jury. The record had evidence that Reeves read all of the soil reports and was aware of the soil engineer's recommendations for structural floors and sump pumps. However, Reeves did not direct the structural engineer to prepare a structural foundation plan that would accommodate a structural floor, and decided not to install a sump pump in any home. Reeves argues that the soils report was equivocal, in that that the soils report said that "use of a slab-on-grade floor system could be considered." Because a reasonable jury could have rejected the builder's position that it merely let "the [plaintiffs] decide whether to purchase a home with a slab-on-grade basement floor," the trial court did not err by sending plaintiffs' negligence claim against New Vista to the jury. When viewed in the light most favorable to plaintiffs, this evidence is also sufficient for a jury to determine that Reeves actively participated in, directed, or sanctioned conduct that may have been negligent, and that he knew or should have known that plaintiffs' home was negligently constructed. Therefore, the trial court erred by not allowing the jury to consider whether Reeves was negligent.

The court rejects New Vista's argument that it was error to let buyer's claim against it go to the jury. It argues that the purchase agreements gave the buyers a choice, either to assume the risks of a slab-on-grade floor or to choose a structural floor, and that disclaimers in plaintiffs' purchase agreement barred their negligence claim. The homeowners, however, had presented evidence that a portion of this disclaimer was crossed out and that the salesperson had told homeowners that the disclaimer did not apply because the builder had already selected the basement for that house. Where, as here, the face of the contract shows a change, the terms of the contract may be proven by extrinsic evidence.

Finally, the builder argued that it cannot be held liable for the actions of independent contractors such as the soils engineer, the structural engineer, and the architect. The court disagrees. A defendant can be liable for negligence if it fails to follow the recommendations of its independent contractors. Here, New Vista ignored the recommendations of the soils engineer to install a structural floor in the basement.

Finally, New Vista contended that because estimated repair costs exceeded fair market value of the home, the trial court erred in not capping repair cost damages at fair market value. The Court disagreed. The record shows that fair market value was disputed, so it was not error to submit repair costs to the jury.

The court reverses the portion of the judgment based on concealment, implied warranty, and Colorado Consumer Protection Act claims. The case is remanded with directions to reinstate the claims against Reeves for negligence and negligent misrepresentation. The judgment against New Vista on the negligence and negligent misrepresentation claims is affirmed.

People v. Adams
Colorado Supreme Court, November 30, 2010
243 P.3d 256 (Colo. 2010)
Assignability of trust fund statute claims; C.R.S. § 38-22-127 and 127(5).

This is an action brought by the Supreme Court Unauthorized Practice of Law Committee that deals with the trust fund statute in our mechanic lien laws. Adams is not a licensed attorney. From 2004 through 2007, he operated a collection business and attempted to receive assignments from subcontractors and thereby collect debts the subcontractors were owed by contractors. The subcontractors signed agreements assigning their debts to Adams, in exchange for his promise to pay them 50 percent of any recovery. Adams and his clients signed three versions of these agreements.

Using these purported assignments, Adams filed claims "*pro se*" on his behalf in several Chapter 7 federal bankruptcy court cases. The bankruptcy courts are familiar with trust fund claims, which if successful may be excepted from discharge under Section 523 of the Bankruptcy Code. In each case, Adams asserted claims under the trust fund statute, C.R.S. § 38-22-127, and sought treble damages under the statute's incorporation of the civil theft statute, C.R.S. § 18-4-405. The bankruptcy court dismissed Adams's claims, ruling that he was not the real party in interest because the subcontractors' debts had not been properly assigned to him. In *In re Thomas*, 387 B.R. 808 (D. Colo. 2008), the U.S. District Court held that claims under the Colorado Trust Fund Statute are not assignable on a contingency-fee basis for collection purposes. The Presiding Disciplinary Judge found that Adams had engaged in the unauthorized practice of law and recommended an injunction, a fine, and imposition of costs. Adams appeals directly to the supreme court.

The court on appeal holds that trust fund statute claims may be assigned, with one exception: the right to collect treble damages under C.R.S. §38-22-127(5) cannot be assigned. The court agrees with the bankruptcy court's finding that the claims Adams pursued in bankruptcy court were not based on valid assignments. It holds that Adams engaged in the unauthorized practice of law when he pursued these claims in a representative capacity on behalf of his subcontractor clients. The Court adopted the PDJ's recommendation that Adams pay costs in the amount of $3,000 and permanently enjoined Adams from further practicing law without a license. The fine was dropped.

Glover, Personal Representative of the Estate of Noren v. Innis
Colorado Court of Appeals, March 3, 2011
__ P.3d__, 2011 Colo. App. LEXIS 322
Promissory note; attempted gift; waiver.

This case presents an interesting story of creative estate planning. Plaintiff is the personal representative of Noren; defendants Norma and Richard Innis were neighbors. The PR sues the Innises on a promissory note for $250,000, given at the time that Noren conveyed a joint tenancy interest in his property to the Innises. The question raised by the PR for Noren's estate is whether a gift was intended. If not, the Innises argue that Noren waived his right to collect on the note.

Noren owned adjacent residential property in Mesa County. The Norens spent significant time out of state. The Innises looked after the Norens' property when they were in Nevada. Noren and defendants had an attorney draft a promissory note payable by Mr. and Mrs. Innis to Noren in the principal amount of $250,000, with a related agreement and warranty deed conveying Noren's Mesa County property to the Innises. The draft agreement stated that Noren intended to sell his property to himself, and Richard and Norma Innis as joint tenants in consideration for the note.

The note and agreement were signed by the Innises in November 2003 and sent with the unsigned warranty deed to decedent in Nevada. A year and a half later, Noren signed the agreement and deed, returned it for recording, and retained the note. The note required the Innises to pay the $250,000 in monthly installments commencing January 1, 2007. Noren, however, died before any payments were due, and the Innises never made any payments. Defendants claimed decedent never accepted the note, waived payment under it, and repeatedly expressed his intent to "give" them the property.

At first, the trial court denied the PR's motion to set aside the conveyance as illusory, but granted partial summary judgment on the enforceability of the note, subject to any defenses. The trial court then held a bench trial. The trial court rejected the Innises defenses, characterizing the defense of waiver as "renunciation," and rejecting the defense.

On the latter issue, the court of appeals reverses. The court agrees that decedent did not renounce his rights to collect under the note for purposes of C.R.S. § 4-3-604. However, § 4-3-601(a) permits the obligation of a party to pay under an instrument to be discharged under the UCC or by any act or agreement that would discharge an obligation to pay under a simple contract. This includes the common-law defense of waiver, which may be implied by a party's conduct. The trial court erred by failing to consider defendants' waiver defense, independent of the statutory defense of renunciation. The judgment on the note is reversed and remanded for trial or further findings on the issue of waiver.

JW Construction Company, Inc. v. Elliott
Colorado Court of Appeals, March 17, 2011
__ P.3d __, 2011 Colo. App. LEXIS 403
Mechanic lien; excessive lien statute; attorney fees; individual vs. corporate liability for fee award.

This is a homeowner–builder dispute; homeowners obtain a judgment against their contractor, JW Construction Co., Inc. (JW), and its president for fraud. They also obtain an award of attorney fees for filing excessive mechanics' liens pursuant C.R.S. §38-22-128. The judgment was affirmed in part and reversed in part.

Even if JW's lien was excessive, subjecting it to an award of costs and attorney fees, its principal, Wodiuk, is not personally liable for attorney fees incurred by the Elliotts to

defend against the excessive lien. The excessive lien statute allows for recovery of costs and attorney fees only against the "person who files a lien;" the trial court erred by holding that Wodiuk was personally liable for these amounts. According to the plain language of the statute, only the corporation is liable for costs and attorney fees.

JW argued that the trial court applied the wrong standard when determining that JW was liable for filing an excessive lien. The record supports the trial court's finding that JW had knowledge that it was claiming amounts greater than the amounts actually due. That is sufficient to trigger application of the excessive lien statute.

The case is remanded to the trial court with directions to determine the amount of fees that should be allocated to the defense of the excessive lien claim as against JW, and for modification of the fee award consistent with those findings.

Portercare Adventist Health System v. Lego
Colorado Supreme Court, March 28, 2011
___ P.3d ___, 2011 Colo. LEXIS 274
Petition for Certiorari GRANTED

Summary of Issues:

- Whether the court of appeals improperly construed C.R.S. section 13-80-103.5, which states that "[a]ll actions to recover a liquidated debt or an unliquidated, determinable amount of money . . ." must be filed within six-years, to apply only if a written contract exists or there was an agreed upon formula.

- Whether the court of appeals erred when it refused to remand the case to the trial court for an accrual determination when accrual was never litigated under the standard applicable to a breach of contract claim.

Sure-Shock Electric, Inc.
Colo. Court of Appeals, June 23, 2011
__ P.3d __, 2011 LEXIS __________
Mechanic lien; arbitration.

DLV was the owner of property on which it constructed Diamond Lofts, and Sure-Shock was the electrical subcontractor. In their contract, the parties agreed to arbitrate "[a]ny claim arising out of or related to the [s]ubcontract." DLV failed to pay Sure-Shock, and Sure-Shock recorded a mechanic's lien on the property. Sure-Shock filed a complaint asserting claims for breach of contract, unjust enrichment, and foreclosure of the lien. DLV moved to stay proceedings and compel arbitration under the contract. The motion was granted and the parties arbitrated.

The arbitrator ruled in favor of Sure-Shock, awarding it the amount of its lien, plus interest from the date the lien was recorded. The court granted Sure-Shock's motion for confirmation of the award, and entered a decree of foreclosure. DLV appeals, arguing that certain procedural issues decided by the trial court at the hearing on confirmation

could only be considered by the arbitrator. The court affirms. Only a court may issue a decree of foreclosure, and a court may determine the issue of procedural validity of a lien if the issue was not raised by DLV in arbitration. The trial court is the proper forum for contesting any disputes as to the procedural validity of Sure-Shock's mechanic's lien.

7. EASEMENTS AND PUBLIC ROADS

Bolinger v. Neal
Court of Appeals, October 14, 2010
__ P.3d __, 2010 Colo. App. LEXIS 1536
Easement; created by plat and PUD map; easement by estoppel; conservation easement.

In this easement case, plaintiffs Bolinger, Mathiesen, Shelton, Coulter, Wollam, Bonnie Schoenstein, and the Mill Creek Subdivision Homeowners Association (HOA) appeal from the trial court's judgment in a quiet title action. Defendants Neal and his company, Plains View Development, LLC, (collectively, Plains View), cross-appeal.

This case concerns a path easement within the Mill Creek Subdivision, a planned unit development (PUD) in Weld County. Defendant Neal developed a parcel of land near Berthoud, Colorado, consisting of Lot A and Lot B. Lot B was to be subdivided as a PUD comprising nine large residential lots and approximately 100 acres of open space, which became Lot 10 of the subdivision. Lot A was sold to Plaintiffs Wollen and Shoenstein in late 2000, with a "promise" that they would have unfettered access to Lot 10 within Lot B. A deed of conservation easement on Lot 10 was given to Colorado Open Lands in December 2001. This deed reserved to Neal the power to grant the lot owners in the subdivision access to Lot 10. It required prior approval by COL of improvements and gave COL the power to restrict some activities on Lot 10. In 2003, Neal recorded a subdivision plat, essentially a resubdivision of Lot B. In 2004, he recorded an amended plat and an amended PUD. Both the plat and the PUD showed trails to and across Lot 10 for the benefit of the subdivision owners.

The first issue on appeal is whether the court properly determined that the map and the PUD created an express path easement on Lot 10 for the purpose of owners of lots in the subdivision. The court gives a thorough review of the law and gives a strongly worded holding in favor of the lot owners. It holds that the map on the PUD creates an express easement, and is not deficient for failure to expressly indentify the holders of the dominant estate. The amended PUD sufficiently identified Lot 10 as the servient estate and clearly described the path around the perimeter of and within Lot 10. Therefore, the amended PUD created an express easement.

The DeWolfs, the owners of Lot 7 and Lot 10, argue that even if the amended PUD could be read to create a path easement, the conservation deed precludes Neal from granting the easement. The court holds that the conservation deed permits Neal to

grant access to Lot 10 to the surrounding property owners, and this rights reserved to Neal are not inconsistent with the path easement created by the amended PUD.

Two individual plaintiffs owning property in Lot A, who are not express beneficiaries in the easements described in the Lot B plat, contend they are entitled to a path easement by estoppel under RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10. The court holds that the trial court acted within its discretion in denying such relief as to Wollam and Schoenstein, whose lots (within Lot A) were conveyed before the resubdivision of Lot B had been approved and platted. Therefore, Wollam and Schoenstein only have a license to use Lot 10. Oddly, the court then holds that since the license is not an interest in land, its parameters could not be adjudicated in a quiet title action under C.R.C.P. 105. The court reasons that these two plaintiffs could have sought a declaratory judgment on this point, but did not.

Several plaintiffs asserted fraud claims against Neal and his company on the basis of representations that the lot owners would have “unfettered” access to Lot 10, not just a license or a path easement. Because the recording of the conservation easement gave actual or constructive notice that Neal’s representation was false, the statute of limitations ran against the Coulters, the Bolingers, Wollam, and Schoenstein before they commenced this action. Because the statute of limitations bars the fraud claims of these plaintiffs, and because Shelton and Mathiesen received what they were promised, the fraud judgment in their favor and the nominal damage awards were reversed.

Breach of contract damages in favor of Wollam and Schoenstein were affirmed.

8. ESTATES AND PARTITION

No reported cases.

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

Fisher v. Community Banks of Colorado
Colorado Court of Appeals, September 2, 2010, *certiorari granted*
___ P.3d ___, 2010 Colo. App. LEXIS 1215
Credit agreement statute of frauds; ambiguity; extrinsic evidence.

The bank loaned borrower approximately $3.4 million to build a luxury home in Cherry Hills Village. Borrower executed deeds of trust to that land and to his Telluride vacation home. The loan was modified and extended three times, through documents titled “Change in Terms Agreement.” After default, the bank initiates foreclosure proceedings, and thereafter sells the note to a third party, which settles with borrower. Borrower reserves his claims against the bank, and then sues for damages. The issue: what is the default rate of interest?

Borrower appeals the trial courts finding that the loan agreements unambiguously set a 36 percent default interest rate, and that the credit agreement statute of frauds, C.R.S. § 38-10-124, precludes evidence that the parties never intended that rate. Although the credit agreement statute contains an expansive statute of frauds provision, it does not limit extrinsic evidence to resolve facially ambiguous credit agreements. The agreement here was ambiguous because the original loan agreement and the three change agreements contained inconsistent provisions regarding the interest due on borrower's default. Borrower gets a new trial.

Note, the supreme court accepted this case for review on March 14, 2011, on this issue:

- Whether the court of appeals erred in holding that section 38-10-124(2), C.R.S. (2010), allowed the introduction of extrinsic evidence to interpret an allegedly ambiguous contract.

Amos v. Aspen Alps 123, LLC
Colorado Supreme Court, March 28, 2011
Petition for Writ of Certiorari GRANTED

Summary of Issues:

- Whether the court may award the foreclosed property to one of the conspirators rather than void the sale when bidders at a public foreclosure sale conspired to rig the bidding in violation of the Colorado Antitrust Act and the resulting deed is void.
- Whether a foreclosing bank's material failure to comply with C.R.C.P. 120's requirements to identify and give notice to all interested parties voids the resulting foreclosure sale.

Watson v. Cal-Three, LLC
Colorado Court of Appeals, April 14, 2011
___ P.3d ___, 2011 Colo. App. LEXIS 547
Excessive payoff demand; recusal of judge; damages for disgorgement of profits.

In 1999, Brandon Park, LLC borrowed money from Bank to develop and construct townhomes. The loan was secured by a first deed of trust. Watson, the principal of this closely held company, signed a guarantee – repayment of the loan in exchange for a fee to be paid from the project's proceeds. Calahan Construction Company was the general contractor for the first phase of the project. Brandon Park began having problems making payments, and Calahan sued. After mediation, the parties reached a settlement. Brandon Park transferred all of its rights in the project to Cal-Three, a new entity formed by Watson for the purpose of becoming the owner and developer of the project.

In August 2002, Watson pays off Bank and apparently obtains an assignment of its deed of trust. The total balance of the Bank's mortgage was $66,000. Watson notifies

Cal-Three of its alleged default by reason of its failure to pay the bank debt, HOA assessments, and mechanic liens as promised in the mediated settlements. Calahan tries to sell one unit, but Watson sends a payoff letter to the title company demanding an amount for the entire project, as opposed to a payoff for the single unit as called for in the mediated settlement agreement. The closing did not occur; although it is not expressly stated in the opinion, it appears that the sale of the single townhouse would have been sufficient to pay the Bank debt. The next day, Watson commenced a civil action for appointment of a receiver and a foreclosure proceeding through the public trustee.

At the foreclosure sale in February 2003, Watson successfully bid on the property. Eventually, Watson sold the remaining three completed townhomes for $414,326.55 and the remaining raw land for $738,000.

Cal-Three filed an answer and counterclaim in the receivership action, asserting claims of breach of contract, bad faith breach of contract, and intentional interference with contract. Following a bench trial, the court ruled in favor of Cal-Three on its breach of contract and covenant of good faith claims. The trial court awarded Cal-Three the money received from the sale of the townhomes and raw land, Watson's gross profits, as well as $50,000 in punitive damages.

Watson argues that the trial judge should have recused herself *sua sponte* because, before entering judgment, she sent a letter of complaint concerning Watson, an inactive attorney, to the Colorado Supreme Court Office of Attorney Regulation Counsel. Apparently Watson violated the trial court's sequestration order by sending a facsimile recounting trial testimony to a witness who had yet to testify. The court of appeal holds that a judge may not be recused for bias or prejudice that is based on the facts and circumstances of the case. C.R.C.P. 251.4 places a duty on a judge to report unprofessional conduct by an attorney to the regulatory authorities.

The court reverses on the trial court's award of damages, which seem to be based on Watson's gross profits, or the total sales proceeds of the townhouses and raw land. While a claim for a plaintiff's lost profits is fairly common, the court holds that in particularly egregious cases, a court may order damages based on disgorgement of the defendant's profits. Here, the lower court made findings of a willful and wanton breach of the settlement agreements. However, in so doing, the damages must take into account the defendant's expenses (i.e., the payment of the $66,000 to pay the Bank's loan) and the relative contributions of both sides toward improvement of the property. The trial court should determine what portion of Watson's profits is attributable to Cal-Three's work and what portion was attributable to Watson's efforts and investment. In other words, the court may order disgorgement of all *net* profits.

In re Thomas v. Federal Deposit Insurance Corporation, in its capacity as receiver for New Frontier Bank
Colorado Supreme Court, June 6, 2011
___ P.3d ___, 2011 Colo. LEXIS 475
Pre-receivership claim against federal bank; FIRREA; administrative procedure.

The issue presented to the supreme court in this original proceeding is whether a state court retains jurisdiction over civil claims brought against a bank that later enters receivership, where the claimant fails to exhaust the administrative remedies of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), relevant sections to this discussion being codified in 12 U.S.C. § 1821(d).

In 2006, Plaintiff Steven Thomas and his closely held company entered into a series of contractual agreements with The Bridges Country Club. Certain club facilities involved in the agreement were owned or operated by Black Canyon Golf, LLLP. Subsequently, New Frontier Bank of Greely acquired the facilities property through foreclosure. Thomas was later unable to obtain performance of the club's obligations under the agreement. In September 2007, Thomas brought contract claims against New Frontier Bank. However, before the case was resolved, in April 2009, the Colorado State Bank Commissioner, by order of the Colorado State Banking Board, closed New Frontier Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver. FDIC published a series of notices advising all creditors having claims against the former New Frontier Bank that their claims and proof thereof had to be filed with the FDIC by the Bar Date of July 15, 2009. On July 17, 2009, FDIC sent Thomas an individual notice providing him with an additional ninety days to file a proof of a claim with the FDIC along with an explanation of his delay. Thomas did not file any proof of claim with the FDIC, either before or after the Bar Date, or the extended deadline.

Then, on February 2010, Defendant FDIC, in its capacity as receiver of New Frontier Bank, moved to dismiss Plaintiff's claims under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, citing Plaintiff's failure to exhaust the administrative claims review process established by Congress under FIRREA. The trial court denied the motion; the FDIC then sought review under C.A.R. 21, contending that the trial court was proceeding without jurisdiction. After review, the supreme court held that where a claimant has received proper notice of the required administrative claims procedures under FIRREA, yet fails to exhaust those administrative remedies, the Act precludes any court from continuing to exercise jurisdiction over pre-receivership claims filed against the failed bank. Accordingly, the matter is remanded to the trial court with directions to dismiss Plaintiff's claims against the FDIC for lack of subject matter jurisdiction.

10. JUDGMENTS AND FRAUDULENT TRANSFER

No reported cases.

11. LAWYERS AND PROFESSIONAL LIABILITY

North Valley Bank v. McGloin, Davenport, Severson and Snow, P.C.
Colorado Court of Appeals, December 9, 2010
__ P.3d __, 2010 Colo. App. LEXIS 1831
Attorney's charging lien; "first lien"; priority over prior perfected security interest.

Plaintiff North Valley Bank loaned $100,000 to BLR Construction Company. BLR signed notes granting the bank a security interest in the contractor's accounts receivable and in all proceeds of these accounts. The bank perfected the security interest by filing a financing statement with the secretary of state.

Thereafter, BLR contractor was hired by Custom Landscapes to work on a project financed by the State of Colorado. BLR charged Custom $53,145 for its work. Custom did not pay, and BLR retained the McGloin law firm to assist in collection of the debt.

The attorneys sued Custom (and ultimately the State was joined) on an open account. The attorneys also filed a notice of an attorney's lien under C.R.S. § 12-5-119 against any judgment that BLR might receive as a result of the lawsuit. The bank contacted the attorneys and informed them it had a perfected security interest in any money the contractor might be awarded in the lawsuit. The landscaper joined the State as a defendant. The trial court entered judgment in favor of the contractor and against the State in the amount of $51,402.

The State sent a check for $51,402 to the attorneys, who kept $41,381 as reimbursement for legal services, and $3,000 as a retainer against any future services they might render. They forwarded $7,021 to the contractor. The bank then filed this case against the attorneys, raising claims for replevin, conversion, and declaratory relief. The trial court held that the attorney's lien was superior to the bank's perfected security interest and entered judgment in the attorneys' favor. It held that the claim of BLR was a general intangible, not an account receivable, and was therefore not governed by the UCC. The court of appeals affirms, on different grounds.

The right to an attorney's lien is created by statute. Our charging lien statute, C.R.S. § 12-5-119, specifically grants an attorney "a *first lien* on such demand in suit or on such judgment for the amount of his fees." The charging lien attaches "immediately" when a judgment is obtained, and the attorney does not need to take any further steps to enforce the lien against his client. To enforce the lien against third parties, proper notice must be given.

The bank argues that the UCC gives its previously perfected security interest priority over the attorney's lien. The Court disagrees. Article 9 does not cover statutory liens for services. C.R.S. § 4-9-109(d)(2). Although the claim of BLR was an account receivable and therefore subject to the bank's security interest, a statutory lien may be given priority over a previously perfected security interest if the statute, as here, indicates a "specific legislative intent to give such a priority." The court finds the "first

lien" language to be clear and dispositive. C.R.S. § 4-9-333, which deals with priority between security interests and certain statutory liens, does not help the bank, as its scope is limited to possessory interests in "goods." An attorney's charging lien is a statutory lien for services, and is not covered by the UCC.

The court attempts to distinguish *Cottonwood Hill, Inc. v. Ansay*, 782 P.2d 1207, 1209-10 (Colo. App. 1989), which held a bank's deed of trust on real property to be senior to an attorney's lien, as that case turned on the bank's lack of notice of the attorney lien, which is not an issue here. The court carefully compares our statute's "first lien" language to similar statutes in other states, rejecting the reasoning of what could be construed as a majority position.

This decision could give attorneys the green light to assert lien rights more aggressively. An interesting plea for the profession is in a law review note cited by the court. Zach Elsner, Comment, *Rethinking Attorney Liens: Why Washington Attorneys Are Forced into "Involuntary" Pro Bono*, 27 SEATTLE U. L. REV. 827, 830-31 (2004) (retaining liens are possessory liens; charging liens are nonpossessory liens).

Finally, although one may think that the bank still gets the short end of the stick *vis a vis* BLR's lawyers, whose lien covers almost all of the sum recovered, the court notes that the bank failed to argue that it may be entitled to a part of the judgment, or that some of the fees may have been for other work unrelated to this collection matter.

Allen v. Steele
Colorado Supreme Court, May __, 2011
___ P.3d ___
Attorney; negligent misrepresentation; conference with client not followed by engagement for representation.

Although the underlying case here involves torts, the issue raised is important to all attorneys in private practice. This case began when Plaintiff Jack Steele met with attorney Allen to discuss filing a negligence suit against the other driver in his recent automobile accident. Allen allegedly gave some Steele information about the deadline for bringing an action, but the complaint against Allen does not allege that she was retained to represent Steele. The trial court dismissed the claim of negligent misrepresentation against Allen for failure to state a claim under C.R.C.P. 12(b)(5). The court of appeals reversed, and the supreme court accepted certiorari to decide the narrow question of whether a non-client may state a claim of negligent misrepresentation against an attorney for providing allegedly incorrect information during a consultation about a potential civil lawsuit. In order to decide this issue, the court defines the contours of what constitutes a "business transaction" within a negligent misrepresentation claim.

A claim of negligent misrepresentation requires, in part, that the misrepresentation be "for the guidance of others in their business transactions." As common usage would suggest, a business transaction is a commercial transaction carried on for profit – "a particular occupation or employment habitually engaged in for livelihood or gain."

Black's Law Dictionary 226 (9th ed. 2009). Colorado case law demonstrates that the tort of negligent misrepresentation is intended to provide a remedy for, and is in fact limited to, "money losses due to misrepresentation in a business transaction." The Colorado Rules of Professional Conduct give additional insight into the meaning of "business transaction." Colo. RPC 1.8(a) prevents an attorney from entering into a business transaction with a client. The court reasons that this rule is not intended to prevent an attorney from assisting a client with a potential lawsuit. If the term "business transaction" were viewed so broadly as to encompass a lawsuit against another party, then attorneys could not assist clients in lawsuits, thereby rendering Colo. RPC 1.8 meaningless.

The court also addresses § 15(1)(c) of the *Restatement (Third) of The Law Governing Lawyers* (2000) which requires attorneys to exercise reasonable care when providing legal services to prospective clients. The court held that a claim of negligent misrepresentation may not be founded upon the § 15(1)(c) requirement. Therefore, the court holds as a matter of law that an initial consultation to discuss a potential civil lawsuit is not sufficient to meet one of the required elements of a negligent misrepresentation claim, "guidance of others in their business transactions." Because the Steeles did not plead this element in their complaint, their action was effectively dismissed for failure to state a claim.

The court's holding does not disturb its prior holding in *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995), where defendant attorneys, on behalf of their client, prepared a series of opinion letters stating that a pending lawsuit had no merit. The letters were prepared and sent to induce a bank to buy the client's municipal notes and bonds. The bank in that case stated a claim of negligent misrepresentation against the attorneys. Because the attorneys prepared the opinion letters at the request of their client in order to induce the bank to enter into a mutually beneficial business relationship, the bank was able to sustain the claim. The court distinguishes the instant claim, which does not involve a client's business transaction with a third party. Simply put, because the plaintiffs did not plead sufficient facts to demonstrate that an attorney provided them with false information for their guidance in a business transaction, the plaintiffs failed to state a claim of negligent misrepresentation for which relief can be granted.

12. LEASING AND EVICTION

Fischer v. City of Colorado Springs
Colorado Court of Appeals, September 16, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1348
Lease to governmental entity; multi-year obligation; certificates of participation as financing vehicle; constitutional.

City and the United States Olympic Committee enter into an economic development agreement for the purpose of developing facilities for use by the USOC. To raise funds

to acquire and renovate the facilities, the EDA provides for a lease purchase agreement between the City and the Public Finance Authority -- a nonprofit corporation operated by City officials.

Under the terms of the lease purchase agreement, the City authorizes the PFA to issue certificates of participation, a form of security representing a proportionate undivided interest in an agreement such as a lease. *See* C.R.S. § 11-51-201(17). With the proceeds, the PFA purchases from the City the Police Operations Center and Fire Station No. 8, and then leases them back to the City, assigning its rental income to the investors who had purchased the certificates. The police and fire stations would also serve as collateral for the certificates. The lease between the PFA and the City, however, would be annually renewable, subject to future city councils' decisions to appropriate money to fund it. Plaintiff challenges the validity of the financing scheme on three grounds: (1) the certificates amounted to a contract obligating the City to commit future revenues, which is prohibited unless first authorized by an election, by the Colorado Constitution and the City's home rule charter; (2) the scheme was an unconstitutional donation to a private corporation; and (3) the EDA conflicted with the PFA's articles of incorporation, which prohibited arrangements not consistent with the Colorado Constitution and the City's home rule Charter.

The trial court determined the lease purchase agreement "does not constitute a general obligation debt or multiple fiscal year financial obligation." It granted the City's motion for judgment on the pleadings and dismissed the complaint.

In essence, plaintiff argues that because future city councils effectively would be obligated to appropriate money from the general fund to renew the City's lease of the police and fire stations each year, an election was required under the Colorado Constitution, Article XI, § 6, and the City Charter, § 7-90. The Court disagreed.

The Constitution and Charter provisions proscribe any arrangement in which the City is contractually obligated to incur a debt, the repayment of which will obligate future city councils to commit revenues from the general fund. Such a constitutional debt arises only if the agreement affirmatively requires the payments to be made.

13. PREMISES LIABILITY, TRESPASS AND NUISANCE

Constable v. Northglenn, LLC
Colorado Supreme Court, March 21, 2011
248 P.3d 714 (Colo. 2011)
Indemnity; premises liability; non-delegable duties of landowners.

A woman who slips on ice in a shopping center's parking lot sues the center's owner, Northglenn, LLC. Northglenn filed a third-party complaint against its tenant, Carol Constable, who operates a flower shop in the center, seeking indemnity based on the terms of their lease agreement. Constable moves for a determination of law pursuant to

C.R.C.P. 56(h), arguing that the indemnity provision of the lease is void as against public policy, because (a) it failed to clearly express the intent of the parties to indemnify Northglenn for its own negligence, and (b) because it purported to relieve Northglenn of nondelegable duties over which Northglenn had exclusive control.

The five-year lease between Constable and its landlord contained a provision indicating that Constable agreed to indemnify Northglenn from liability for bodily injury or property damage sustained by anyone in "the Premises" or elsewhere in "the Center," as long as that person was present to visit Constable's shop or as a result of her business. The term "Premises" was defined as the floor area comprising Constable's shop, while the "Center" was defined as "that certain shopping center . . . currently known as The Washington Center" wherein the Premises are located. An express exception to Constable's indemnity obligation indicated, however, that she would have "no obligation to indemnify [Northglenn] against harm resulting from [Northglenn's] own gross negligence or intentional torts."

The trial court ruled for the tenant, but the court of appeals reversed in an unpublished opinion. On certiorari review, the supreme court agrees with the court of appeals that the indemnity provision is not void as against public policy. The provision clearly and unequivocally reflected the intent of the parties for Constable to indemnify Northglenn, LLC for injuries or losses suffered by Constable's customers in the shopping center's parking lot as a result of Northglenn's negligence. Moreover, the provision did not contravene public policy by purporting to delegate a duty made non-delegable by statute. An agreement to indemnify another against liability for the breach of a duty is not, in the view of the court, the equivalent of delegating that duty to another. The court is persuaded by policy considerations favoring freedom of contract which, in the court's view, should generally permit business owners to allocate risk amongst themselves as they see fit. The court notes that the propriety of a lease provision requiring a tenant to indemnify a landlord against the financial burden resulting from breach of even a non-delegable duty is "widely acknowledged in other jurisdictions." See, *e.g.*, *De Los Santos v. Saddlehill, Inc.*, 511 A.2d 721 (N.J. Super. Ct. App. Div. 1986).

Hamill v. Cheley Colorado Camps, Inc.
Colorado Court of Appeals, March 31, 2011
__P.3d __, 2011 Colo. App. LEXIS 495
Exculpatory clause; informed consent; public policy; gross negligence.

The court of appeals affirms the district court's grant of summary judgment in favor of defendant Cheley Colorado Camps, Inc. in an equine personal injury case. The judgment was affirmed.

Hamill attended summer camp at Cheley in 2002, 2003, and 2004. Before attending camp each summer, Hamill and her parents signed a Liability/Risk Form (the agreement). In July 2004, when Hamill was 15 years old, she fell off a Cheley horse and broke her arm. Hamill sued Cheley for negligence and gross negligence, arguing that a Cheley wrangler had inappropriately saddled the horse she rode. The district court granted Cheley's motion for summary judgment on the two negligence claims

based on an exculpatory clause in the camp agreement. The court held that factual issues prevented the court from granting summary judgment on the camp's equine immunity statute defense, C.R.S. § 13-21-119, but held that a contractual exculpatory provision signed by Ms. Hamill's parents barred her claim.

The court of appeals holds the exculpatory agreement valid for the following reasons: (1) the agreement did not implicate a public duty and did not involve an essential service; (2) Hamill's mother voluntarily chose to sign the agreement, expressly giving permission for Hamill to participate in horseback riding activities; (3) the agreement was fairly entered into; and (4) the agreement plainly expressed the intent to release prospective negligence claims.

Hamill contends that her mother's consent to release prospective negligence claims was not "informed," as required by C.R.S. § 13-22-107, because she did not understand the scope of the agreement. Although Hamill's mother may not have contemplated the precise mechanics of her daughter's fall, this does not invalidate the release and does not create a genuine issue of material fact. She knew her daughter would be riding horses and she was advised that there were risks, known and unknown, associated with the activity.

Hamill further argued that public policy considerations render the agreement invalid. The governing statute promotes children's involvement in horseback riding and approves the informed release of prospective negligence claims. In enacting C.R.S. § 13-22-107, the general assembly expressly superseded Colorado's prior case law and empowered parents to weigh the risks and benefits of their children's activities, overruling prior Colorado case law to the contrary.

Finally, the court holds that the plaintiff failed to establish a factual issue as to whether Cheley's wrangler was "willfully" incompetent, purposefully caused the saddle to slip, or recklessly disregarded the appropriate way to tack the horse.

14. PROPERTY TAXATION AND ASSESSMENTS

Jefferson County Board of Equalization v. Gerganoff
Colorado Supreme Court, November 8, 2010
241 P.3d 932 (Colo. 2010)
Board of Assessment Appeals; award of costs to taxpayer.

The court granted certiorari to review the decision of the court of appeals in *Gerganoff v. Board of Assessment Appeals*, 222 P.3d 395 (Colo. App. 2009), to decide whether, upon sustaining in part a taxpayer's appeal of a county's property valuation, the Board of Assessment Appeals is required to award the taxpayer his or her costs incurred in bringing the appeal. The supreme court reverses, holding that the BAA has the *discretion* to award costs to the taxpayer.

C.R.S. § 39-8-109(1) provided, prior to 2010, that upon a ruling by the BAA in favor of a taxpayer, the taxpayer "shall forthwith receive the appropriate refund of taxes and delinquent interest thereon, together with refund interest at the same rate as delinquent interest as specified in section 39-10-104.5, and a refund of costs in said court or board of assessment appeals, as the case may be, including the fees of the appellant's witnesses, in such amount as may be fixed by the court or board of assessment appeals . . . ." The court notes that the use of "shall" and "may " in the same sentence of 160 words "is not a model of clarity." The court of appeals went with "shall;" the supreme court opts for "may," applying the standard rules of statutory interpretation. In 2010 the legislature, with a keen eye on the public purse, amended the statue. The new rule is that, upon a ruling of the BAA, "[T]he appellant and the county shall each be responsible for their respective costs in said court or board of assessment appeals, as the case may be."

C.P. Bedrock, LLC v. Denver County Board of Equalization
Colorado Court of Appeals, April 14, 2011
__ P.3d __, 2011 Colo. App. LEXIS 549
Property tax; agricultural classification.

This appeal from a ruling of the Board of Assessment Appeals concerns a 40-acre parcel on Tower Road in Denver. This parcel was acquired by taxpayer as part of a 600-acre tract in 1998, and the entire parcel was leased through 2006 to a rancher. The property was classified for tax purposes as agricultural land. In 2006 the City widened Tower Road, which required removal of a fence along the 40 acre parcel, which made ranching impractical. The taxpayer then leased the 40 acres to Wayne Miller. Miller conducted farming operations on 400 acres adjoining the 40 acres in question.

Relying on C.R.S. § 39-1-103(5)(c), Denver reclassified the subject property in 2007 from agricultural to commercial vacant land in 2007. The taxpayer, C.P. Bedrock, LLC, appealed this classification to the BAA, which reclassified the parcel as agricultural for tax years 2007 and 2008. The subject property is zoned commercial mixed use.

Various governmental entities worked as part of a cooperative effort to widen Tower Road in 2006. The Town Center Metropolitan District started an 80-foot-wide ditch construction project that bisected the property from east to west. It was completed in August. The workers used the entire property during construction. Miller did not graze livestock or grow crops on the property in 2006. In 2007 and 2008, Miller grew millet and winter wheat on the property.

In January 2006, Miller applied for inclusion of the property in his conservation plan with the Direct and Counter-Cyclical Program (DCP), which entitled him to a wheat subsidy payment from the Adams County branch of the federal Farm Service Agency. The property was included in March 2007.

At the BAA hearing, Miller testified that he did not perform any conservation practices on the property in 2006. The BAA found that "no farming or ranching activities occurred

on the subject property during 2006." However, it concluded that because the property was part of a larger farm unit that was actively farmed in 2006, it did not have to be reclassified, thereby returning the taxable value of the property to $3,000 from the reclassified value of $4,031,600.

On appeal, Denver argues that the BAA action was contrary to law because the property was not used as agricultural land in 2006. The court of appeals agrees. There was no farming on the property in 2006; it was used as a construction site. The court then rejected the BAA's alternative ground that the property was "in the process of being restored through conservation practices." Under the applicable statute, a parcel may qualify as agricultural land if it has been placed in a conservation reserve program, or if it is subject to a conservation plan approved by the appropriate conservation district for up to a period of ten crop years. The property in this case was not in a conservation reserve program in 2006. Accordingly, the BAA order to reclassify and revalue the property as agricultural land is reversed.

15. TAX SALES, TREASURER DEEDS AND CONSERVATION EASEMENT TAX CREDITS

Meyer v. Haskett
Colorado Court of Appeals, December 9, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1827
Quiet title action; validity of treasurer's deed; sufficiency of notices; fraudulent transfer.

This case begins with an entry of judgment for past due child support against father for $81,000. Father and mother than agree that the judgment would be assigned to a trust for the education of the child. Although father represented in interrogatories that he owned the property, prior to entry of the judgment, he conveyed his interest in the property to a limited liability company in which he was the only member.

Before all of this happened, the property had been sold at a tax sale for 1982 taxes. The property was sold off to El Paso County, which held the certificate of purchase until 2007, at which point it requested issuance of a treasurer's deed. When notices of the deed issuance were sent pursuant to C.R.S. § 39-11-128, notice was sent to the LLC but not to the Educational Trust. The treasurer's deed was issued on June 8, 2007. Two weeks later, the Trust sought to sell the land upon a writ of execution of the earlier child support judgment. At a sheriff's sale, the Trust purportedly purchased father's interest in the property. Before a sheriff's deed issued, the treasurer deed purchaser was granted an injunction. The tax sale purchaser filed this complaint to quiet title to the property. Father and the LLC were served by publication and defaulted. The Educational Trust filed an answer. This appeal resulted when the trial court entered summary judgment against the Trust.

The Trust challenged the sufficiency of the notices for issuance of the treasurer's deed based on its claim to the property and a claim for fraudulent transfer of father's interest

in the property to the LLC. The court reviews the treasurer's deed statute, including the requirement that the treasurer shall serve a notice of deed issuance "upon all persons having an interest or title of record in or to the same if, upon diligent inquiry, the residence of such persons can be determined." Unfortunately, the court holds that a person "having an interest or title of record" is equivalent to "record owner," apparently considering that lien holders with a right to redeem are not entitled to notice. In any event, the court holds that the Trust could not demonstrate that it had an interest in, or title of record to, the property, for two reasons. First, at the time the child support judgment was entered and the writ of execution recorded, the LLC, not father, was the record owner of the property. Accordingly, the lien never attached. The court notes that father's interest in the limited liability company was personal property. Because the writ of execution only entitled the Trust to execute upon father's property, and father had no interest in the property, the Trust was not entitled to notice of the issuance of a treasurer's deed.

The court rejects the argument that the treasurer should have given notice to a company who retained a record interest to the property as a result of some conveyances in 1888. The court holds that the Trust cannot assert the invalidity of the treasurer's deed on the basis that a third party failed to receive notice.

Finally, the Trust's best argument, under the Colorado Uniform Fraudulent Transfer Act, fails for failure to plead a claim for relief under the act, and the issue was raised for the first time in a reply brief in favor of vacating the summary judgment order.

Finally, father, who supported the attack on the issuance of the treasurer's deed, lacked standing to challenge the issuance of the treasurer's deed because he had no interest in the property, having conveyed his interest to the LLC.

16. TITLES AND TITLE INSURANCE

Joondeph v. Hicks
Colorado Supreme Court, June 28, 2010
235 P.3d 303 (Colo. 2010)
Equitable subrogation; subsequent purchaser and mortgagee with actual knowledge; derivative subrogation.

What happens after a court grants equitable subrogation to a home lender and a home purchaser for amounts of a new mortgage loan and a down payment ahead of an intervening lien of which the new home purchaser and lender had not actual knowledge? This case presents these questions in the aftermath of *Hicks v. Londre*, 125 P.3d 452 (Colo. 2005). The supreme court in this case affirms the decision of the court of appeals, reported here last year. *Hicks v. Joondeph*, 205 P.3d 432 (Colo. App. 2008). In so doing, the court rejects the doctrine of derivative subrogation applied by the trial court to allow a subrogee to transfer its equitable subrogation rights to a subsequent buyer, notwithstanding that buyer's actual knowledge of the prior recorded judgment lien.

Hicks sought to foreclose a judgment lien in 2002 on property in the Glenmoor subdivision in Cherry Hills Village that had been owned by the judgment debtor, Grubbs. Grubbs sold the property to Londre, and Chase took a deed of trust for the purchase money loan. The title company failed to locate the judgment lien. In litigation that resulted in *Hicks v. Londre*, *supra*, the court allowed Londre (as owner and holder of an equitable lien) and Chase to be jointly subrogated to the former first lien position of Grubbs' mortgagee.

The title insurer for Londre and Chase were persuaded to insure over the Hicks lien, and Londre sold to Joondeph, with purchase money financing from CitiMortgage. After learning of the sale, Hicks sought again to foreclose his lien, arguing that the Joondephs and their lender had actual knowledge of the Hicks lien and could not qualify for equitable subrogation under the test set out in *Hicks v. Londre, supra*. The trial court applied subrogation again, applying "derivative subrogation" in reliance on a 1996 case out of the Fifth Circuit.

The court of appeals held that the Joondephs would not be entitled to equitable subrogation because they had actual knowledge of Hicks' preexisting lien. The court also found no precedent in Colorado for recognizing "derivative" equitable subrogation, which would allow the conveyance of the prior owners' subrogation rights to the petitioners via warranty deed.

The court's opinion is short and to the point. Because the Joondephs and their mortgagee had actual knowledge of Hicks' prior lien and were not operating under a mistaken assumption that their lien would have senior priority status, they are not entitled to equitable subrogation. The court holds that a doctrine of derivative equitable subrogation has no foundation in Colorado law. Under the test propounded in *Hicks v. Londre*, equitable subrogation remains a narrow exception to the normal order of priority established by Colorado's race-notice recording system, to be applied only on a case-by-case basis, where some mistake occurs which justifies equitable relief. The court does not address arguments made by the Joondephs and their mortgagee based on the common-law shelter principle, which has some basis in both the Uniform Commercial Code and cases interpreting our recording act. Hicks argued that this principle did not apply because neither the Joondephs, nor their mortgagee, were good faith purchasers for value; the court apparently agreed.

Munoz v. Meaner
Colorado Supreme Court, February 28, 2011
247 P.3d 1031 (Colo. 2011)
Denial of motion for attorney fees; groundless and frivolous statute; no specific factual findings required.

This ten year saga concerns a quiet title action brought by Munoz against Measner to quiet title to certain property. The underlying claim was by Munoz for adverse possession of approximately 700 square feet of land. While the Munoz family prevailed

on the adverse possession claim, they had also brought claims against the Measners (the record title owners) for outrageous conduct, nuisance, and slander of title. The dismissal of these peripheral claims was the subject of the Measners' motion for attorney fees under the groundless and frivolous statute, C.R.S. § 13-17-102(4), which allows for an award of fees if the claim "lacks substantial justification," either because the claim or the evidence introduced at trial was groundless or frivolous, among other factors. On appeal, the court of appeals held, in 2009, that the trial court abused its discretion by finding that the Munoz' claims did not lack substantial justification without analyzing each claim individually according to the factors enumerated in § 13-17-103(1) of the statute.

The supreme court accepted review and reversed. The statute in questions requires the trial court to make specific factual finding with regard to certain aggravating and mitigating circumstances outlined in § 103(1) only when *granting* an award of fees, not when denying an award, as occurred here. The court notes that the trial court originally made sufficient findings in denying the motion for fees, including an analysis of each claim, and that the court did not abuse its discretion in denying the request.

This claim was apparently considered worthy of review by our supreme court due to the significant work load presented by the litigation over attorney fees. It should be noted that the factors in § 103 all deal with the *amount* of the fee award (*i.e.*, any effort made to settle or to reduce number of claims in an action; relative financial positions of the parties; whether the claim or defense was made in bad faith, etc.). The court also noted that counsel for Munoz sought fees for all claims, claiming they were all interrelated, and failed to break out the fees for quiet title action as opposed to the fees for collateral tort claims.

Sifton v. Stewart Title Guaranty Company
Colorado Court of Appeals, June 9, 2011
___ P.3d ___ (Colo. App. 2011)
Spurious lien and document statute; release prior to hearing; attorney fees and costs.

One can see that the spurious lien and document is being used and has teeth. This case addresses the liability of a party that sees the error of its ways, in a sense, and wishes to release its lien or document prior to the scheduled hearing under the statute. Must the court in this situation still hold a hearing to resolve the respondent's liability for attorney fees? The court of appeals affirms the trial court on this issue and says "no," but holds that the trial court must go further, under the pleadings of this particular case, and determine whether the respondent is liable for attorney fees under the frivolous and groundless statute, C.R.S. § 13-17-102.

Sifton filed this action to have two deeds of trust that encumbered her property, on which she asserted her signature had been forged, declared spurious and released. The deeds of trust were originally for the benefit of two of Stewart Title's insureds and had been assigned to Stewart Title in a claim settlement. The case became

"protracted," in the words of the court, but the trial management order reflects a stipulation that trust deeds were forgeries. The court resolves the first issue by looking at the plain language of C.R.S. 38-35-204. The section reads in part: "*If*, following the hearing on the order to show cause, the court determines that the lien or document *is* a spurious lien or spurious document, the court shall make findings of fact and enter an order and decree declaring the spurious lien or spurious document and any related notice of lis pendens invalid, *releasing the recorded or filed spurious lien or spurious document, and* entering a monetary judgment in the amount of the petitioner's costs, including reasonable attorney fees . . ." (emphasis added by court). The court concludes, as did the district judge, that the trial court's determination must involve a lien or document still affecting title to property at the time of the hearing. To convince us, the court offers this analysis: "Although '[w]ords in the present tense include the future tense,' C.R.S. § 2-4-104, Sifton has not cited authority . . . that present tense language applies to past events."

As for the frivolous and groundless claim, the petitioner Sifton first raised this issue in its brief in response to Stewart's motion to dismiss the case after the trust deeds were released shortly before the date set for hearing on the spurious lien claim. The trial court did not address the request for fees under the frivolous and groundless statute. The court of appeals remands for this reason, holding that the relatively late request by Sifton is sufficient to bring the request before the court. The court goes further. A court "may properly determine that an action was 'brought or defended' in a substantially groundless manner even when it is dismissed . . . before the trial actually commences." Moreover, the court notes even a prevailing party can be subject to an attorney fees award for "having unnecessarily expanded proceedings," *citing Portercare Adventist Health System v. Lego*, ___ P.3d ___ at n.6 (Colo. App. Sept. 16, 2010) (*cert. granted* Mar. 24, 2011).

A Good Time Rental v. First American Title Agency
Colorado Court of Appeals, June 9, 2011
__ P.3d__ (Colo. App. 2011)
Claim by customer against closing agent; negligence and negligent misrepresentation; economic loss rule.

Plaintiffs A Good Time Rental, LLC, and Noble Petroleum, LLC owned two adjacent parcels in Douglas County. Restaurant Operating Company, LLC (ROC) proposed to acquire the two properties in a tax-free exchange for two of its properties in California. In addition, Plaintiffs and ROC agreed that ROC would pay $300,000 to Plaintiffs, with Plaintiffs taking a note and deed of trust in that amount as a "seller carryback." Plaintiffs contacted American Heritage to provide title, closing and settlement services. The note was to be cancelled upon Plaintiffs' purchase of the California properties. Plaintiffs prepared "closing instructions," which bound the parties and American Heritage to carry out the transaction as agreed upon.

Plaintiffs claim that the Colorado part of the deal was closed, but that the California part of the transaction did not, due to problems with Plaintiffs' assumption of debt on the California land. The complaint states that, in closing the Colorado transaction,

American Heritage never obtained an original promissory note signed by ROC. As a result, Plaintiffs got nothing for their land. The complaint goes on to allege that American Heritage had negligently breached its duty to "exercise reasonable care and competence" in conducting the closing; and had negligently misrepresented that all documents necessary to the closing on the Colorado properties had been received and reviewed, and that it ready to close escrow. American Heritage moved for summary judgment pursuant to the economic loss rule, arguing that plaintiffs' sole recovery against it was in contract, not tort, because the parties' contract – the closing instructions – contained the duties allegedly breached. The district court granted American Heritage's summary judgment motion, barring Plaintiffs' claims under the economic loss rule.

The court of appeals affirms, walking through the factors of the economic loss rule, a rule which is applied when determining whether tort law or contract law provides the remedy for a plaintiff's loss. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000), states the economic loss rule in Colorado: "A party suffering economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law." The court holds that when the harm allegedly suffered is only to contractual expectations, the duty to perform a contract with reasonable care is not independent of the contract, and therefore a tort claim based on that duty is barred by the economic loss rule. Even if a fiduciary relationship existed, as is often held to exist between a closing agent and client, American Heritage's contractual duty to provide closing and settlement services could not serve as the Plaintiffs' basis of *any* tort claims seeking additional compensation for an alleged failure to perform that same contractual obligation.

17 West Mill Street LLC v. Smith
Colorado Court of Appeals, June 9, 2011
___ P.3d ___, 2011 Colo. App. LEXIS 842
Attorney; wrongful release of deed of trust; statutory interpretation regarding "fraudulent request"; nominal damages.

The case concerns a series of transactions between Robbins, a private lender doing business through his single member LLC, 17 West Mill, and a series of companies controlled by one Kreutzer. Robbins made a number of loans secured by a number of different properties, and the parties frequently "swapped deeds," substituting one property for another as security for the various loans. In these collateral swaps, Smith, counsel for Kreutzer, would obtain Robbins authorization for release of a deed of trust, and would then personally sign the release as attorney for 17 West Mill. In one transaction involving $12 million in condo units, Smith erroneously assumed that Robbins would approve a release on Unit 42 in the property in question, and signed a typical release on behalf of 17 West Mill. That company caught the mistake a year later, and brought suit against Smith and an innocent purchaser of Lot 17, seeking a decree declaring the release of the trust deed to be fraudulent and void under C.R.S. § 38-39-102(8), and sought damages for Smith's negligence. The trial court entered only nominal damages against Smith, for lack of proof of loss. The court,

understandably, found the evidence to be too confusing. The trial court also held that 17 West Mill failed to prove actual fraud, and dismissed the claim to reinstate the trust deed.

The court of appeals reverses on the latter issue. Under § 38-39-102(8), "[i]f the written request to release the lien of any deed of trust is a fraudulent request, the release by the public trustee based upon such request shall be void." The trial court construed the term "fraudulent" as requiring proof of the elements of common law actual fraud, including that the person making a false representation knew the representation was false. Reversing, the court of appeals looks to legislative history, including testimony in the legislature in 1992 testimony from Section stalwart Bill Horlbeck. The court reasons that the legislature aimed to prevent deception of the public trustee and wrongful releases of deeds of trust, not to punish only those who intentionally deceived. Thus, the General Assembly contemplated something akin to "constructive fraud" when it adopted subsection (8). "'Constructive fraud' has been defined as a breach of a legal or equitable duty that the law declares to be fraudulent because of its tendency to deceive others, to violate public interests, irrespective of the moral guilt of the perpetrator." *Barnett v. Elite Properties of America, Inc.*, (Colo. App. May 27, 2009). Thus, taking into consideration the legislative intent behind the enactment of section 38-39-102(8), the court holds that any material misrepresentation as to statutory requirements in a request for release of deed of trust makes the request "fraudulent" under that statute, regardless of intent; the part of the trial court's finding of no fraud is reversed and remanded for further findings.

17. ZONING AND LAND USE CONTROL

Sensible Housing Co., Inc. v. Town of Minturn
Colorado Court of Appeals, August 19, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1168, *certiorari granted*
C.R.C.P. 106; annexation; standing to challenge; pending quiet title litigation.

In order to have standing to challenge another landowner's petition to annex property into a municipality, the challenger must be a landowner or a qualified elector in the affected area under C.R.S. § 31-12-116. The challenger filed this action on the basis that the town abused its discretion by approving the annexation while title to the property at issue was being litigated. Challenger lost on summary judgment in the quiet title action, but appealed. In the annexation case, the court dismissed the challenger's complaint because it was not the property owner or a qualified elector. On appeal, the court reverses and remands. Claim and issue preclusion do not apply to resolve the standing issue, as an appeal was still pending in the quiet title action. There is no final judgment, as no final decision had been rendered. The annexation case is remanded with directions to stay the case until resolution of the quiet title appeal.

Note, the supreme court accepted this case for review on April 18, 2011:

Summary of Issues:

- Whether the court of appeals violated the separation of powers doctrine by applying the priority rule to bar a home rule municipality from proceeding with a legislative annexation determination where the Municipal Annexation Act of 1965, C.R.S. sections 31-12-101 to 31-12-123 vests a municipality with exclusive authority to annex property.

- Whether, in the alternative, if the priority rule applies where concurrent court and legislative annexation proceedings are pending, the court of appeals erred when it sua sponte determined, contrary to *Wiltgen v. Berg*, 164 Colo. 139, 435 P.2d 378 (Colo. 1967), that a town's annexation ordinances were *void ab initio*.

Clark v. City of Grand Junction
Colorado Court of Appeals, December 23, 2010
___ P.3d ___, 2010 Colo. App. LEXIS 1920
Petition to attack zoning ordinance; notary.

This case concerned a portion of a certain property as "light industrial" and a portion as "industrial/office." Under the Grand Junction city charter, an ordinance shall be suspended if, within 30 days after the ordinance is passed, citizens submit a petition with signatures containing at least 10 percent of the City's registered electors who cast a vote for governor in the last election. If the petition contains the requisite number of signatures, the City Council must reconsider the ordinance and either repeal it or submit it to a citywide vote.

In this instance, a petition with 860 signatures was required. A challenge was made to the notarization of the petition, as the notary in question had both signed the petition, and was active in the petition effort. Although C.R.S. § 12-55-110(2) provides that a disqualifying interest arises when a notary is named as a party to a transaction, a person does not become a named party to a petition simply by signing it. In interpreting the statute, the court applies a rule of interpretation in favor of the right to vote. Colorado courts have been reluctant to interpret statutes in a technical way that may hamper the people's right to put certain issues to a popular vote.

Grandote Golf & Country Club, LLC v. Town of La Veta
Colorado Court of Appeals, March 3, 2011
___ P.3d ___, 2011 Colo. App. LEXIS 324
Annexation requirements; strict compliance; filing of annexation ordinance with state division of local government; C.R.S. § 31-12-113(2).

The Town of La Veta adopted Ordinance 131 to annex certain property of the Grandote Golf & Country Club. This ordinance was passed in 1984. The following year, the Golf Club filed a court action to require the Town to take certain steps necessary to make the annexation effective. The lawsuit was dismissed, and the Town adopted another ordinance, No. 144, to repeal the earlier ordinance. In 1987, the Town adopted yet another ordinance, No. 154, to annex a portion of the Golf Club property.

This declaratory judgment action was filed in 2009, to declare that Ordinance No. 144 was void and that all property described in the original ordinance remained part of the Town. The district court initially granted the Town's motion to dismiss on statute of limitations grounds, since the applicable two year statute of limitations accrued on the effective date of Ordinance No.144 in 1985. On appeal, the court of appeals concludes that the original ordinance, No. 131, never became effective because two certified copies of the ordinance were not filed with the County Clerk & Recorder, and the Clerk & Recorder never filed a copy of the ordinance with the local government, as required by C.R.S. § 31-12-113(2)(a)(II)(A) and C.R.S. § 24-32-109. These statutes must be strictly complied with; substantial compliance is insufficient under the express requirements of the statutes. The court rejects the Club's arguments that the complaint for declaratory judgment did not specifically seek a ruling that Ordinance No. 131 was ineffective; the complaint dealt primarily with the validity of the ordinance *repealing* Ordinance No. 131. The court holds that the pleadings sufficiently place the effectiveness of Ordinance No. 131 in issues.

Citizens for Responsible Growth v. RCI Development Partners, Inc.
Colorado Supreme Court, May 23, 2011
___ P.3d ___, 2011 Colo. LEXIS 430
C.R.C.P. 120; administrative finality; notice of written ruling to trigger thirty-day filing deadline.

The group Citizens for Responsible Growth sought review of the court of appeals' judgment reversing a C.R.C.P. 106(a)(4) order of the district court. *See Citizens for Responsible Growth v. RCI Dev. Partners, Inc.*, No. 08CA0890 (Colo. App. May 21, 2009) (not selected for official publication). Citizens challenged Elbert County's approval of RCI's land-use applications, and the district court remanded for further proceedings by the Board of County Commissioners. Without considering the merits of the district court's order, the court of appeals found that it exceeded its jurisdiction by entertaining a complaint filed more than thirty days after the point of administrative finality.

Because Elbert County regulations required a written ruling to finalize the Board's quasi-judicial action in this case, and because depriving Citizens of judicial review without notice of that written ruling would violate constitutional guarantees of due process of law, the judgment of the court of appeals is reversed and the case is remanded to the court of appeals for the resolution of RCI's remaining assignments of error.

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