COLORADO REAL ESTATE CASE LAW UPDATE

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INTRODUCTION

Welcome back to Steamboat Springs! This is my 17th attempt at summarizing the work of the Colorado appellate courts in interpreting our laws and developing our body of law relating to real estate. I feel more honored than ever to appear before this impressive group of professionals.

Support your Real Estate Section, and get involved!

A few notes on format. The cases are divided by subject area, roughly. No attempt is made to cross reference to other subject areas involved in the case.

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1. ARBITRATION, MEDIATION AND ADR

No reported cases.

2. BOUNDARIES AND ADVERSE POSSESSION

Graham v. Jules Investment, Inc.
Colorado Court of Appeals, October 9, 2014
2014 COA 136
Encroachment of improvements on neighboring property; trespass; remedy; relative hardships.

The Grahams purchased a home on 36.5 acres in rural El Paso County. A wildlife refuge had existed on adjoining land since the 1990's. After their purchase, the Grahams engaged a survey, and discovered that a 1.7 acre fenced and improved "den" for lions and tigers encroached on their land. The fenced area, improved with concrete dens buried two to four feet into the ground, housed 19 lions and tigers, as a part of the much larger facilities on adjoining land. The Grahams sued for trespass, seeking a mandatory injunction requiring removal of the structures and rehabilitation of the land. The trial court, in an order affirmed by the court of appeals, ordered a forced sale of the 1.7 acre area to the refuge owners, as an alternative to a mandatory injunction forcing removal of the encroachment. The trial court found that the structure was built by the refuge owners in good faith, at a time when they owned both parcels. The court further found that the refuge owners would suffer undue hardship if the court required removal of the improvements – which had not been in place for the eighteen year prescriptive period. The land was valued at $5,780, whereas it was estimated that removal and reconstruction of the pens would have cost in excess of $38,000. The court holds that equity allows for a flexible remedy where strict application of the law would result in undue hardship on one land owner.

Although a mandatory injunction requiring a trespasser to remove encroaching structures is the "ordinary" remedy for continuing trespass, it "is not to be issued as a matter of course." *Golden Press, Inc. v. Rylands,* 124 Colo. 122, 125, 235 P.2d 592, 594 (1951) (downtown building constructed inches over boundary line). The court must consider "the peculiar circumstances of each encroachment case" to determine whether "removal of the improvements" or "damages" is the more "appropriate" remedy. The *Rylands* case is the source of the "relative hardships" doctrine referred to in the 2008 amendments to our adverse possession statute, C.R.S. § 38-41-101(4).

The ordered conveyance in exchange for $5,870, which was the value of the 1.7 acres according to plaintiffs, as well as $1,737 to cover the application fee for obtaining a minor subdivision waiver from El Paso County.

The court holds that such an equitable adjustment is not an unlawful "taking" by the state.

People v. Gutierrez-Vite
Colorado Court of Appeals, November 20, 2014
2014 COA 159
Adverse possession; theft of real property; offering false instrument of recording; mistake of law defense.

This case and an unpublished companion case stem from the attempt by Ms. Gutierrez-Vite and her husband to adversely possess a Fraser, Colorado house of one "A.H.," who had apparently moved to Hawaii. A.H. left the mainland without making any arrangements to keep the existing mortgage current, and knew that she would ultimately lose the house in foreclosure. At some point in 2011 after the filing of a notice of election and demand by the lender, the defendants moved in and helped themselves to a "home." Creatively, they executed and recorded an Affidavit of Adverse Possession with the Grand County Clerk and Recorder. I say creatively, since our scrivener's affidavit statute, C.R.S. § 38-35-109(5)(b)(II), does allow one with requisite qualifications to record an affidavit as whether land ". . . has been in the actual possession of any party or parties within the chain of title").

The lender apparently caught wind of this document in a title search for the amended combined notice of foreclosure, and called the police. The police located A.H. (the "victim," in criminal law parlance) who said she did not know that people were living in her house. The police contacted Ms. Gutierrez-Vite and her husband, and said essentially "you have one week to vacate, remove your stuff, and restore the original front door lock." They did not. The police hired a locksmith to change the lock, and no trespassing signs were posted. [Query – how many times have you heard a law enforcement officer say "that's a civil matter"?] The husband then recorded another document with the clerk and recorder, a limited durable power of attorney authorizing another gentleman, a self-styled foreclosure "consultant," to act on their behalf concerning the property as "trustee."

A jury found the defendants guilty of attempted theft and two counts of offering a false instrument for recording. On appeal, the court rejects the argument that the trail court erred in rejecting their proposed instruction on adverse possession. The court also rejects the alternative instruction on a defense of mistake of law based on the adverse possession statute. Under the adverse possession statute, in actions filed on or after July 1, 2008, the party claiming title must not only prove exclusive and uninterrupted possession for at least eighteen years. The party must also present evidence of a good faith belief that he or she is the property's actual owner.

Because this defendant admitted that she knew the property was owned by someone else and she only possessed the property for five months, she did not meet the first requirement for adverse possession. Nice try. Further, as a matter of law, any "mistaken belief" regarding adverse possession law does not relieve them the defendant and her husband of criminal liability. "The fact that defendant had an incorrect view of adverse possession law does not transform her misunderstanding into a mistake of fact."

The court's parting shot: "Because defendant failed to satisfy the statutory adverse possession requirements, we need not address whether, as a matter of law, a residence can be adversely possessed.

3. BROKERS

No reported cases.

4. COMMON INTEREST COMMUNITIES, COVENANTS AND CCIOA

McShane v. Stirling Ranch Property Owners Association
Colorado Court of Appeals, April 23, 2015
2015 COA 48
HOA design review board; mistake; fiduciary duty; exculpatory clause for design review board valid.

Mac McShane and his partner purchased a lot in Stirling Ranch in Garfield County on which to build a home. The lot was subject to a Declaration of Covenants. Under the Declaration, each lot owner in the Stirling Ranch community is a member of the Stirling Ranch Property Owners Association. The association is governed by a Board, and the Board appoints and removes members of the association's Design Review Board. When the DRB approved McShane's initial design for a house, it did so mistakenly based on representations by McShane's architect. The problem? The house was designed to exceed Garfield County's height limits for houses in similar areas. When McShane began construction based on the initial design, the County issued a stop work order. McShane and his partner had to redesign their house. They submitted redesigned plans the DRB, which at first rejected the modified plans for undesignated violations of design guidelines. Plaintiffs then submitted new plans, removing the second story of the structure, which was approved.

McShane filed this action against the POA, claiming damages for the redesign of their home in excess of $260,000. The trial court found that the POA did not breach any fiduciary duty to McShane, and that an exculpatory clause in both the Declaration and the neighborhood Design Guidelines barred damage claims based on equitable estoppel and negligence. And dismissed the claims on summary judgment. The appeals court affirms.

The Declaration provides in pertinent part:

> "The Design Review Board will use reasonable judgment in accepting or disapproving all plans and specifications submitted to it. Neither the Design Review Board nor any individual Design Review Board member will be liable to any person for any official act of the Design Review Board in connection with submitted plans and specifications, except to the extent the Design Review Board or any individual Design Review Board member acted with malice or

> intentional wrongful acts. Approval by the Design Review Board does not necessarily assure approval by the appropriate governmental body or Garfield County. . . ."

The Declaration goes on at length to emphasize this point. The associations Design Guidelines state more succinctly:

> Neither the DRB nor any member of the DRB will be liable to the Master Association, any Owner or any other person for any damage, loss or prejudice suffered or claimed on account of: 1. Approving or disapproving any plans, specifications and other materials, whether or not defective . . .

The court reviews in detail the four factors that Colorado courts have reviewed in deciding whether to enforce an exculpatory clause. These are:

> (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the parties' intentions were expressed in clear and unambiguous language. *Jones v. Dressel,* 623 P.2d 370, 376 (Colo. 1981).

Of course, a listing of "factors" is sometimes less that completely helpful, if the case does not direct how the factors are to be applied. Here, the court goes through each factor and holds that the exculpatory clauses are valid because they do not implicate a public duty, do not involve an essential service, were fairly entered into, and plainly express the intent to release the DRB from liability.

The court also affirmed dismissal of the fiduciary duty claim, holding that the record contained sufficient evidence to support a finding that the SRB's reasons for rejecting the redesign plans were consistent with the Design Guidelines' goals.

Note as well that section 38–33.3–302(3)(b) of the CCIOA provides:

> Decisions concerning the approval or denial of a unit owner's application for architectural or landscaping changes shall be made in accordance with standards and procedures set forth in the declaration or in duly adopted rules and regulations or bylaws of the association, and shall not be made arbitrarily or capriciously.

Subsection 2(b) of the cited statute states that no officer or member of the executive board of an association shall be liable for actions taken or omissions made in performance of duties "except for wanton and willful acts or omissions."

DeJean v. Grosz
Colorado Court of Appeals, June 8, 2015
2015 COA 74
Two unit condominium; unilateral incorporation of association.

The two parties to this action are owners in a two-unit condominium association in Aspen. The legal question presented is simple enough: Can a property owner incorporate a homeowners' association after the initial developer filed a declaration expressing an intention to form an association but then failed to do so?

Teresa Shiff purchased two lots in an Aspen subdivision in the early 1980's, one with a large house and one with a smaller cabin. She scraped the original cabin to build a two-unit structure in the early 1990's. Prior to sale she recorded a condominium declaration which was expressly subject to the CCIOA, and called for a homeowner association to manage the common areas, consisting mainly of open yard area and a party wall between two high-end residences.

Shiff sold the units to Grosz (1995) and the DeJeans (2000) without having incorporated an association or taking any steps to operate an association of the two owners. After 2000, the two owners operated general maintenance functions on an informal basis, but the relationship became acrimonious, in the words of the court, making joint management impossible. In March, 2013, after the parties were involved in litigation involving other neighboring properties, Grosz incorporated an association of owners. The DeJeans sought a preliminary injunction after Grosz drafted by-laws and noticed meetings.

DeJean obtained a preliminary injunction, arguing that because the association was not established prior to either party's purchase of their respective unit, Grosz should be barred from continuing to run the "association" over the objection of her neighbor. The DeJeans relied in part on C.R.S. 38-33.3-301, which states that the "association shall be organized no later than the date the first unit in the common interest community is conveyed to a purchaser." The procedural question is whether the DeJeans had a reasonable chance of success on the merits, should the case go to a complete trial.

The panel of the court of appeals says no, and reverses the trial court. It holds that where the condominium declaration contemplates a homeowners' association, and especially where the covenant runs with the land, a property owner can incorporate a homeowners' association without further consent from the other unit owners. While there no Colorado precedent on this particular issue, the court relied on two cases – from Mississippi and Louisiana – that are precisely on point. It is not clear from the decision whether those states had adopted the Uniform Common Interest Ownership Act. Each relied heavily on the notion that the covenants were recorded, and expressly stated, as did the declaration here, that the covenants would run with the land.

Where the condominium declaration contemplates a homeowners' association, and especially where the covenant runs with the land, a property owner can incorporate a

homeowners' association without further consent from the other unit owners. Therefore, the DeJeans had notice of the Association and consented to membership in it when they purchased their unit, regardless of when the Association was incorporated. Accordingly, the DeJeans did not have a reasonable probability of success on the merits of their claims, and the preliminary injunction was vacated. The case was remanded, and the court denied an award of fees and costs to either party, determining that at this stage there was no prevailing party.

5. CONDEMNATION, EMINENT DOMAIN

Young v. Larimer County Sheriff
Colorado Court of Appeals, September 11, 2014
2014 COA 119
Search and seizure; marijuana growing in leased premises; civil rights claim for taking.

The Defendant Young leased property where he grew marijuana plants and distributed marijuana for medical use under the Medical Marijuana Amendment, Article XVIII, §14 of the Colorado Constitution. After obtaining search warrants, sheriff's deputies entered Young's property and seized forty-two marijuana plants. Unfortunately for Young, they did so by cutting them off just above the roots. This action killed the plants. Young was acquitted of all criminal charges against him in the criminal case in Fort Collins, and he brought this civil rights action for damages on the basis that the deputies had unlawfully killed the plants seized from him. The trial court entered summary judgment against Young.

On appeal, Young argues that 42 USC § 1983 provides a remedy for state action that violates a right created by the Colorado constitution marijuana amendment. Section 14(2)(e) of the amendment requires that medical marijuana that has been seized be returned upon acquittal of criminal charges. The defendants, the Larimer County Sheriff and a detective, argue that because Young's complaint alleged a takings claim and a civil rights claim only under federal law, and because marijuana possession violates federal law, the claims must fail.

The appeals court agrees, and affirms. Because federal law criminalizes possession of marijuana, the court holds that a damage claim is not cognizable under § 1983 or as a taking. No express or implied private right of action exists under the state constitutional amendment. The trial court properly entered summary judgment on this claim.

6. CONTRACTS, PURCHASE AND SALE, TRANSACTIONS

Rome v. HEI Resources
Colorado Court of Appeals, November 20, 2014
2014 COA 160
Colorado Securities Act; partnership interests as securities

In 2009, the Colorado Securities Commissioner filed a complaint alleging that two Colorado corporations violated the Colorado Securities Act (Act) by using unlicensed sales representatives to offer and sell unregistered securities. The allegations were premised on defendants' formation and operation of several joint ventures in oil and gas exploration and drilling. To capitalize the ventures, defendants solicited investors by cold-calling thousands of people across the country. If an individual was interested, defendants sent an information package that included a confidential information memorandum and a joint venture agreement. The latter provided for the formation of a joint venture, organized as a general partnership under the Texas Revised Partnership Act.

HEI was named as the initial managing venturer. Although the joint venture agreement gave the venturers authority to remove the managing venturer by a majority vote and to vote on other issues, the commissioner alleged that any theoretical control by the venturers was illusory. The commissioner argued that the substance of the transaction was an investment contract under which the venturers invested money with the expectation that defendants' efforts would return a profit.

The trial court granted a motion for partial summary judgment. At trial, the commissioner had to prove that the interests were securities based only on the knowledge and experience of the partners or venturers or under other economic realities surrounding their offer and sale. The court ruled in favor of defendants, applying case law calling for a "strong presumption" that the joint venture interests are not securities.

In what the Court of Appeals sees as a matter of first impression in Colorado, it holds that Colorado courts should not apply the "strong presumption" that interests in joint ventures or general partnerships are not securities. Because the trial court applied the strong presumption, the Court vacates the judgment and remands the case for reconsideration.

McDonald v. Zions First National Bank N.A.
Colorado Court of Appeals, March 12, 2015
2015 COA 29, 348 P.3d 957
Construction loan; pro se party fails to file affidavit to oppose summary judgment.

McDonald enters into a construction loan agreement with Zions to financed construction of his home in Eagle County. McDonald and the bank got into a dispute over whether

the bank improperly refused to fund certain payments requested by the owner-borrower. The bank had, as it phrased in an affidavit, "funded several draws for" plaintiff, but "refused to fund draws that were in violation of the [A]greement." The affiant stated that plaintiff had "never commenced construction ... at any time ... never poured a single yard of concrete for a foundation and never erected a single stick of lumber to construct ... the residence contemplated by the ... Agreement."

McDonald, representing himself, filed a lawsuit in Eagle County seeking damages from the bank on a variety of claims. The bank moved for partial summary judgment on breach of contract and bad faith claims. The motion was supported by the aforementioned affidavit. While McDonald filed a response to the motion, he failed to file an affidavit or to provide copies of exhibits referred to in his motion. For lack of a disputed issue of fact, the trial court entered summary judgment in favor of the bank. This judgment is affirmed on appeal, which agreed that there was no material issue of fact before the court.

If there is a relevant issue of interest here, it is in the holding that contractual merger clause in the loan agreement was effective to preclude claims of McDonald based on marketing literature of the bank that contradicted or was different than information in the construction loan agreement.

Although the court takes 18 pages to get to these points, perhaps the real lesson is simpler – "only a fool . . . ."

7. CONSERVATION EASEMENTS AND TAX CREDITS

Markus v. Brohl
Colorado Court of Appeals, October 23, 2014
2014 COA 146
Conservation easement tax credits

How long does the Colorado Department of Revenue have to review the validity and value of conservation easement tax credits? May the Department review the validity and value of those credits in each of the twenty years in which they may be claimed and carried forward? Or, must it complete its review within four years from the first time the credits are claimed? In this case of first impression under the new statutory regimen for appealing decisions of the Department which grant or deny claims for tax credits to a district court, the court holds that the review must occur within four years, regardless of how many years after that the credits may be claimed on a state income tax return, or how many times the credits are assigned.

By contrast, under federal law, each use of a federal conservation easement tax deduction to reduce income triggers a new limitations period within which the IRS may evaluate the validity or amount of the deduction, even where the deduction was originally claimed on a tax return filed outside the limitations period.

In 2004, three pairs of landowners created conservation easements on their land in Otero County. They obtained appraisals and conveyed a conservation easement in favor of the Otero County Land Trust. They applied part of the easement tax credits to their 2004 income tax liability. The landowner/donors carried forward the remainder of the conservation easement credits, some for personal use and some for the use of third parties.

On September 28, 2009, the Department disallowed the entire conservation easement tax credit of one pair of landowners because of a claimed deficiency in the 2004 appraisal. For the same reason, in April 2010, the Department disallowed the tax credit claims of the each of the second pair of landowners. The disallowances, under a four-year limitations period, affected only the donors' use of claimed CE credits in the 2005–08 tax years.

On cross-motions for summary judgment, the donors argued that the four-year limitations period had expired before the Department acted to disallow their tax credits. The Department argued that the limitations period commenced each time a CE donor or transferee applied a tax credit to his or her tax liability. The Department lost in the trial court, and the appeals court affirms.

C.R.S. § 39-22-522 provides that conservation easement tax credits may be transferred to third parties, who are then protected by "the same statute of limitations" as the original easement donor. The court reasons that the legislature intended that conservation easement tax credits be easily and readily transferrable, so that farmers and other "land rich, cash poor" could enjoy the same tax benefits as more wealthy donors. Those easement donors with high taxable income can enjoy the benefit of correspondingly large federal tax deductions. Allowing the Department to challenge the value and validity of a credit for a long period of time after it is first claimed creates a disincentive for the buyers of credits, which in turn undermines the intended benefit for "land rich" individuals.

Ranch O, LLC v. Colorado Cattlemen's Agricultural Land Trust.
Colorado Court of Appeals, February 26, 2015.
2015 COA 20
Conservation easement; reformation of deed based on mutual mistake; actual and constructive notice.

Too many LLC's can be hazardous to one's financial health, it seems. Craig Walker was the sole manager and 99% membership owner of Walker I-Granby, LLC. Walker owned certain property that he conveyed to his LLC. Walker then arranged to put a conservation easement on the land, for the benefit of the Colorado Cattlemen's Agricultural Land Trust. After all of the usual work is done that goes into such a deal – except perhaps updated title work – Walker closes on the deal and signs a deed of conservation easement that purported to give the Land Trust a conservation easement on the subject property. The problem? Walker no longer had record title to

the property, which had been conveyed earlier to the limited liability company. The deed, of course, should have come from Walker I-Granby, LLC. (But then – who would get the tax deductions?)

In the court's recitation of facts, Judge Gabriel writes: "Walker was not aware of this error, and the Land Trust was not aware that the subject property was owned by the LLC and not Walker." No mention is made in the opinion of title searches or the concept of constructive notice.

Back to the story. After closing on the conservation easement, Walker, on behalf of his LLC, entered into discussions with the principal of Ranch O, LLC's about selling the land to Ranch O. Walker informed Ranch O of the Land Trust's conservation easement.

Ranch O agreed to the deal, and bought the subject property from the Walker's LLC. The deed conveying the property noted, in bold type and all block capital letters, that "**THE SUBJECT PROPERTY IS BY THAT CERTAIN DEED OF CONSERVATION EASEMENT FOR THE WALKER–GRANBY RANCH HELD BY THE COLORADO CATTLEMEN'S AGRICULTURAL LAND TRUST RECORDED ON DECEMBER 31, 1998 AT RECEPTION NUMBER 98013967 IN THE LAND RECORDS OF GRAND COUNTY, COLORADO."**

After the action, Ranch O filed an action seeking a declaratory judgment that the conservation deed was invalid and had no force and effect because Walker had no ownership interest in the subject property at the time the conservation deed was signed and recorded. The Land Trust answered, seeking a declaratory judgment that the conservation deed was valid and enforceable because the naming of the incorrect grantor was a scrivener's error caused by the mutual mistake of the parties. The trust sought a decree reforming the conservation easement deed to correct the error. The district court granted the Land Trust's motion for summary judgment, and denied the cross motion of Ranch O.

The appeals court affirms. The panel holds that reformation is appropriate because both parties to the conservation deed mistakenly believed that it correctly identified the grantor and that the grantor had the authority to convey the conservation easement, and that this justifies an equitable claim for reformation of the deed.

Of course, reformation cannot be granted to the detriment of a good faith purchaser protected by the recording act. Ranch O argues that it would be prejudiced, and logically so. However, the court appropriately notes that Ranch O had actual notice of the conservation deed before it purchased the subject property. The conservation easement prominently announced on the face of the LLC's deed to Ranch O. Ranch O, given its actual knowledge of the Conservation Deed, cannot simply ignore it and then seek to defeat the land trust's claim for equitable relief.

Atherton v. Brohl, Director of the Colorado Department of Revenue
Colorado Court of Appeals, May 7, 2015
2015 COA 59
Conservation easement tax credits; expedited appeal to district court; lack of final judgment.

Rodney and Ellen Atherton filed tax returns claiming conservation easement tax credits. The Department of Revenue disallowed the claim. The Athertons protested the Department's disallowance of the tax credits and requested an administrative hearing. In 2011, before an administrative hearing took place, the Athertons appealed the Department's decision to the district court pursuant to newly enacted procedures set out in C.R.S. § 39-22-522.5 (2014). After a hearing held pursuant to the statute, the district court issued a detailed order in the Department's favor, concluding that the claimed credits are deficient in various respects, and should be rejected. The district court limited its order to the validity of the credits, but nonetheless indicated in its order, pursuant to § 39-22-522.5(2)(p), that it "shall constitute a final judgment and is thus subject to appeal."

The order did not end the action, and was therefore not a final judgment. It still remained for the district court to determine the amount, if any, that the Athertons owe the Department in back taxes and penalties. C.R.S. § 39-22-522.5(2)(m)(II). The district court noted this in its order, but apparently felt that an interlocutory appeal would be productive. The appeals court disagrees, and dismisses the appeal.

8. CONSTRUCTION DEFECTS

***S K Peightal Engineers v. Mid Valley Real Estate Solutions V, LLC*, **
Colorado Supreme Court, February 10, 2015
2015 CO 7, 342 P.3d 868
Construction defect claim by REO subsidiary of mortgage lender; economic loss rule; third party beneficiary; interrelated contract doctrine; bank subsidiary not a transferee under *Cosmopolitan Homes* line of cases.

We addressed this case after the court of appeals ruling. The official summary of the issues set by the Supreme Court was:

- Whether the economic loss rule bars a homeowner's negligence claim against a construction professional when the owner is a commercial entity rather than a natural homebuyer.
- Whether the interrelated contract doctrine as defined in *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004), can apply to a wholly-owned subsidiary that did not exist when the initial contracts were drafted but instead was created after work on the relevant contracts had been completed.

After argument, the Court reframes and refines the issues to as follows: (1) "whether entities that did not exist at the time the relevant contracts were completed can still be subject to the economic loss rule through the interrelated contracts doctrine;" and (2) "whether commercial entities situated similarly to [Mid Valley], which was a third-party beneficiary to a contract that interrelated to the contract by which the home at issue was built, are among the class of plaintiffs entitled to the protections of the independent tort duty to act without negligence owned by construction professionals to subsequent homeowners when constructing residential homes." As we see, in the second issue the Court introduces more plainly the issue that may, in the end, supersede the economic loss rule analysis. In short, Mid Valley is the "real estate owned" entity set up by the construction lender for the house in question. The lender took the property back in lieu of foreclosure, subject to a detailed agreement between the lender and the builder-developer, and conveyed title to Mid Valley, a single-asset entity owned and controlled by the bank. Can a bank subsidiary be a "subsequent homeowner" within the meaning of *Cosmopolitan Homes v. Weller,* 663 P.2d 1041 (Colo. 1983), to which an independent duty of care is owed by construction professionals?

In a lengthy and difficult opinion by Chief Justice Rice, the Court concludes that the independent duty owed to subsequent purchasers (as set forth in Cosmopolitan Homes) does not apply to third-party beneficiaries of a commercially negotiated contract that interrelates to the contract under which the home was built. Accordingly, the Court concluded that Mid Valley could not properly be considered a "subsequent homeowner."

As the Court reasons:

> "Even if Mid Valley would otherwise be bound by Petitioners' contracts through the interrelated contracts doctrine, the economic loss rule would not apply to bar Mid Valley's tort suit if Petitioners owe Mid Valley an independent tort duty of care. Although home builders (including subcontractors) generally owe an independent duty in the construction of homes under *Cosmopolitan Homes* such that homeowners can typically sue in tort for negligent construction, this duty is only owed to *subsequent* purchasers and transferees. We must therefore determine whether Mid Valley—a third-party beneficiary of the Deed-in-Lieu, which is simply a modification of the Construction Loan Contract that facilitated the development of the home at issue—can be properly considered a "subsequent purchaser" as intended in *Cosmopolitan Homes.* We conclude that it cannot."

The Court goes through the *Cosmopolitan Homes* line of cases in great depth. Its reasoning can be summarized as follows. A commercial entity (or third party beneficiary) that negotiates an arm's length contract outlining the duties and liabilities of each party to the contract during the construction of a home does not qualify as a subsequent homeowner as contemplated by *Cosmopolitan Homes*, and is not a member of the class to which this special independent duty is owed.

The Court notes that it does not answer whether all commercial entities who would qualify as subsequent homeowners are a member of the class to which this special independent duty is owed. This leaves plenty of room for future litigation about these

types of entities and whether a given commercial entity can be considered a commercial entity that was part of the construction process and had the ability in an arm's length transaction to negotiate duties and liabilities.

In one sense, that may be the determining issue in the dispute. If Mid Valley has no tort duty owed to it by construction professionals (the architects and engineers in this case), the only claims left would be contract claims, and the economic loss rule analysis would be moot. In any event, the Court concludes that Mid Valley was the intended third-party beneficiary of the deed-in-lieu of foreclosure agreement and "may have a cause of action for breach of contractual duties." It remands to the district court for further proceedings.

Vallagio at Inverness Residential Condominium Assoc. v. Metropolitan Homes
Colorado Court of Appeals, May 7, 2015
2015 COA 65
Declaration provision requiring arbitration of construction defect claims; validity of declarant consent to amendment of arbitration provision.

In this construction defect case brought by a homeowner association, the court addresses a very timely series of issues relating to the developer's attempt to prohibit any amendment of its declaration of covenant provisions requiring arbitration of construction claims. The claims are brought against the developer and declarant, Metropolitan Inverness, and its manager and general contractor Metropolitan Homes.

Each homeowner purchased pursuant to a sales contract that required arbitration of any construction defect claims by the owner. The declaration allows amendment of the declaration by vote of 67% of the owners, consistent with the CCIOA, and also required the consenting vote of the declarant for any amendment until the last unit is sold to an owner other than the declarant.

In addition, the declaration of covenants contained a provision requiring of construction defect claims.

> Section 16.6 of the declaration included a mandatory arbitration provision specifically for construction defect claims. That section stated that its provisions "shall not ever be amended without the written consent of Declarant and without regard to whether Declarant owns any portion of the Real Estate at the time of the amendment."

The district court held that the declarant consent requirements violated applicable provisions in CCIOA, and that the amendment provisions were ambiguous, requiring the covenants to be interpreted in favor of the association. It therefore denied the motion to compel arbitration.

The court of appeals reverses, for the most part, finding that arbitration is required against Metropolitan Inverness under section 16.6 of the declaration. The court goes through the statutory objections in detail:

- C.R.S. §38-33.3-302(2) – the court holds that the declarant consent provision does not impose any limitation on the power of the association to deal with the declarant.
- C.R.S. §38-33.3-217(1)(a)(1) – the declarant consent provision does not violate the 67% maximum vote limit for amendments, and the statute does not explicitly preclude a declaration from imposing additional requirements for amendments to the declaration.
- C.R.S. §38-33.3-104 – the court disagrees that the declarant consent provision would allow the declarant to "control the votes of the unit owners," in contravention of the purpose of CCIOA.
- C.R.S. §38-33.3-303(5) – the declarant consent provision does not violate this statute by allowing the declarant to control the association after the period of declarant control expires.

The court remands for further proceedings to determine whether Metropolitan Homes and the individual defendants Kudla and Kraus have standing to compel arbitration under the declaration as third party beneficiaries. The court noted that it was not ruling on Metropolitan's claim based on equitable estoppel, citing *Meister v. Stout*, 2015 COA 60 (May 7, 2015). That case held in the contest of a limited liability company operating agreement:

> "As a matter of first impression in the state courts of Colorado, we hold that a signatory to an agreement containing an arbitration clause may be equitably estopped from avoiding arbitration when he sues a nonsignatory on claims that (1) presume the existence of that agreement or (2) allege interconnected and concerted misconduct between the nonsignatory and one or more of the signatories related to that agreement."

The court directs the district court to address this alternative theory of defense as well, "if necessary."

9. EASEMENTS AND PUBLIC ROADS

LR Smith Investments, LLC v. Butler
Colorado Court of Appeals, December 18, 2014.
2014 COA 170
Prescriptive easements; permissive use; "mere acquiescence or silence."

LR Smith claims a prescriptive easement for ingress and egress over two roads crossing a ranch owned by Butler in northwest Moffat County. The trial court found that Smith and its predecessors continuously, openly, and notoriously used the roads from the mid-1950s until late 2011, when Butler dug ditches preventing access to the roads.

The trial court held that Butler did not meet her burden to overcome the presumption of adversity, and that Smith had satisfied the elements for prescriptive easements to use the roads. The court quieted title to Smith's nonexclusive right to use the roads for ranching and agricultural purposes, to access the Smith property for hunting and guiding purposes, and for similar uses.

On appeal, Butler argues that Smith's use of the road was permissive, which would defeat Smith's prescriptive easement claim for lack of the requisite "hostility." The trial court had found that Smith's use of the roads was open and apparent and that there was no agreement, explicit or implied, between the parties that established that Smith's use of the roads was permissive. This finding has support in the record. "Mere acquiescence or silence" is not proof of permissive use. The judgment is affirmed.

10. ESTATES AND PARTITION

In the Estate of Foiles
Colorado Court of Appeals, August 14, 2014
2014 COA 104, 338 P.3d 1098
Trust beneficiary claim for breach of fiduciary duty; terms of trust.

This case out of Morgan County has lessons for real estate lawyers executing reasonably complex transactions. The property in this case was held in a family trust. The trust held both farm and non-farm assets and was established by Clyde Foiles. The co-trustees were Larry, Ruth (either a sister or his mother), and Farmers State Bank. The other key player is Greg, Larry's nephew, one of several beneficiaries.

The trust provides, in simple terms, that upon termination of the trusts, Larry was to receive the farm property, and the co-beneficiaries (a group of family members including Greg) was to receive all non-farm property. The trust agreement provides that Larry could not exercise powers as trustee directly or indirectly for his own benefit. Only the Bank had that power. Larry could only execute such a transaction with the express consent of all beneficiaries. The Bank's later ratification was not sufficient. From 1996 to 2001, Larry executed 1031 transactions whereby the family farm was sold, and the trust acquired a Denver apartment building. The trust then executed a "series of transactions" whereby the trust purchased other farm property in a 1031 exchange, and Larry ended up as sole owner of the apartments.

Ruth approved of all of these transactions, but the Bank apparently did not. It is unclear whether the Bank, as co-trustee, was consulted.

Greg brought an action against Larry, claiming that he had breached his fiduciary duty to the trust in executing these transactions. The trial court, acting in its capacity as probate court, found for Larry, but appeals court reverses.

In the absence of a trust provision allowing ratification by a co-trustee of otherwise invalid actions of a trustee, only the consent of all beneficiaries who have proper capacity and are fully informed of the facts can ratify an action taken in violation of a

trust agreement. In this case, only the Bank had the authority to ratify the actions. The ratification by Ruth was is insufficient.

The court holds that Greg, as a beneficiary, established a prima facie claim that Larry breached a fiduciary duty. The matter is remanded for additional findings as to whether Larry Foiles met his burden to go forward with some evidence that the questionable transaction was fair and reasonable, and, ultimately, whether he was liable for breach of fiduciary duty. That may not be easy, given the number of transactions and the lapse of time. As Dickens might say, asunder goes the family.

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

Sure-Shock Electric, Inc. v. Diamond Lofts Venture, LLC.
Colorado Court of Appeals, August 28, 2014
2014 COA 111
Foreclosure; mechanic lien; foreclosure; equitable apportionment; prevailing party for award of costs.

Sure-Shock is the lead electrical contractor on a construction project on property owned by Diamond Lofts Venture. Sure-Shock filed a mechanics' lien for the unpaid contract price for its electrical work. Pursuant to their contract, Diamond and Sure-Shock arbitrated the claim. The arbitrator awarded Sure-Shock the principal amount claimed in its amended lien statement. The trial court affirmed the arbitrator's award and entered a decree of foreclosure, authorizing the sale of the Diamond Lofts units to satisfy Sure-Shock's lien.

On appeal, the court holds that a lien claimant need not give a new "ten day" notice before recording an amended lien statement to correct an error in the original. In this case, the amendment was recorded the same day as the original.

More problematic for the lienor is the fact that, at the time liens were recorded, Diamond Lofts owns only seven of the 29 units in the building. The electrical work benefited the entire building. While Sure-Shock's lien statement sufficiently identified the entire property, it failed to name and serve the other 22 property owners.

The trial court determined that an equitable apportionment should be based on the actual benefit enjoyed by each unit, and this "equitable apportionment" is affirmed. Therefore, Sure-Shock was awarded 33.1% of its lien amount, which corresponds to the proportion of the total square footage of the Diamond Lofts units relative to the entire Blake Street property, and a decree of foreclosure on the seven units owned by Diamond Lofts.

Mackall v. JP Morgan* Chase *Bank, N.A.
Colorado Court of Appeals, September 11, 2014
2014 COA 120
Real party in interest; borrower standing to sue after bankruptcy case dismissed; issue preclusion based on bankruptcy proof of claim; failure to state claims for abuse of process and slander of title; credit agreement statue of frauds.

Two borrowers on a home mortgage unleash the dogs in a full bore "pro se" attack on a JP Morgan Chase. They default on their home loan, and after a Rule 120 order enters authorizing a foreclosure sale, they file for bankruptcy protection under Chapter 13. That case was dismissed without a confirmed plan or discharge.

The borrowers then filed a civil action against Chase, asserting claims for fraud, forgery, violations of the Fair Debt Collection Practices Act, and claimed further that Chase was not the proper party to enforce the underlying note. The district court granted Chase's motion to dismiss for failure to state a claim. The appeals court affirms.

The appeals court reject's Chase's argument that the borrowers lacked standing to bring the action because (1) all of the claims were actionable when plaintiffs filed for bankruptcy, and (2) plaintiffs failed to disclose the claims to the bankruptcy court. The court disagrees. When a bankruptcy case is dismissed, the debtor is vested once again with standing to assert any claim that it possessed before it filed for bankruptcy, regardless of whether it disclosed the claim to the bankruptcy court during the bankruptcy proceedings.

The court holds that dismissal of the many other claims brought by the borrowers was appropriate. A score card on the claims:

- **Abuse of process** by Chase in pursuing its Rule 120 order authorizing a foreclosure sale. Because the complaint failed to allege that Chase filed the Rule 120 motion for any purpose other than to obtain an order authorizing sale, the district court properly dismissed plaintiffs' abuse of process claim.
- **Slander of title**. Plaintiffs' complaint failed to allege that their property was on the market for sale. As a result, they could not show that any false facts caused "special damages," an element of the tort of slander of title. To show special damages, "[a]t a minimum, the property must be on the market for sale, and the tort must create a cloud upon the title; then the expense of legal proceedings to remove the cloud on title satisfies the damages requirement."
- **Bad faith breach of contract, promissory estoppel**. Additionally, plaintiffs' claims for breach of contract, implied covenant of good faith and fair dealing, and promissory estoppel were properly dismissed because the credit agreement statute of frauds, C.R.S. §38-20-124, bars any unwritten modification of the loan agreement.
- **Intentional infliction of emotional distress**. Finally, because Chase had the statutory right to enforce the promissory note against plaintiffs, C.R.S. §4-3-301

(defining "person entitled to enforce" a note) plaintiffs' claim for intentional infliction of emotional distress failed.

The court holds that the bankruptcy court's order allowing Chase's proof of claim, prior to dismissal of the Chapter 13 case, was entitled to preclusive effect. See Bankruptcy Code § 349(b)(not including an order allowing a proof of claim as one of matters affected by bankruptcy case dismissal.)

On the other hand, the court notes that because the bankruptcy court order had preclusive effect, it did not need to address whether the granting of a Rule 120 motion could be preclusive as well. However, the court offered this counsel:
Nevertheless, to provide guidance to litigants in future cases, we note that because C.R.C.P. 120 proceedings are not adversarial, they cannot give rise to a final judgment that has preclusive effect. *See United Guar. Residential Ins. Co. v. Vanderlaan,* 819 P.2d 1103, 1105 (Colo.App.1991).

Gagne v. Gagne
Colorado Court of Appeals, September 24, 2014
2014 COA 127, 338 P.3d 1152
Judicial dissolution of limited liability company; ambiguity in operating agreement.

Paula and Richard Gagne, mother and son, are the sole members of four limited liability companies (LLCs), each of which owns multi-unit apartment complexes. Richard initiated this action, claiming that he and his mother had been unable to agree on the continued operation and management of the companies, and had reached an impasse as to an equitable distribution of the companies or their assets. Richard sought judicial dissolution of the four LLC's, a declaratory judgment regarding their respective rights, and the appointment of a receiver. The district court issued a declaratory judgment, granting partial summary judgment in favor of Paula on her son's dissolution claim, along with other claims involving attorney fees.

On appeal, Richard argues that the district court erred in granting partial summary judgment in favor of Paula. The court of appeals first finds that the operating agreements, in the provisions dealing with termination and dissolution of the companies, were ambiguous. This requires a remand for further findings as to the parties' intent, if any, in the drafting of the agreements.

On the broader issue, the court interprets for the first time in Colorado section 7-80-810(2), C.R.S. 2014, which governs the judicial dissolution of a limited liability company. The court concludes that a limited liability company may be dissolved if a party seeking a judicial dissolution proves that the managers and members of the company are unable to pursue the purposes for which the company was formed in a reasonable, sensible, and feasible manner. Applying that standard, the court concludes that genuine issues of material fact preclude the entry of summary judgment on the judicial

dissolution claim, reverses the partial summary judgment on that claim, and remands to the trial court for trial.

12. JUDGMENTS AND FRAUDULENT TRANSFER

Independent Bank v. Pandy
Colorado Court of Appeals, January 15, 2015
2015 COA 3, 343 P.3d 951
Collection of foreign judgments; statute of limitations; execution upon property interest held in trust

In 2010, this Michigan bank obtained a judgment against Joseph Pandy. Mr. Pandy is, with his wife, a the beneficiary of a living trust that owns a portion of the C Lazy U resort (C Lazy U Homesteads") in Granby. In 2013 the Michigan judgment was domesticated in Grand County pursuant to the Uniform Enforcement of Foreign Judgments Act, and a transcript of judgment was recorded in Grand County. This created a lien against any property owned by Mr. Pandy in Grand County.

Not being able to simply levy on the judgment, because title to the homestead was in in the trust, the bank in 2014 initiated an action to quiet title and for judicial foreclosure of Mr. Pandy's interest in the Homestead property. Pandy moved for summary judgment under Colorado's general three-year statute of limitations in C.R.S. § 38-80-101(1)(k)(" All actions accruing outside this state if the limitation of actions of the place where the cause of action accrued is greater than that of this state . . .") The Michigan statute of limitations for this action is substantially longer.

The court, affirming the district court, holds that judgment has already entered and the general statute of limitations is inapplicable. Under C.R.S. § 13-52-101, a judgment lien is enforceable for six years after the date of the original judgment entered in the forum state. Accordingly, this action is timely, and the matter is remanded to the trial court for unwinding the other legal issues, which will involve the attempt to obtain control over the judgment debtor's interest in the trust or the trust property.

Note: This matter was before the court on an interlocutory appeal, which allows a preliminary ruling of a trial court that would be otherwise controlling or dispositive of a case to be appealed before a full trial on the merits of the underlying claim. C.A.R. 4.2.

13. LAWYERS AND PROFESSIONAL LIABILITY

Craft v. Philadelphia Indemnity Insurance Co.
Colorado Supreme Court. February 17, 2015
2015 CO 11, 343 P.3d 951
Notice requirements in claims-made insurance policies

We include this case solely because most of us, as attorneys, have claims-made liability policies. Be forewarned!

In this opinion, the Colorado Supreme Court answers a question of state law certified by the U.S. Court of Appeals for the Tenth Circuit. The question, as reframed by the Court, was whether Colorado's notice-prejudice rule applies to a date-certain notice requirement in a claims-made insurance policy.

A claims-made policy covers only those claims brought against the insured during the policy period and reported to the insurer by a date certain, typically within a brief window following the expiration of the policy period. The date-certain notice requirement, in the words of our Court, effectuates the parties' arrangement and limits the insurer's liability to those claims reported within the time specified.

The Supreme Court concludes that excusing noncompliance with a date-certain notice requirement would alter a fundamental term of the claims-made insurance contract, and would not serve the public policy interests that originally supported the adoption of the notice-prejudice rule. Accordingly, the Court answers the question in the negative.

Coats v. Dish Network
Colorado Supreme Court, June 15, 2015
2015 CO 44
Medical marijuana; work place; lawful activity.

We note this case because, well, we are getting used to a marijuana jurisprudence, and many of us employ staff assistants.

In this case, the Supreme Court addresses C.R.S. § 24-34-402.5, which concerns the "unlawful prohibition of legal activities as a condition of employment." Under this statute, the Court holds, the term "lawful" refers only to those activities that are lawful under both state and federal law. Therefore, employees who engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected by the statute.

14. LEASING AND EVICTION

Rocky Mountain Natural Gas, LLC, v. The Colorado Mountain Junior College District
Colorado Court of Appeals, September 11, 2014
2014 COA 118
Illegal lease; remedy.

This dispute arises from a lease agreement between the natural gas company and a junior college district. Rocky Mountain is a Colorado utility company that provides natural gas services. The junior college district is organized under C.R.S. § 23-71-101 *et seq.* As relevant here, the board of trustees of a junior college district has the power to "[r]ent or lease district property not immediately needed for its purposes for terms not exceeding three years." § 23-71-122(1)(e).

When a dispute over amounts due under the lease arose, the district moved to dismiss the gas company's claims, contending in part that the lease was "void, invalid, and unenforceable" as a matter of law, because the term of the lease exceeded three years, the district's statutory authority.

CMC is authorized to contract as a municipal corporation. *See* C.R.S. § 23-71-120 (authorizing junior college districts to hold property and be parties to suits and contracts "the same as municipal corporations in this state").

Here, the agreement between RMNG and CMC provided for a lease of property, at an agreed price, for a period of twenty years, with an option to extend the lease for twenty more years. The purpose of the lease was to allow the construction and operation of a natural gas compressor station on CMC's property. The court on appeal holds that the contract is void. It holds that shortening the duration term of the lease so that it complies with the statute would amount to reformation of the contract.

Rather than reforming the lease, the court creates an exception to the general principle of law that prohibits any recovery under an illegal contract. "We hereby adopt what appears to be the prevailing rule: that where property is furnished to a municipal corporation under an unenforceable contract, and the municipality has not paid for the property, then the seller or person supplying the property may, upon equitable terms, recover it in specie." This is consistent with the general rule that unjust enrichment claims may succeed only in the absence of a valid contract. The court concluded in these circumstances that "it would be grossly inequitable to permit the district to continue to enjoy the benefits of the contract without fully compensating" the gas company.

Westin Operator, LLC v. Groh
Colorado Supreme Court, April 13, 2015
2015 CO 25, 347 P.3d 606
Duty of care during eviction from hotel room; intoxicated tenant; resulting injuries.

Through her parents, Jillian Groh sought to hold the Westin Hotel responsible for serious injuries she sustained in a drunk-driving accident following a lawful eviction from the Westin. Groh registered at The Westin with two friends. They went out drinking until 2 am; the Westin did not serve them alcohol. Upon their return, they brought back 5-8 guests. Guards came to the room after other guests complained of noise. Guards instructed all guests not registered to the room to leave. Groh protested, saying all of her guests and herself were too drunk to drive. Groh refused to stay without her friends. At that point all were taken to the lobby and ultimately were escorted out. There were taxis outside the hotel before and after the incident, according to security cameras. Groh and a carful of friends got into her car, with a friend behind the wheel, intoxicated. They soon got into a rear end accident, and Groh was severely injured.

The Westin filed a motion for summary judgment, which the trial court granted. The court of appeals initially affirmed the summary judgment order. The court of appeals then granted Groh's petition for rehearing. A different panel withdrew the first court of appeals opinion, held that a hotel has a duty to evict a guest "in a reasonable manner," and reversed the summary judgment order with respect to Groh's claims of negligence and negligent hiring and training.

The Supreme Court examines the duty of care a hotel owes a guest during a lawful eviction. Based on the special relationship that exists between an innkeeper and guest, the Court holds that a hotel that evicts a guest has a duty to exercise reasonable care under the circumstances. This requires the hotel to refrain from evicting an intoxicated guest into a foreseeably dangerous environment. Whether a foreseeably dangerous environment exists at the time of eviction depends on the guest's physical state and the conditions into which he or she was evicted, including the time, the surroundings, and the weather. Because there are disputed issues of fact, the case is remanded for trial.

The Court also considered whether the Dram Shop Act of the Colorado Liquor Code, CRS § 12-47-801, applies to this case. The Court concluded that the Act does not apply because it is undisputed that the Westin did not serve alcohol to Groh.

15. PREMISES LIABILITY, TRESPASS AND NUISANCE

Jordan v. Panorama Orthopedics & Spine Center
Colorado Supreme Court, April 13, 2015
2015 CO 24, 346 P.3d 1035
Premises Liability Act; definition of "landowner."

The Supreme Court took this case to consider whether a clinic that is the main tenant at a medical campus qualifies as a "landowner," as defined by the Premises Liability Act. Jordan fell and sustained injuries on a common area sidewalk on the campus. The Court determines that the clinic was not in possession of the sidewalk, because it had only a right of non-exclusive use of the sidewalk and the landlord retained responsibility for maintaining that area. The Court concludes that the clinic was not legally responsible for the condition of the sidewalk, under the terms of the lease, or for the activities conducted or circumstances existing there.

16. PROPERTY TAXATION AND ASSESSMENTS

No reported cases.

17. TAX SALES and TREASURER DEEDS

Cordell v. Klingsheim
Colorado Court of Appeals, October 9, 2014
2014 COA 133
Treasurer duty of diligent inquiry; defect in notice renders treasurer deed void.

This case follows up on the recent decision of the Colorado Supreme Court in *Lake Canal Reservoir Company v. Beethe*, 227 P.3d 882 (Colo. 2010). The Court in that case stepped into the quagmire of the "void vs. voidable" distinction as applied to treasurer deeds. Fortunately, the court here does not accept the invitation to get bogged down in that confusing and unproductive endeavor.

Carl and Wanda Cordell were the record owners of a tract of land in La Plata County (Tract 1). Carl Cordell also owned the adjoining Tract 2. The Cordells failed to pay the taxes owed on the two properties, and Brenda Heller purchased the tax liens on the properties at the annual tax lien sale. Heller assigned the tax liens to Klingsheim, who later filed the necessary request for issuance of a treasurer's deed after the requisite three-year redemption period. The county treasurer attempted to send the notice to the Cordells of the plan to issue the treasurer's deeds. C.R.S. §39-11-128 sets forth specific requirements for this notice.

The notice was sent, sort of, to the last known address for the Cordells in New Mexico. The Treasurer properly sent the notices by certified mail to 705 N. Vine, Farmington, New Mexico, which was the address listed for them in the county tax rolls. The return receipts from the mailings, however, indicated that the notices were not delivered to 705 N. Vine, and were not delivered to Carl and Wanda. Rather, the receipts indicated that the notices were delivered to one Cleo Cordell at 703 N. Vine. The box for "agent" on the return receipts had not been checked.

Despite this discrepancy, the Treasurer conducted no further inquiry to determine whether 705 N. Vine was indeed the plaintiffs' residence. As a result, the Cordells never got the required notice of their right to redeem the tax liens. After learning that treasurer deeds were issued to Klingsheim, the Cordells filed an action seeking a declaratory judgment that the treasurer's deeds are void. The district court granted the requested relief, and this judgment is affirmed in a 2-1 decision.

Klingsheim argues on appeal that the trial court erred in concluding that the county treasurer had failed to undertake diligent inquiry to determine where the Cordells lived, as required by statute. The majority holds that the failure of the treasurer to inquire further after learning that the notices were not delivered either to plaintiffs or to a person claiming to be their agent does not constitute "diligent inquiry" in attempting to effect notice on the taxpayers. Because a treasurer's "full compliance" with the requirements of CRS § 39-11-128 is jurisdictional, the trial court properly set aside the deeds as void. It may be noted that the United States Supreme Court addressed a very similar situation in *Jones v. Flowers*, 547 U.S. 220 (2006), with the same result.

In an interesting dissent, Judge Jerry Jones notes first that Cleo was Carl's mother, and that she was his agent as a matter of law. Second, he notes that Mrs. Cordell lived in Illinois, not New Mexico, and that further inquiry in the Colorado public records would have been futile. Put differently, further inquiry "would not have made a difference." Given that premise, failure to make the additional inquiry did not violate section 128 or deprive Ms. Cordell of due process. "Though I agree with the majority that "full compliance" with the statute is required [citing *Siler v. Investment Securities Company,* 125 Colo. at 444, 244 P.2d at 880], I do not believe such compliance requires futile efforts. It is not enough to say that the treasurer did not re-check county records, we must ask whether doing so would have furthered the obvious goal of the notice statute to provide notice."

All three members of the panel agree that the statutory requirement of serving notice on all persons having a record interest in property "if, upon diligent inquiry, the residence of such persons can be determined," is jurisdictional, and "anything less than full compliance voids a treasurer's deed." The burden of showing noncompliance is on the taxpayer. NOTE: Certiorari was granted on June 15, 2015. See p. 30 below.

18. TITLES AND TITLE INSURANCE

Reisbeck v. Levis
Colorado Court of Appeals December 4, 2014
2014 COA 167
Quiet title actions; correction of mistake under C.R.C.P. 60(a).

Plaintiffs Reisbeck and Jersin are the record owners of real property in Adams County, owning an undivided 85% interest and an undivided 15% interest respectively.

In 1947, defendant Arthur Levis obtained a right-of-way across the property for a "rail spur." No rail spur was ever constructed on the property. To clear his title from the recorded encumbrance, an easement, Reisbeck commenced an action to quiet title to the property against any claims of Levis. Jersin was joined as an involuntary party plaintiff. Levis was served by publication, and no answer was filed. Reisbeck moved for entry of default.

The judgment form submitted named "Reisbeck, LLC" as plaintiff. Unfortunately, there is no Reisbeck, LLC. Its proper name is "Reisbeck Subdivision, LLC." The district court granted the motion and entered default judgment in plaintiffs' favor. Following entry of judgment, Reisbeck discovered the name error. He filed a motion under CRCP 60(a), seeking relief and asking the court to amend the judgment and correct the name. The court denied the request.

On appeal, plaintiffs argued it was an abuse of discretion to deny the request for relief. The appeals court agrees. C.R.C.P. 60(a) is a safety valve allowing the district court to correct, at any time, an honestly mistaken judgment that does not represent the understanding and expectations of the court and the parties. Here, there was nothing in the record indicating that the error by counsel was anything other than an honest

mistake. The corrected judgment would represent the parties' expectation in pursuing the quiet title action and the court's intention in issuing the judgment. No different or additional liability would be imposed on any existing defendant and no party previously not named would need to be added. The district court's order was reversed and the case remanded.

Wolfe, State Engineer v. Jim Hutton Educational Foundation
Colorado Supreme Court, March 16, 2015
2015 CO 17, 344 P.3d 855
Presumption of abandonment; nonuse of decreed diversion point; CRS § 37-92-402(11).

When the Water Division Engineers prove that a water-right holder has not used the decreed point of diversion for ten years or more, the Engineers trigger the rebuttable presumption of abandonment under C.R.S. § 37-92-402(11). Once triggered, the burden shifts to the water-right holder to demonstrate a lack of intent to abandon. Because the water court erroneously believed that proof of nonuse at the decreed point of diversion was insufficient to raise the presumption, it failed to require evidence excusing such nonuse to rebut the presumption. The Court reverses the water court and remands the case for reconsideration of whether the Jim Hutton Educational Foundation met its burden of rebutting the presumption of abandonment.

Tomar Development, Inc. v. Friend
Colorado Court of Appeals, June 4, 2015
2015 COA 73
Subordination agreement ambiguous; partial subordination rule adopted.

The Friend family conveyed title to its ranch to Friend Ranch Investors Group, with plans to develop it into a resort-style golf course community. In 2010, Friend Ranch conveyed the property to Mulligan, LLC, and at that time, the relevant order of priority of the various liens on the property was:

(1) Colorado Capital Bank's senior deed of trust -- this deed of trust was assigned to Bent Tree LLC, the sole member and owner of Mulligan LLC, the property owner;

(2) Tomar Development (Tomar), a deed of trust;

(3) Damyanovich, a deed of trust securing a purchase money note for a portion of the property;

(4) the Friend family, a deed of trust securing a purchase money note for the original parcel; and

(5) Colorado Capital Bank's junior deed of trust securing a second loan from the Bank.

Mulligan and the Bank enter into a subordination agreement whereby the Bank's senior lien became subordinate to its junior lien. Neither Tomar, Damyanovich, nor

the Friend family was involved in the deal nor was an intended beneficiary of the subordination agreement. CCB's senior lien was never released.

Bent Tree forecloses on the Bank's senior lien and, in November 2010, Bent Tree gets a public trustee's deed, having bid $11,800. So – what becomes of the remaining liens? This is called the "circuity of liens" problem, a favorite of law professors.

The trial court applied the "partial subordination approach." As explained by the appellate court:

> The majority of jurisdictions have applied the **partial subordination approach**. As will be explained in more detail below, under this approach, the subordinating party contracts with a more junior lienholder to subordinate its interest to that junior lienholder. Thus, the junior lienholder becomes senior to all others, but only to the extent of the subordinating party's interest, leaving any intermediary lienholders unaffected.
>
> A minority of jurisdictions have adopted a **complete subordination approach**. Under this approach, when the subordinating party contracts with a more junior lienholder to subordinate its interest to that junior lienholder, all of the parties simply move up in priority order. So, for example, whoever held the interest that had second priority would now hold the most senior priority position.

Tomar, the Friends, and Damyanovich filed claims in the district court, each seeking declaratory judgments as to the priority of their interests. The trial court went with the partial subordination rule, and the court of appeals panel affirms.

The partial subordination rule is attractive in that liens 2, 3 and 4 are not terminated if they do not redeem, and they are not otherwise prejudiced, as the lien of 5 cannot exceed the lien of 1.

Battle North LLC v. Sensible Housing Company
Colorado Court of Appeals, June 18, 2015
2015 COA 83
Quit claim deeds from a stranger to title; C.R.S. §38-35-201.

This spurious lien action was filed concurrently with yet another quiet title action that has a long saga in Eagle County and our appellate courts. As the court of appeals states here, "The history of disputes over the Pine Martin parcel is recounted in several Colorado appellate court decisions, including: *Town of Minturn v. Sensible Hous. Co.*, 2012 CO 23, 273 P.3d 1154, *rev'g*, 280 P.3d 36 (Colo.App.2010); *Mortgage Investors Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo.2003), *rev'g*, 56 P.3d 1104 (Colo.App.2001); *Ginn Battle Lender, LLC v. Sensible Hous. Co.*, (Colo. App. Nos. 10CA0114 & 10CA2158, 2011 WL 1590536, Apr. 21, 2011) (not published pursuant to C.A.R. 35(f)); *Mortgage Investors Corp. v. Battle Mountain Corp.*, 93 P.3d 557 (Colo.App.2003); and *Turkey Creek Ltd. Liab. Co. v. Anglo Am. Consol. Corp.*, 43 P.3d 701 (Colo.App.2001). Sensible Housing Company has appeared in more than a few of these cases.

The factual background is complex, but this case comes down to a determination by the court that two quit claim deeds purporting to convey the Pine Martin parcel to Sensible Housing Company were spurious. The parcel was owned in 1931 by an outfit called PMMC, but the property was sold for taxes in 1932 and treasurer's deeds were issued, terminating that interest. A man named Tucker incorporated a new PMMC entity in 1996 in South Dakota, without any authority to act on behalf of the original Colorado entity. The new corporation purports to convey the subject property by quit claim deed to Sensible Housing Company in 2006 and 2008. Battle North, the record owner of the Pine Martin parcel, brought this action under C.R.C.P. 105.1 to declare the quit claim deeds spurious and void.

Sensible Housing defends primarily by arguing that a quit claim deed from a stranger to title conveys nothing, and therefore cannot harm or cloud the title of the true owner. This is a "no harm, no foul, not spurious" line of thinking. The court of appeals, in an opinion by Judge Jones, exhaustively rebuts this notion, and affirms the district court's judgment declaring the deeds to be spurious and void. This is a good read for those interested in this decades old saga of land near Vail ski area.

19. ZONING AND LAND USE CONTROL

SDI, Inc. v. Pivotal Parker Commercial, LLC
Colorado Supreme Court, December 8, 2014
2014 CO 80, 339 P.3d 672
Special district; assignment of right to collect development fees to private entity.

Does the Special District Act, sections 32-1-101 to -1807, C.R.S. (2014), give special districts the power to assign to a private party the right to receive development fees? Here, Cherry Creek South Metropolitan District #1 assigned to a predecessor-in-interest of petitioner SDI, Inc. the right to receive fees that the District had assessed upon developers within its boundaries to finance the development of municipal infrastructure. The District had increased these development fees by about four percent in each of the years prior to the assignment. SDI also increased the fees it collected, but at a rate of eight percent per year. SDI brought an action against respondent Pivotal Parker Commercial, LLC ("Pivotal"), seeking to recover unpaid development fees and requesting a declaratory judgment that it was entitled to the fees, as increased annually, in the future.

The trial court determined that SDI was entitled to receive the fees as increased annually, rejecting Pivotal's argument that the fee increase amounted to an improper delegation of legislative authority. On appeal, the court of appeals reversed, concluding that the District had no authority to assign fee revenue. It held that because the Act expressly authorizes special districts to "pledge" revenue under section 32-1-1001(1)(j)(I), and because an assignment differs from a pledge, the Act necessarily precludes districts from assigning revenue.

The Supreme Court reverses, concluding that "specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent" of the Act. § 32-1-1001(1)(n). The express power to pledge does not, by itself, restrict the power to assign. The power to assign revenue falls within another express power given to districts, namely, the power to "dispose of . . . real and personal property." § 32-1-1001(1)(f). The District's assignment of the right to collect development fee revenue was therefore a lawful exercise of its statutory authority.

Maslak v. Town of Vail
Colorado Court of Appeals, January 15, 2015
2015 COA 2, 345 P.3d 972
Rule 106(a)(4) complaint; filing in wrong district through ICCES by oversight meets 28-day deadline.

Eight homeowners adjacent to the Vail golf course attempt to file a complaint under C.R.C.P. 106(a)(4) against the Town of Vail and the town's planning commission, to reverse the Town's decision to build an events facility at the Vail golf course. Unwittingly, the complaint filed through the state's electronic filing system, ICCES, had the correct caption of "Eagle County District Court," but the electronic filing designated the wrong county. In the "drop box," counsel selected Denver County, rather than Eagle. The Denver clerk rejected the filing under the authority of CJD 1101 (Chief Justice Directive for court administration matters) for matters filed in "the wrong court location."

Although the original electronic filing was well before the 28-day deadline of city council action, the following days fell over the 2013 Fourth of July holiday, and counsel for the homeowners were required to refile in Eagle County. This occurred on the thirtieth day, after the deadline.

Under C.R.C.P. 121, section 1-26 (5), "documents transmitted to the E-Filing Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date." The appeals court, reversing the district court's decision to dismiss the complaint for lack of subject matter jurisdiction due to the "late" filing, holds that filing on the E-Filing system in any specific district court is the equivalent with filing in the district court named in the pleading caption. It was undisputed that counsel for the town received notice of the action within hours after the first filing, and before the 28-day deadline had passed. The court therefore reasons that the Town suffered no prejudice.

Auxier v. McDonald
Colorado Court of Appeals, April 23, 2015.
2015 COA 50
C.R.C.P. 106(a)(4) deadline; relation back to a timely complaint.

The Fritzes obtained a building permit to construct an accessory structure at a Salida address adjacent to plaintiff Auxier's property. Auxier objected and appealed several decisions related to the project to the City of Salida Planning Commission. The Planning Commission issued the building permit. Auxier filed a pro se complaint in the district court, within 28 days, but did not name the Planning Commission, the Salida City

Council, or the City of Salida as parties. Two months later, and well past the 28-day deadline for a complaint under C.R.C.P. 106(a)(4), Auxier filed an amended complaint with the district court, asserting proper claims against these parties claiming abuse of discretion.

The dismissal of Auxier's complaint is affirmed on appeal. "If the plaintiff's original complaint did not seek review under Rule 106(a)(4) within the relevant limitations period, an amendment seeking such review will not "relate back" under Rule 106(b) to the date of filing of the original complaint. Relation back under this section can only be invoked if there was a "timely complaint" to begin with. A timely complaint under this rule is one "seeking review *under subsection (a)(4)* of this Rule," in the words of the court.

July 1, 2015

Certiorari Granted

Pulte Home Corporation v. Countryside Community Association
Colorado Supreme Court, September 6, 2014
Petition and Cross-Petition for Writ of Certiorari GRANTED

Summary of the Issues:

- Whether the majority of the court of appeals erred by concluding that a common interest community is formed immediately upon a developer's recording of a declaration and plat, rendering the developer immediately liable for assessments, notwithstanding that (a) the declaration provides for the gradual annexation process that has long been practiced across Colorado, and (b) the developer clearly intended such gradual annexation.
- Whether the court of appeals erred by affirming a grant of summary judgment on the association's equitable claim for unjust enrichment to the extent the community's declaration does not provide a remedy at law.

Regional Transportation District v. 750 West 48th Ave, LLC
Colorado Supreme Court, November 24, 2014
Petition for Writ of Certiorari GRANTED

Summary of the Issues:

- Whether the court of appeals erred in allowing an eminent domain valuation commission to reverse a trial court's in limine legal ruling and exclude evidence.
- Whether the court of appeals erred in ruling that the judge, who did not preside at trial and thus did not hear the evidence, could issue an instruction excluding a specific item of evidence that the eminent domain valuation commission had ruled relevant and admissible.

Branch Banking & Trust Company v. Fiscus
Colorado Supreme Court, April 6, 2015
Petition for Writ of Certiorari GRANTED

Summary of the Issue:

- Whether a lender in possession of a promissory note secured by a deed of trust on real property may assert a holder-in-due-course defense under section 4-3-305, C.R.S. (2014), to a claim that the deed of trust was forged.

Klingsheim v. Cordell
Colorado Supreme Court, June 15, 2015
Petition for Writ of Certiorari GRANTED

Summary of the Issue:

- Whether the court of appeals' decision in *Cordell v. Klingsheim,* 2014 COA 133, erroneously construed county treasurers' "diligent inquiry" duties under section 39-11-128, C.R.S. [See case report, p. 23 above).

Ryan Ranch Community Association v. Kelley
Colorado Supreme Court, June 29, 2015
Petition for Writ of Certiorari GRANTED. EN BANC.

Summary of the Issues:

- Whether the process of "annexation by deed" to form units within common interest communities is void under the Colorado Common Interest Ownership Act.
- Whether a plat map that subdivides property identified in an earlier declaration constitutes an amendment to said declaration.
- Whether a homeowner who has actual knowledge of a declaration amendment can avoid paying community assessments based on a clerical error in the recorder's index.