SUMMARY
January 19, 2023

2023COA6

No. 22CA0402, *In Interest of AD* — Colorado Uniform Guardianship and Protective Proceedings Act — Guardianship of Minor — Judicial Appointment of Guardian — Parents Unwilling or Unable to Exercise Parental Rights

A division of the court of appeals reviews the guardianship appointment for a minor under section 15-14-204(2)(c), C.R.S. 2022. In so doing, the division adopts the analytical framework outlined in *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128 (Colo. 2010). Applying that framework to section 15-14-204(2)(c), the division concludes that the moving party must prove, by clear and convincing evidence, that the parent is (1) "unable or unwilling" to exercise their parental rights, and (2) the guardianship is in the best interest of the minor notwithstanding the parent(s)' opposition to the guardianship. Moreover, in entering such an order, the court must articulate the "special factors" it relies upon

to justify this interference with parental rights. *See Troxel v. Granville*, 530 U.S. 57 (2000).

Utilizing that framework here, the division concludes that the court did not err in appointing a guardian for the minor.

COLORADO COURT OF APPEALS **2023COA6**

Court of Appeals No. 22CA0402
Larimer County District Court No. 21PR30624
Honorable Sarah B. Cure, Judge

In the Interest of A.D., a Child,

I.S. and V.T.,

Appellees,

and

L.D.

Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE FOX
Lipinsky and Schock, JJ., concur

Announced January 19, 2023

Lindsey Steele-Idem, Guardian Ad Litem

Liggett Johnson & Goodman, P.C., Gail B. Goodman, Fort Collins, Colorado, for Appellees

Wick & Trautwein, LLC, Julie M. Yates, Fort Collins, Colorado, for Appellant

¶ 1 L.D. appeals the district court's order granting guardianship of her son, A.D., to I.S. and V.T. (jointly, Petitioners) pursuant to section 15-14-204(2)(c), C.R.S. 2022. We affirm.

I. Background

¶ 2 L.D. is the sole living parent of A.D., one of her three children. A.D. was sixteen at the time of the guardianship proceeding. Although L.D. and A.D. once shared a healthy relationship, it deteriorated dramatically during the summer and fall of 2021. This deterioration gave rise to Petitioners' request for — and the district court's grant of — an unlimited guardianship over A.D. We turn to that history now.

¶ 3 In June 2021, A.D.'s car was vandalized while parked in front of the family home. A.D. and his mother had a heated argument about why it happened and who was responsible for cleaning it. Upset by this conversation, A.D. went to stay at his girlfriend's house. Although he soon returned home, A.D. ran away from home five more times following disagreements with L.D.

¶ 4 In early July 2021, L.D. gave A.D. an ultimatum: he could (1) go to military school, (2) attend therapeutic boarding school, or (3) abide by her house rules. A.D. ran away again that night, but this

time he spent over a month away from home, staying with his girlfriend, couch surfing at friends' homes, or sleeping in public parks.

¶ 5 On August 7, 2021, A.D. was taken to the emergency room after appearing to overdose while partying with friends at a park. The hospital made a mandatory report to the Department of Human Services (DHS). Once A.D. was stable, L.D. and V.T. (L.D.'s longtime colleague and family friend) met with a DHS representative to discuss next steps. L.D. agreed that, given the hostility between A.D. and herself, and between A.D. and his two siblings (who both lived with L.D.), it was in his best interest to stay with Petitioners.

¶ 6 On September 8, 2021, A.D. drove Petitioners' car to L.D.'s house for his first night back since early July. When he arrived, L.D. became extremely upset that he had driven there. In her mind, A.D.'s operation of a car — and Petitioners' facilitation of it — violated their agreement that he not drive until certain conditions were met. The next morning, without notice to Petitioners or her son, L.D. called the Division of Motor Vehicles (DMV) and withdrew her permission for A.D.'s driver's license. The DMV revoked his license the next day.

¶ 7 A.D. became enraged when he learned that his mother had revoked her consent and subsequently sent a series of angry texts to her. L.D. then blocked A.D.'s number, thus preventing A.D.'s calls or texts from coming through to L.D.'s phone (though texts came through on her computer).

¶ 8 On September 24, 2021, DHS facilitated an "adults only" meeting with L.D., Petitioners, and DHS representatives. That meeting resulted in three shared priorities: (1) Petitioners were to provide regular updates about A.D. to L.D., who would, in turn, communicate with Petitioners before making decisions affecting A.D.; (2) A.D.'s license would be reauthorized within thirty days once to-be-defined conditions were met; and (3) A.D. would be allowed to be on the high school wrestling team, which all parties agreed was good for him.

¶ 9 Over the next month, Petitioners regularly emailed L.D. updates on A.D. L.D. provided few, if any, responses to these updates. Petitioners also sent L.D. a proposed plan for A.D. to get his license back, but L.D. did not respond.

¶ 10 On October 20, 2021, Petitioners filed their petition for appointment as A.D.'s guardians. L.D. objected to the petition, sought dismissal of the action, and requested attorney fees.

¶ 11 On November 8, 2021, Petitioners requested that the court appoint a guardian ad litem (GAL) to represent A.D.'s interests. Over L.D.'s objection, the court appointed a GAL pursuant to section 15-14-115, C.R.S. 2022, after concluding that, owing to their disagreement over the guardianship, the parties could not represent A.D.'s best interest in the guardianship proceedings. The GAL represented A.D.'s best interest throughout the litigation, and the court also instructed the GAL to provide a report about whether L.D. was "unable to exercise her parental rights."

¶ 12 On November 14, 2021, before Petitioners filed their reply, L.D. — without consulting Petitioners or A.D. — revoked her permission for A.D. to wrestle the day before the first day of practice. Why she took this sudden action is unclear: L.D. testified it was because A.D. was not maintaining passing grades, while another witness testified that she wanted "leverage" over him to participate in family therapy. Regardless, A.D. was devastated by the timing and nature of this action.

¶ 13 While these motions were pending, Petitioners continued to care for A.D. Petitioners asked L.D. for permission to talk to A.D.'s teachers, coaches, and doctors about how to better care for him. Yet from August to early December 2021, L.D. refused to grant Petitioners permission to engage with these individuals. She ignored or outright refused to allow such communications until December 8, 2021, when, after repeated requests from a DHS representative, she allowed Petitioners to attend — but not participate in — a meeting with A.D.'s teachers.

¶ 14 L.D. also resisted Petitioners' requests for financial support for A.D.'s care. To her credit, L.D. provided A.D. with $25 per week for groceries. These funds came from A.D.'s $1,800 monthly survivorship benefit, which was established following the death of A.D.'s father when A.D. was three. Petitioners knew the benefit existed and requested more financial support. L.D. did not respond to these requests.

¶ 15 Except for the text exchange between L.D. and A.D. following the revocation of L.D.'s consent for A.D.'s license, L.D. and A.D. never communicated directly. Instead, all such communications went through Petitioners or DHS.

¶ 16 Consistent with section 15-14-205(1), C.R.S. 2022, the district court conducted a hearing on Petitioners' guardianship motion. The hearing spanned two days, with both sides calling numerous witnesses.

¶ 17 In a written order, the court granted Petitioners an unlimited guardianship over A.D. In so doing, the court concluded that Petitioners had proved by clear and convincing evidence that L.D. was, consistent with section 15-14-204(2)(c), "unwilling or unable" to care for A.D. and that the guardianship was in A.D.'s best interest notwithstanding his mother's opposition to it.

II. Discussion

¶ 18 We first address L.D.'s contention that it was improper for the court to proceed under section 15-14-204(2)(c) because, she claims, the order deprived her of parental rights in a manner akin to a dependency and neglect proceeding without affording her the attendant process. After determining that the court properly proceeded under section 15-14-204(2)(c), we examine the evidentiary burden and application of section 15-14-204(2)(c). With those legal principles in hand, we then turn to the district court's

judgment and conclude that the court did not err in granting the guardianship.

A. Guardianship Proceeding

¶ 19 Section 15-14-204(1) empowers district courts to appoint guardianships for minors upon request from "a person interested in the welfare of a minor."[1] A court can do so for several reasons. As pertinent here, it may appoint a qualified guardian if it finds the parents are "unwilling or unable to exercise their parental rights" and that the appointment is "in the minor's best interest." § 15-14-204(2)(c).

¶ 20 Unless otherwise limited by the court, a guardian possesses "the duties, responsibilities, and powers of a parent regarding the ward's support, care, education, health, and welfare." *In re D.I.S.*, 249 P.3d 775, 780 (Colo. 2011); §§ 15-14-207, -208, C.R.S. 2022. Of course, granting such a guardianship may result in the

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[1] Under the Colorado Constitution article VI, section 9(3), district courts (with the exception of the City and County of Denver, which has a separate probate court) retain jurisdiction to handle all probate matters — including guardianship proceedings. *See In re J.C.T.*, 176 P.3d 726, 732 (Colo. 2007) (holding that the Denver probate court did not exceed its jurisdiction when it took steps to find a permanent guardian for a minor).

coextensive loss of those duties, responsibilities, and powers for the parent(s).

¶ 21 Judicial actions taken under article 3 of the Colorado Children's Code can also affect parental rights. *See* §§ 19-3-100.5 to -705, C.R.S. 2022. For example, if the State alleges that a minor is dependent and neglected under section 19-3-102(1), C.R.S. 2022, then the court may hold an adjudicatory hearing at which the State must prove by a preponderance of the evidence that the child is dependent and neglected. *See L.L. v. People*, 10 P.3d 1271, 1277-78 (Colo. 2000). If the State meets its burden, the court may take a number of actions, including appointing a guardian for the minor. §§ 19-1-104(4), 19-3-508(1), 19-3-702(4)(a)(III), C.R.S. 2022.

¶ 22 On appeal, L.D. argues that the district court erred by proceeding under the guardianship statute. In her view, the court should have transferred the dispute to a juvenile court, where it would have been subject to the extensive procedural mechanisms associated with a dependency and neglect proceeding.

¶ 23 We discern no error. Foremost, the district court's action was consistent with the jurisdictional provisions of the Probate Code and the Children's Code. § 15-14-106(1), C.R.S. 2022 ("[T]he court

has jurisdiction over . . . guardianship and related proceedings for individuals domiciled or present in this state . . . ."); § 19-1-104(4) ("Nothing in this section shall deprive the district court of jurisdiction to appoint a guardian for a child . . . ."). The Children's Code allows a district court to request that the juvenile court make recommendations pertaining to guardianship. § 19-1-104(4)(b). But the State possesses the exclusive authority to initiate a dependency and neglect proceeding under the Children's Code. *L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385, 1392 (Colo. 1996). And here, the State did not initiate such a proceeding to empower the juvenile court to assume jurisdiction over A.D. *See* § 19-1-104(4)(a) (providing that, when a petition involving the same child is pending in juvenile court, the district court shall certify the question of legal custody to the juvenile court).

¶ 24 The court's action was also consistent with binding precedent. For instance, in *In re J.C.T.*, the supreme court upheld a probate court order directing a GAL to find a permanent guardian for a minor under the probate court's supervision. 176 P.3d 726 (Colo. 2007). The supreme court reasoned that, although the guardianship closely resembled adoption, it was distinct because it

resulted only in the suspension of parental rights — as opposed to the termination of the legal relationship between parent and child. Thus, the probate court retained jurisdiction. *Id.* at 728-32; *see also* Deirdre M. Smith, *Termination of Parental Rights as a Private Remedy: Rationales, Realities, and Alternatives*, 72 Syracuse L. Rev. 1173, 1178-84 (2014) (examining the nature and significance of this crucial distinction).

¶ 25 While we recognize that the guardianship deprives L.D. of substantial parental rights — namely, her authority over A.D. — her legal status as his mother remains intact. *See People in Interest of K.S.*, 33 Colo. App. 72, 76, 515 P.2d 130, 132-33 (1973) (discussing the difference between the deprivation of a parent's custodial rights and the termination of the parent's legal status as a parent). And the suspension of such rights is within the district court's power. *See In re J.C.T.*, 176 P.3d at 730 (The district "court 'is granted broad discretion in all cases involving protected persons.'" (quoting *O.R.L. v. Smith*, 996 P.2d 788, 790-91 (Colo. App. 2000))).

¶ 26 Accordingly, the district court did not err by acting pursuant to section 15-14-204(2)(c).

B. Evidentiary Questions

¶ 27 We now address two related evidentiary questions. First, given that parents are entitled to a presumption that they act in their children's best interest, must the party seeking appointment as guardian under section 15-14-204(2)(c) prove, by clear and convincing evidence, that the guardianship is in the best interest of the child despite this presumption? And second, in granting a guardianship under section 15-14-204(2)(c), must the court delineate the "special factors" upon which it relies? We answer "yes" to both questions.

1. Clear and Convincing Evidence

¶ 28 Parents have a fundamental liberty interest in the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 68 (2000); *In re Adoption of C.A.*, 137 P.3d 318, 327 (Colo. 2006). To protect this liberty interest, there is a presumption that parents act in the best interest of their children. *Troxel*, 530 U.S. at 67. And Colorado courts have held, in analogous circumstances, that this presumption can only be overcome by clear and convincing evidence. *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, 1130 (Colo. 2010) (visitation time for nonparents

under section 14-10-123(1), C.R.S. 2022); *In Interest of Baby A*, 2015 CO 72, ¶ 29 (termination of parent-child legal relationship under section 19-5-105, C.R.S. 2022).

¶ 29 We conclude that this heightened evidentiary burden should also apply in the context of section 15-14-204(2)(c). *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, is particularly instructive. There, a child's former foster parents sought an order granting them visitation rights over father's objection. *Id.* at 1130-32. The court held that, before granting such an order, the nonparent must show by clear and convincing evidence that the allocation of parenting time to the nonparent is in the best interest of the child. *Id.* at 1130.

¶ 30 Although granting nonparental visitation rights is different than granting a guardianship, we nevertheless conclude that it is sufficiently analogous to warrant application of the same heightened evidentiary burden. Indeed, using the clear and convincing standard in the context of section 15-14-204(2)(c) not only protects the parents' fundamental liberty interest in the care, custody, and control of their children, *Baby A*, ¶ 24, but also ensures that the best interest of the minor is preserved. *See In re*

R.M.S., 128 P.3d 783, 788 (Colo. 2006) (observing, in the context of section 15-14-202, C.R.S. 2022, that the overarching purpose of the guardianship statute is to promote the best interest of the minor).

¶ 31 This interpretation is also consistent with section 15-14-121, C.R.S. 2022. Our guardianship statute is modeled after the Uniform Guardianship and Protective Proceedings Act (UGPPA). Section 15-14-121 states that, in applying and interpreting the statute, courts must consider "the need to promote uniformity of the law with respect to its subject matter among states that enact it." Other states that have enacted the UGPPA have also imposed a clear and convincing evidentiary standard where the parents oppose the guardianship. *See, e.g.*, Wash. Rev. Code § 11.130.185(2)(c) (2022); Me. Stat. tit. 18-C, § 5-204(2)(C) (2022).

¶ 32 Moreover, this interpretation is consistent with how other state courts have interpreted similar, although not identical, guardianship statutes. *See, e.g.*, *Terrence E. v. Christopher R.*, 842 S.E.2d 755, 760 (W. Va. 2020); *In re Guardianship of Nicholas P.*, 27 A.3d 653, 658 (N.H. 2011); *In re Guardianship of Elizabeth H.*, 771 N.W.2d 185, 192-93 (Neb. Ct. App. 2009).

¶ 33 For these reasons, we hold that a party invoking section 15-14-204(2)(c) must prove by clear and convincing evidence that (1) the parents are "unwilling" or, as relevant here, "unable" to exercise their parental rights; and (2) the guardianship is "in the minor's best interest."

2. Special Factors

¶ 34 In addition to the moving party's heightened burden of proof, interference with parental rights also imposes an affirmative obligation on courts. This duty stems from *Troxel*, which held that there must be "special factors" that justify the interference with parental rights. *Troxel*, 530 U.S. at 68. Because a parent's position is accorded "special weight" vis-a-vis the parental presumption, decisions that override that presumption must identify the "special factors" — that is, the specific reasons — that justify the court doing so. *Baby A*, ¶ 27.

¶ 35 The same courts that required movants to meet a heightened evidentiary burden before interfering with parental rights have also imposed this additional factfinding obligation on courts. *Id.*; *B.J.*, 242 P.3d at 1132. These holdings, coupled with the analogous gravity of a guardianship appointment, lead us to conclude that in

appointing a guardian under section 15-14-204(2)(c), a court must make findings of fact identifying the "special factors" upon which it relies.

C. Interpretation and Application of Section 15-14-204(2)(c)

¶ 36 L.D. contends that the district court erred by concluding that section 15-14-204(2)(c) was satisfied. More precisely, she argues that the discord between herself and A.D. was simply the product of him being a rebellious teenager, rather than her inability to exercise her parental rights within the meaning of section 15-14-204(2)(c). We conclude otherwise.

1. Additional Background

¶ 37 The district court determined that Petitioners showed, by clear and convincing evidence, that (1) L.D. was unable to exercise her parental rights and (2) the guardianship was in A.D.'s best interest. In reaching this conclusion, it articulated numerous "special factors" on which it relied.

¶ 38 First, the court observed that there was a complete breakdown in communication between L.D. and A.D. Indeed, the two had not meaningfully communicated for six months at the time of the hearing, and L.D. substantially contributed to this breakdown. For

one, her own actions prevented direct communication with A.D. She took away his phone because he would not allow her to track him, then refused to talk to him on the replacement phone he received from his girlfriend, only to later block his number following the license revocation. She also disregarded alternative communication systems set up in lieu of direct channels. For example, after she suddenly revoked her consent for him to drive and to wrestle, she then disregarded communications from Petitioners regarding A.D.'s educational needs. While the court recognized that A.D. contributed to this dynamic, it concluded that L.D.'s actions only worsened the situation.

¶ 39 The court also determined that there was a complete loss of trust between L.D. and A.D. It noted that, like the breakdown in communication, L.D.'s actions had contributed to this strife, most notably her unilateral decisions — without prior warning — to revoke her permissions for his license and for him to wrestle. It further observed that, although L.D. insisted that she wanted A.D. home, she also expressed that she did not feel safe with him at home. While A.D. undoubtedly contributed to this loss of trust, the court found that L.D. failed to take steps to rebuild it.

¶ 40 Finally, the court observed that L.D. seemed to be more interested in retaining her parental authority over A.D. than helping with his distress. This dynamic was highlighted by L.D.'s response to Petitioners' requests to communicate with A.D.'s teachers, coaches, and doctors. She knew A.D. was going through a tough time, and that these adults could help Petitioners help A.D., yet she refused to allow communication for several months. As with her actions regarding the breakdown in communication and loss of trust, this behavior likewise evinced an inability to place A.D.'s needs above her own and thus exercise her parental rights.

¶ 41 In addition to making these factual findings, the court concluded that the guardianship was in A.D.'s best interest. He had been living safely with Petitioners since September 2021, improving his academic performance, and participating in other high school activities (e.g., wrestling, dances, etc.). More importantly, the court found that A.D. trusted Petitioners and felt stable in their custody.

¶ 42 These findings were consistent with the GAL's report concluding that L.D. was unable to exercise her parental rights and that the guardianship was in A.D.'s best interest. The court thereby

concluded that the elements of section 15-14-204(2)(c) were satisfied.

2. Analysis

¶ 43 L.D.'s principal contention is that the court interpreted the meaning of "unable" too broadly. In her view, a court may only conclude that a parent is unable to exercise parental rights if an examining physician concludes that she is no longer able to care for the child.[2] To support this interpretation, she points to another portion of the statute — specifically, section 15-14-202, which concerns the appointment of a guardianship through a will or similar testamentary document. In particular, she relies on section 15-14-202(3), which states:

> [T]he appointment of a guardian becomes effective upon the death of the appointing parent or guardian, an adjudication that the parent or guardian is an incapacitated person, *or a written determination by a physician who has examined the parent or guardian that the parent or guardian is no longer able to care for the child,* whichever occurs first.

[2] L.D. does not argue that "unable" under section 15-14-204(2)(c), C.R.S. 2022, means "unfit."

(Emphasis added.) L.D. argues that accepting the district court's interpretation runs the risk of defining functionally identical terms differently across the statute. We are unpersuaded.

¶ 44 Adopting such a narrow interpretation reads a requirement into section 15-14-204(2)(c) that is not there. The General Assembly defines essential terms it deems appropriate, and it chose not to do so here. *See* § 15-14-102, C.R.S. 2022 (the definitional section of the Colorado UGPPA). Moreover, there is no evidence that the General Assembly intended the standards delineated in section 15-14-202 — which concerns distinct circumstances — to also apply in the context of appointment of guardians. *See Allstate Ins. Co. v. Smith*, 902 P.2d 1386, 1387 (Colo. 1995) (presuming that the General Assembly meant what it said).

¶ 45 Perhaps more importantly, L.D.'s interpretation would impede a court's ability to further the statute's primary purpose — namely, to protect the best interest of the minor. *See In re R.M.S.*, 128 P.3d at 788. By way of example, unless a court received clinical confirmation of the parents' inability to care for the minor, it could not appoint a guardian even if the appointment was in the minor's best interest. We decline to interpret section 15-14-204(2)(c) in a

manner that would directly undermine the General Assembly's intent. *See Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004).

¶ 46 The record supports the district court's finding that there was clear and convincing evidence that, while L.D. was willing, she was "unable" to exercise her parental rights under section 15-14-204(2)(c). A.D.'s behavior was undoubtedly challenging and he placed himself in danger by repeatedly running away. But, as the court found with record support, L.D.'s response to that behavior only made the situation worse. Her failure to meaningfully engage with him, her repeated betrayals of his trust, and her actions that arguably undermined his efforts at self-improvement all support the district court's finding that she was unable to exercise her parental rights. These are the "special factors" that support our conclusion that section 15-14-204(2)(c) is satisfied.

¶ 47 By no means do we suggest that L.D. is clinically incapable of parenting. Rather, the confluence of dynamics at play makes L.D.'s parenting of A.D. untenable. L.D. and A.D. do not talk to, trust, or respect one another, and no evidence was presented that indicated she will soon be able to alter those dynamics. While such dynamics do not, alone, render a parent "unable" to exercise their parental

rights, under the extreme facts of this case, the district court did not err in finding that this situation falls within the broad purview of section 15-14-204(2)(c).

¶ 48 In the alternative, L.D. claims that the court erred when it concluded that the guardianship was in A.D.'s best interest without applying the standards specified in the Uniform Dissolution of Marriage Act (UDMA). §§ 14-10-101 to -133, C.R.S. 2022. Specifically, section 14-10-124(1.5)(a), C.R.S. 2022, articulates the factors a court must consider before allocating parental responsibilities following a dissolution of marriage or legal separation. L.D. faults the court for not applying all the factors laid out in section 14-10-124(1.5)(a).

¶ 49 This argument fails because nothing in section 15-14-204 suggests that its best interest standard must mirror the UDMA analysis. Granted, a court may consider the section 14-10-124(1.5)(a) factors in a section 15-14-204 inquiry, as the court did here. But while such factors may be relevant, we see no basis for requiring that courts undertake an identical analysis under 15-14-204 when determining whether to appoint a guardian for a minor. Accordingly, the court did not err by not doing so.

¶ 50 Because the record supports the district court's finding that L.D. was unable to exercise her parental rights within the meaning of section 15-14-204(2)(c), and because L.D. does not challenge that the guardianship was in A.D.'s best interest, *Galvan v. People*, 2020 CO 82, ¶ 45, we conclude that the district court did not err in appointing Petitioners as guardians.

D. Other Issues

¶ 51 We last address three other issues the parties raise.

1. Appointment of Guardian Ad Litem

¶ 52 L.D. also faults the district court for appointing a GAL before it entered a finding that L.D. was "unable or unwilling" to exercise her parental rights.

¶ 53 Pursuant to section 15-14-115, a court may appoint a GAL "if the court determines that representation of the interest otherwise would be inadequate." The statute further states that the court "shall state on the record the duties of the [GAL] and its reasons for the appointment." § 15-14-115. Here, the district court determined that, given Petitioners and L.D.'s disagreement about the guardianship, A.D.'s interest was not adequately represented. It therefore appointed a GAL and outlined the scope of the GAL's

duties. Because the court provided a reason for the appointment, and because it articulated the breadth of the GAL's representation, the court did not err in appointing the GAL without first finding that L.D. was "unable or unwilling" to exercise her parental rights.

2. Financial Support for Guardianship

¶ 54 L.D. also takes issue with the court's order regarding financial support for A.D. Consistent with section 15-14-209, C.R.S. 2022, the court ordered L.D. to provide Petitioners with $1,100 of the $1,800 in monthly survivorship benefit she received on behalf of A.D. L.D. claims the court erred because, according to her, this amounts to a child support order — which the court could not enter without first making the factual findings specified in the child support guidelines statute. *See* § 14-10-115, C.R.S. 2022.

¶ 55 After the court entered its order, however, Petitioners were designated as the representative payees. Consequently, Petitioners — not L.D. — now receive A.D.'s monthly benefit. Because the court's order only required L.D. to provide Petitioners with a portion of the survivorship benefits while she was receiving those benefits, and because L.D. is no longer receiving those benefits, the issue is moot. *In re Parental Responsibilities Concerning S.Z.S.*, 2022 COA

105, ¶ 50 ("We will not render an opinion on the merits of an issue when subsequent events have rendered the issue moot.").

3. Attorney Fees

¶ 56 Finally, Petitioners request attorney fees pursuant to C.A.R. 39.1. But we deny that request because Petitioners fail to explain the legal or factual basis for the award as C.A.R. 39.1 requires. *Herbst v. Univ. of Colo. Found.*, 2022 COA 38, ¶ 20.

III. Conclusion

¶ 57 The order is affirmed.

JUDGE LIPINSKY and JUDGE SCHOCK concur.

SUMMARY
June 8, 2023

2023COA51

No. 22CA0232, *Marriage of James* — Colorado Rules for Magistrates — Magistrate has no Authority to Consider a Petition for Rehearing; Civil Procedure — Post-Trial Motions — Motion for Reconsideration; Colorado Rules of Appellate Procedure — Appeals in Civil Cases — Running of Time for Filing Notice of Appeal

A division of the court of appeals concludes that under the Colorado Rules for Magistrates, specifically C.R.M. 5(a), and the applicable Colorado Appellate Rules, a party in a proceeding before a magistrate acting with the parties' consent may not file a C.R.C.P. 59 motion for reconsideration and thereby toll the forty-nine-day deadline for filing a notice of appeal pursuant to C.A.R. 4(a)(3). Accordingly, the division dismisses a party's appeal of the permanent orders of a magistrate, acting with the consent of the parties, as untimely because (1) the party filed the notice of appeal more than forty-nine days after the entry of the magistrate's

permanent orders and (2) the party's C.R.C.P. 59 motion was not permitted under C.R.M. 5(a) and thus did not toll the forty-nine-day deadline to file the notice of appeal.

COLORADO COURT OF APPEALS **2023COA51**

Court of Appeals No. 22CA0232
Arapahoe County District Court No. 20DR31968
Honorable Cynthia Mares, Judge

In re the Marriage of

Tahlia Denee James,

Appellee,

and

David James,

Appellant.

APPEAL DISMISSED

Division II
Opinion by JUDGE FURMAN
Tow and Johnson, JJ., concur

Announced June 8, 2023

Tahlia Denee James, Pro Se

Kilby Law, LLC, Matthew A. Kilby, Denver, Colorado, for Appellant

¶ 1 May a party in a proceeding before a magistrate acting with the parties' consent file a C.R.C.P. 59 motion for reconsideration, thus tolling the time in which to file a notice of appeal pursuant to C.A.R. 4(a)(3)? Based on our review of the Colorado Rules for Magistrates, combined with the applicable Colorado Appellate Rules, we conclude that the answer is no.

¶ 2 David James (husband) appeals certain portions of the permanent orders issued by a magistrate acting with the parties' consent under C.R.M. 7(b). We dismiss his appeal as untimely.

I. Husband's Untimely Notice of Appeal

¶ 3 In December 2020, husband petitioned for the dissolution of his marriage to Tahlia Denee James (wife). The parties thereafter consented to a magistrate presiding over their permanent orders hearing, which was held on October 5, 2021. The magistrate issued written permanent orders on November 3, 2021. Later that same day, husband filed a C.R.C.P. 59 motion for the magistrate to reconsider the permanent orders, alleging that the magistrate had ignored his objection to the proposed form of permanent orders filed by wife.

¶ 4 On December 20, 2021, a district court judge issued an order dismissing husband's C.R.C.P. 59 motion for lack of jurisdiction. Forty-nine days later, on February 7, 2022, husband filed his notice of appeal, seeking this court's review of the permanent orders. This court then issued an order requiring husband to show cause why the appeal should not be dismissed given that the notice of appeal was filed more than forty-nine days after the entry of permanent orders. After husband filed a response to the show cause order, a motions division of this court deferred consideration of the timeliness of husband's appeal to this division.

¶ 5 We now hold that because husband's appeal was untimely, we lack jurisdiction for appellate review and must dismiss his case.

II. Discussion

A. Principles of Interpretation

¶ 6 Our review of the timeliness of husband's appeal requires us to interpret both the Colorado Rules for Magistrates and the Colorado Rules of Appellate Procedure.

¶ 7 We must interpret court rules consistently with principles of statutory construction, giving words their plain and ordinary meanings. *See* § 2-4-101, C.R.S. 2022; *Hiner v. Johnson*, 2012 COA

164, ¶ 13. When construing the rules, we should give effect to each word and interpret each provision in harmony with the rules' overall design, whenever possible. *In re Marriage of Rozzi*, 190 P.3d 815, 819 (Colo. App. 2008). If different rules conflict or cannot be harmonized, more specific provisions control over more general provisions. *Id.*

B. A Timely Notice of Appeal as a Jurisdictional Prerequisite

¶ 8 The timely filing of a notice of appeal is a jurisdictional prerequisite for appellate review. *In re Marriage of Buck*, 60 P.3d 788, 789 (Colo. App. 2002). Pursuant to C.A.R. 4(a)(1), a party has forty-nine days after the entry of the judgment or order in which to file a notice of appeal.

¶ 9 Husband's notice of appeal was filed on February 7, 2022, which is outside the forty-nine-day window for him to appeal the November 3, 2021, permanent orders under C.A.R. 4(a)(1).

¶ 10 Husband contends that his notice of appeal filed on February 7, 2022, was timely because his C.R.C.P. 59 motion for reconsideration filed with the magistrate tolled the C.A.R. 4(a)(1) deadline until the district court issued its order of dismissal. Husband relies on C.A.R. 4(a)(3), which provides that the deadline

for the filing of a notice of appeal is tolled while a C.R.C.P. 59 motion is pending. We are unpersuaded because a further examination of the magistrate rules reveals that the magistrate was precluded from considering husband's C.R.C.P. 59 motion in the first instance.

C. The Intersection of the Colorado Rules for Magistrates and Colorado Appellate Rules

1. Authority of Magistrates

¶ 11 A magistrate may exercise only those powers provided by statute or court rule. *See In re Parental Responsibilities Concerning M.B.-M.*, 252 P.3d 506, 509 (Colo. App. 2011); § 13-5-201(3), C.R.S. 2022 ("District court magistrates may hear such matters as are determined by rule of the supreme court, subject to the provision that no magistrate may preside in any trial by jury."); *see also In re R.G.B.*, 98 P.3d 958, 960 (Colo. App. 2004) (a magistrate is a hearing officer who acts with limited authority). This is because magistrates are statutorily authorized members of the judiciary who enter orders or judgments in judicial proceedings and are supervised by district court judges. *M.B.-M.*, 252 P.3d at 509; C.R.M. 1 ("Although magistrates may perform functions which

judges also perform, a magistrate at all times is subject to the direction and supervision of the chief judge or presiding judge.").

¶ 12 District court magistrates have different powers depending on the nature of the proceeding over which they preside. In domestic relations cases, a magistrate has the power to conduct various preliminary proceedings and to resolve certain post-decree motions, regardless of the parties' consent to the magistrate's authority. C.R.M. 6(b)(1). Yet a magistrate has the power to only preside over a contested permanent orders hearing, as occurred here, with the consent of the parties. C.R.M. 6(b)(2).

¶ 13 A magistrate who is without authority as to a particular action lacks the jurisdiction to act, meaning that any corresponding action taken by the magistrate is null and void. *In re Marriage of Phelps*, 74 P.3d 506, 509 (Colo. App. 2003) (where a magistrate was not authorized to act on a motion, the magistrate's corresponding order was void); *People v. Widhalm*, 991 P.2d 291, 293 (Colo. App. 1999) (recognizing that "any action taken by a court when it lacks jurisdiction is a nullity").

2. Review of Magistrate Orders and Judgments

¶ 14 The procedure for review of a magistrate's order or judgment is also governed by whether the consent of the parties was required. If the adjudication of the matter by a magistrate did not require the consent of the parties, a party must first seek review of the magistrate's order or judgment by a district court judge; only after the party has obtained the district court's review does this court have jurisdiction to hear an appeal. C.R.M. 7(a); *In re Marriage of Moore*, 107 P.3d 1150, 1151 (Colo. App. 2005) (dismissing the appeal in a matter heard without regard to consent of the parties where the appellant had not first obtained final district court review under C.R.M. 7(a)).

¶ 15 Conversely, under C.R.M. 7(b), where an order or judgment was entered in a proceeding requiring the consent of the parties, district court review is not available. Instead, the matter "shall be appealed pursuant to the Colorado Rules of Appellate Procedure in the same manner as an order or judgment of a district court." *Id.*

3. C.R.M. 5(a)'s Prohibition on Postjudgment Motions

¶ 16 Because the powers of district court magistrates are limited, *see R.G.B.*, 98 P.3d at 960, the actions that a magistrate may take

are generally circumscribed by the Colorado Rules for Magistrates and other statutory provisions, *see* § 13-5-201(3).

¶ 17 As is relevant to husband's appeal, district courts have a limited ability to reconsider their judgments within the confines of C.R.C.P. 59 and 60. But, as to magistrates, C.R.M. 5(a) provides as follows:

> An order or judgment of a magistrate in any judicial proceeding shall be effective upon the date of the order or judgment and shall remain in effect pending review by a reviewing judge unless stayed by the magistrate or by the reviewing judge. Except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has no authority to consider a petition for rehearing.

Other divisions of this court have held that, under C.R.M. 5(a), "[a] magistrate may not entertain a motion for reconsideration under C.R.C.P. 59 or for relief from a judgment under C.R.C.P. 60." *M.B.-M.*, 252 P.3d at 510.

¶ 18 But the divisions of this court that have considered and applied C.R.M. 5(a)'s prohibition for magistrates to rule on postjudgment motions have done so only in the context of proceedings where the parties' consent was not required. For

example, in *M.B.-M.*, the court held that because of C.R.M. 5(a), the magistrate was without jurisdiction to sua sponte reverse a contempt order in a proceeding that did not require the parties' consent under C.R.M. 5(b). 252 P.3d at 509-10. The division in *M.B.-M.* specifically limited its discussion of the magistrate rules to "situations where consent of the parties is not required, and d[id] not consider the effect of a magistrate's ruling where the parties have given consent for a magistrate to hear and decide matters ordinarily decided by a district court." *Id.* at 509; *see also Phelps*, 74 P.3d at 509 (declaring magistrate's ruling on motion for reconsideration void in a non-consent proceeding); *In re Marriage of Tonn*, 53 P.3d 1185, 1187 (Colo. App. 2002) (rules governing magistrates do not authorize any motion respecting a magistrate's order except a motion for review in proceeding involving post-decree entry of support judgment); *In re Marriage of Roosa*, 89 P.3d 524, 530 (Colo. App. 2004) (magistrate had no power to decide motion for reconsideration of magistrate's order resolving various post-decree motions).

D. Husband's Appeal in This Case

¶ 19 We now resolve the question left unanswered by *M.B.-M.*: even where a magistrate's actions require the parties' consent, C.R.M. 5(a) prohibits the magistrate from entertaining C.R.C.P. 59 postjudgment motions. We acknowledge that husband's C.R.C.P. 59 motion, if permitted under C.R.M. 7(b), would have tolled the deadline for him to file his notice of appeal, and thus his appeal would have been timely. But husband, in effect, asks us to interpret the rule to create an exception to the plain text of C.R.M. 5(a), and allow postjudgment motions in magistrate proceedings where the consent of the parties was necessary.

¶ 20 We are unpersuaded by husband's argument because the language of C.R.M. 5(a) disallowing postjudgment motions in magistrate proceedings is unequivocal and contains no exceptions for proceedings where the parties' consent was necessary.

¶ 21 C.R.M. 5(a) provides that an order or judgment of a magistrate becomes effective upon its issuance in "any judicial proceeding," indicating that the rule is applicable in all types of proceedings, regardless of whether consent of the parties was required. The rule then unambiguously provides that a magistrate has "no authority"

to consider petitions for rehearing, with the narrow exception of C.R.C.P. 60(a) petitions as to clerical errors. C.R.M. 5(a). Nowhere does C.R.M. 5, or any provision of the magistrate rules, limit the applicability of C.R.M. 5(a) to only magistrate proceedings where the parties' consent was not required.

¶ 22 We presume that, in drafting the Colorado Rules for Magistrates, if the Colorado Supreme Court had intended to exclude proceedings where consent was necessary from C.R.M. 5(a)'s prohibition on postjudgment motions, it would have done so. *Cf. Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009) ("[W]here the legislature could have restricted the application of a statute, but chose not to, we will not read additional restrictions into the statute."); *Mason v. People*, 932 P.2d 1377, 1380 (Colo. 1997) (courts presume that if the legislature intended the statute to achieve a particular result, it would have employed terminology clearly expressing that intent). Therefore, we decline to create such an exception in this instance.

¶ 23 We also disagree with husband's contention that, because C.R.M. 7(b) requires a magistrate's judgment to be appealed in an identical fashion to a district court judgment, he must have been

able to file a valid C.R.C.P. 59 motion for the magistrate's consideration, thus tolling the appellate deadline. To hold that the magistrate could have entertained husband's C.R.C.P. 59 motion would require us to disregard C.R.M. 5(a)'s clear prohibition of the same.

¶ 24 We also conclude that the Rules for Magistrates and C.A.R. 4(a)(3) can be read harmoniously. While C.A.R. 4(a)(3) provides that a "timely" C.R.C.P. 59 motion tolls the time to file an appeal, given C.R.M. 5(a)'s unequivocal prohibition on petitions for rehearing in magistrate proceedings, C.R.C.P. 59 does not apply in this circumstance. In other words, because of the plain language of C.R.M. 5(a), C.A.R. 4(a)(3) is simply inapplicable to the appeal of magistrate orders and judgments. To the extent such an outcome results in a different treatment of husband's appeal compared to the appeal of a district court's judgment, we conclude that the more specific rule controls over the more general one. *See, e.g.*, *Spiremedia Inc. v. Wozniak*, 2020 COA 10, ¶ 18 (motion for reconsideration treated as a motion under C.R.C.P. 59); *cf. Rozzi*, 190 P.3d at 819 (specific provisions control over more general provisions). *Compare* C.R.M. 5(a) (prohibits C.R.C.P. 59 motions in

magistrate proceedings), *with* C.R.M. 7(b) (the judgment of a magistrate acting where consent was necessary shall be appealed in the same manner as a district court judgment).

¶ 25 We acknowledge husband's concerns that litigants may be disincentivized from consenting to a magistrate if relief under C.R.C.P. 59 is unavailable. But it is not our role to "judicially legislate" to address husband's concerns by interpreting C.R.M. 5(a) "to accomplish something the plain language does not suggest, warrant or mandate." *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994).

¶ 26 We therefore conclude that husband's notice of appeal, which was filed more than forty-nine days after the November 3, 2021, permanent orders, was untimely. As a result, his appeal must be dismissed because we lack jurisdiction over it. *See Buck*, 60 P.3d at 789; C.A.R. 4(a)(1).

III. Conclusion

¶ 27 The appeal is dismissed.

JUDGE TOW and JUDGE JOHNSON concur.

SUMMARY
January 4, 2024

2024COA3

No. 23CA0124, *In the Matter of the Estate of Ybarra* — Colorado Rules for Magistrates — Magistrate has no Authority to Consider a Petition for Rehearing; Colorado Rules of Appellate Procedure — Appeals in Civil Cases — Time for filing Notice of Appeal

As a matter of first impression, a division of the court of appeals considers whether a motion seeking an extension of the deadline to file post-trial motions, or an order granting such a motion, tolls the deadline to file a notice of appeal under C.R.C.P. 59 and C.A.R. 4(a)(1) when no cognizable C.R.C.P. 59 motion is ever filed. The division concludes that it does not.

Thus, the division concludes that the appeal was untimely and was filed beyond the maximum period allowed for excusable neglect under C.A.R. 4(a)(4). The division also concludes that unique circumstances don't justify accepting the untimely appeal. The

division accordingly dismisses the appeal for lack of jurisdiction. The court also awards appellate attorney fees and costs to the appellee.

COLORADO COURT OF APPEALS **2024COA3**

Court of Appeals No. 23CA0124
Adams County District Court No. 20PR222
Honorable Sara Sheffield Price, Magistrate

In re the Matter of the Estate of Ramon Lopez Ybarra, a/k/a Ramon L. Ybarra, a/k/a Ramon Ybarra, deceased.

Raymond Ybarra Jr.

Appellant,

v.

Connie DeLeon, n/k/a Connie Zamora,

Appellee.

APPEAL DISMISSED AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE GOMEZ
Welling and Lipinsky, JJ., concur

Announced January 4, 2024

Solem Woodward & McKinley, P.C., Zachary F. Woodward, Englewood, Colorado, for Appellant

The Moore Law Firm, P.C., Theresa M. Moore, Englewood, Colorado, for Appellee

¶ 1 This case presents a novel issue concerning the timeliness of an appeal — and once again demonstrates the "confusing appellate labyrinth" that has plagued parties who seek to appeal rulings entered by magistrates. *In re Marriage of Stockman*, 251 P.3d 541, 543 (Colo. App. 2010) (quoting *In Interest of C.A.B.L.*, 221 P.3d 433, 443-44 (Colo. App. 2009) (Roy, J., specially concurring)). The appellant in this case, Raymond Ybarra Jr., seeks to appeal a magistrate's order, entered with the required consent, removing him as the personal representative of his father's estate and awarding the appellee, his sister Connie Zamora, damages against him for breach of fiduciary duty, conversion, and civil theft.

¶ 2 After the magistrate entered her order, Ybarra's new attorney sought and obtained an extension of time to "review the [c]ourt record and determine whether post-trial relief may be warranted." Within that extended deadline, the attorney filed a motion for relief under C.R.C.P. 59, which the magistrate denied, citing her lack of authority to grant such relief. Ybarra's attorney then filed a notice of appeal — 110 days after the initial magistrate's order, 66 days after the extended deadline for post-trial motions, and 26 days after the magistrate denied Ybarra's Rule 59 motion. Based on a 49-day

appeal deadline, *see* C.A.R. 4(a)(1), this means that, if the deadline to appeal was based on the date of the magistrate's initial order, Ybarra's appeal was 61 days late; if it was based on the extended post-trial motion deadline, his appeal was 17 days late; and if it was based on the date of the magistrate's denial of his Rule 59 motion, his appeal was timely.

¶ 3 Ybarra contends that the appeal deadline was based on the extended post-trial motion deadline. Specifically, he argues that the magistrate's order granting additional time to seek post-trial relief tolled his deadline for filing an appeal, making his appeal only 17 days late, and that we should accept it due to excusable neglect. Alternatively, he argues that we should accept the appeal under the unique circumstances doctrine.

¶ 4 We reject both arguments. Colorado courts have held that a request for an extension of time to file a Rule 59 motion is not itself a Rule 59 motion, *see Campbell v. McGill*, 810 P.2d 199, 200 (Colo. 1991), and that a Rule 59 motion doesn't toll the deadline to appeal a magistrate's order entered where consent was necessary, *see In re Marriage of James*, 2023 COA 51, ¶ 24. But no published Colorado case has addressed whether obtaining an extension of time to file a

post-trial motion tolls the appeal deadline where no cognizable post-trial motion is filed, particularly following a recent amendment to C.A.R. 4(a).[1] We now hold that it does not. Thus, Ybarra's appeal was filed 61 days late — beyond the maximum period allowed for excusable neglect. *See* C.A.R. 4(a)(4). We also conclude that unique circumstances don't justify accepting the appeal.

¶ 5 We therefore dismiss the appeal for lack of jurisdiction. We also award Zamora her appellate attorney fees and costs, in an amount to be determined by the district court on remand.

I. Background

¶ 6 This case stems from a dispute between Ybarra and Zamora concerning their father's estate. Ybarra opened the case by filing an application through which he was appointed as the personal representative of the estate. The court issued a notice informing the parties that "this matter may be assigned to a district court

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[1] Until July 1, 2022, C.A.R. 4(a)(3) provided that the time to file an appeal didn't start to run until "expiration of a court granted extension of time to file motion(s) for post-trial relief under C.R.C.P. 59, where no motion is filed." Rule Change 2022(05), Colorado Appellate Rules (Amended and Adopted by the Court En Banc, Feb. 24, 2022), https://perma.cc/6EQ9-625W. This provision doesn't apply to Ybarra because the order he seeks to appeal was entered a few months after the amendment went into effect.

magistrate" and that "all parties must consent to any decisions made in this matter being performed by a magistrate." The notice stated that, if an interested party didn't object to the notice within fourteen days, that party "will have consented to the magistrate." Neither party filed an objection.

¶ 7 A year later, Zamora filed a petition for removal of the personal representative and for damages under sections 15-12-611(1) and 15-10-501(1), C.R.S. 2023, leading to the order Ybarra now seeks to appeal. In that order, the magistrate found that Ybarra had committed multiple breaches of his fiduciary duties by converting estate assets for the benefit of himself and third parties; removed him as personal representative; awarded damages to Zamora for breach of fiduciary duty, conversion, and civil theft; and awarded Zamora's attorney fees and costs under sections 15-10-504(2)(a) and 18-4-405, C.R.S. 2023. At the bottom of the order was an advisement about the process for appealing a magistrate's order:

> Any order or judgment of a magistrate entered in a proceeding in which consent is necessary is issued with consent and any appeal must be taken pursuant to C.R.M. 7(b). Any order or judgment of a magistrate entered in a proceeding in which consent is not necessary must be appealed no later than fourteen days

> subsequent to the final order or judgment if the parties are present when the magistrate's order is entered, or twenty-one days from the date the final order or judgment is mailed or otherwise transmitted to the parties, pursuant to C.R.M. 7(a) . . . .

II. Timeliness of the Appeal

¶ 8 We interpret court rules using the same principles we use to interpret statutes. *People in Interest of B.H.*, 2022 COA 9, ¶ 7. Accordingly, we apply the plain and ordinary meanings of the words in the rules, attempt to give effect to each word, and, where possible, interpret each provision in the rules in harmony with the rules' overall design. *Id.*; *James*, ¶ 7.

¶ 9 The timely filing of a notice of appeal is generally a jurisdictional prerequisite for appellate review. *B.H.*, ¶ 8. The procedure for appealing a magistrate's order or judgment depends on whether the parties had to consent to a magistrate adjudicating the matter. *James*, ¶ 14. In probate cases, the parties' consent is required for a magistrate to hear and rule on any matters filed pursuant to titles 15, 25, or 27 of the Colorado Revised Statutes. C.R.M. 6(e)(2). If consent is required, the matter must be "appealed pursuant to the Colorado Rules of Appellate Procedure in the same

manner as an order or judgment of a district court." C.R.M. 7(b). If consent isn't required, the matter must first be reviewed by a district court judge before this court can review it. C.R.M. 7(a).

¶ 10 Pursuant to the Colorado Appellate Rules, in civil cases, a notice of appeal must be filed within forty-nine days after "entry of the judgment, decree, or order being appealed." C.A.R. 4(a)(1). But under C.A.R. 4(a)(3), "[t]he running of the time for filing a notice of appeal is terminated as to all parties when any party timely files a motion in the lower court pursuant to C.R.C.P. 59." The time to appeal restarts when the Rule 59 motion is resolved — either when it is ruled upon or when it is deemed denied after sixty-three days. C.A.R. 4(a)(3); *see also* C.R.C.P. 59(j).

¶ 11 C.R.M. 5(a), however, prohibits magistrates from entertaining Rule 59 motions, regardless of whether the underlying ruling did or did not require consent. *James*, ¶ 19; *In re Parental Responsibilities Concerning M.B.-M.*, 252 P.3d 506, 510 (Colo. App. 2011). Due to that prohibition, a division of this court recently held that the tolling that ordinarily applies to a Rule 59 motion doesn't apply where such a motion relates to a magistrate's order or judgment. *James*, ¶ 24. The division therefore concluded that the appellant's

filing of a Rule 59 motion with a magistrate concerning a matter for which consent was required didn't toll the appellant's deadline to file an appeal. *Id.* at ¶¶ 24, 26.

¶ 12 Ybarra doesn't reargue the issue decided in *James*. In fact, he acknowledges that his Rule 59 motion didn't toll the appeal deadline. He also acknowledges that the magistrate required consent to decide the underlying issues (which Zamora had raised under title 15) and that the parties gave the requisite consent. *See* C.R.M. 6(e)(2)(A) (consent is necessary for a magistrate to "[h]ear and rule upon all matters filed pursuant to C.R.S. Title 15"); C.R.M. 3(f)(1)(A)(ii) (parties are "deemed to have consented to a proceeding before a magistrate" if they're provided notice of the referral and don't file a written objection within fourteen days). Accordingly, under C.R.M. 7(b), Ybarra had to file his appeal with this court within the forty-nine-day deadline prescribed by C.A.R. 4(a), and his Rule 59 motion didn't toll that deadline.

¶ 13 Ybarra contends, however, that the magistrate's order granting an extension of time to file post-trial motions "ma[de] the finality of the judgment at hand subject to those anticipated motions," which

"could have destroyed the finality of the [order on appeal]." This, he contends, tolled his deadline to appeal. We disagree.

¶ 14 Although Ybarra obtained an extension of time to file a post-trial motion, there was no post-trial motion he could've filed that would've tolled the deadline to appeal. The only post-trial motion over which a magistrate has authority to rule — and, thus, the only post-trial motion Ybarra could've properly filed — is a C.R.C.P. 60(a) motion. *See* C.R.M. 5(a) ("Except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has no authority to consider a petition for rehearing."). But Rule 60(a) motions don't toll the appeal deadline. *See* C.A.R. 4(a)(3); *In re Marriage of Forsberg*, 783 P.2d 283, 284 n.2 (Colo. 1989). And, as we've explained, while Rule 59 motions generally toll the appeal deadline, that tolling doesn't apply in magistrate proceedings. *James*, ¶ 24. We fail to see how an extension of time to seek post-trial relief could toll the appeal deadline in a proceeding where the only available post-trial relief doesn't toll that deadline.

¶ 15 More generally, regardless of what post-trial relief was available to Ybarra, a motion for an extension of time to file a post-trial motion doesn't, in and of itself, toll the appeal deadline. The

only motion listed in C.A.R. 4(a)(3) as tolling the appeal deadline is a Rule 59 motion. Therefore, under the plain language of the rule, the filing of any other motion — including a motion for an extension of time to file a post-trial motion — doesn't toll the deadline. *Cf. Forsberg*, 783 P.2d at 284 n.2 (a Rule 60 motion doesn't toll the appeal deadline); *Kindig v. Kindig*, 536 P.2d 320, 322 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (stating, in applying an earlier version of C.A.R. 4(a), which listed four specific motions that extended the deadline for filing an appeal, that "[t]he filing of any other motion does not so extend that time").

¶ 16 To be sure, a court may extend the fourteen-day deadline to file a Rule 59 motion, so long as a request for an extension is made before that deadline expires. *See* C.R.C.P. 59(a). And, as Ybarra points out, if a party doesn't obtain an extension of time to seek post-trial relief, a late-filed Rule 59 motion won't toll the appeal deadline. *See Stone v. People*, 895 P.2d 1154, 1156 (Colo. App. 1995). But that doesn't mean that a motion for an extension of time to seek post-trial relief filed during this fourteen-day period, or an order granting such a motion, itself tolls the deadline to appeal. This is because, under C.A.R. 4(a)(3), the deadline to appeal is tolled

only upon the "timely" filing of a Rule 59 motion. Thus, while an extension may be necessary to ensure that a Rule 59 motion is timely and will have a tolling effect, that doesn't mean that the extension itself has any impact on the appeal deadline when a cognizable Rule 59 motion is never filed.

¶ 17 Moreover, as our supreme court's decision in *Campbell* makes clear, a motion for an extension of time to file a Rule 59 motion is "not itself a [Rule] 59 motion." 810 P.2d at 200. The court in *Campbell* considered the operation of Rule 59(j), concluding that the Rule 59 motion filed in that case could be deemed denied, at the earliest, the requisite number of days after the effective filing of the Rule 59 motion — not after the filing of a motion for an extension of time to seek Rule 59 relief. *Campbell*, 810 P.2d at 200-01 (applying an earlier version of C.R.C.P. 59(j), in which Rule 59 motions were deemed denied after sixty days). Thus, the deemed-denied date and the restarting of the appeal clock were based on when *the Rule 59 motion* was filed, not when *the motion for an extension of time* was filed. *See Campbell*, 810 P.2d at 200-01.

¶ 18 If the Rule 59 motion dictates when the appeal clock restarts, then it must also dictate when the appeal clock tolls. Any other

conclusion would be inconsistent with the plain language of C.A.R. 4(a)(3), which sets the filing and disposition of a Rule 59 motion as the benchmarks for determining when the appeal timeline tolls and restarts. Thus, neither Ybarra's motion for an extension of time nor the magistrate's order granting it tolled the deadline to appeal. Accordingly, the appeal deadline was based on the date of the magistrate's initial order, and the appeal was sixty-one days late.

III. Excusable Neglect

¶ 19 Having concluded that the appeal was sixty-one days late, we needn't consider the merits of Ybarra's contention that excusable neglect justifies his untimely appeal. This is because the notice of appeal was filed after our authority to accept an appeal based on excusable neglect had expired.

¶ 20 C.A.R. 4(a)(4) grants us authority to extend an appeal deadline upon a showing of excusable neglect for up to thirty-five days. After that date, we lack jurisdiction over an appeal regardless of whether the appellant can show excusable neglect. *Heotis v. Colo. Dep't of Educ.*, 2016 COA 6, ¶¶ 24-25; *In re Marriage of Buck*, 60 P.3d 788, 790 (Colo. App. 2002); *see also* C.A.R. 26(c)(1) ("[T]he court may not extend the time to file . . . a notice of appeal beyond that prescribed

in C.A.R. 4(a) . . . ."). Thus, irrespective of whether Ybarra can show excusable neglect, we lack jurisdiction over his appeal.

IV. Unique Circumstances

¶ 21 We now turn to Ybarra's argument that unique circumstances justify acceptance of his untimely appeal. We aren't persuaded.[2]

¶ 22 The unique circumstances doctrine creates a "narrow exception" to the procedural rules that limit our ability to grant extensions, such as C.A.R. 4(a)(4). *Converse v. Zinke*, 635 P.2d 882, 886 (Colo. 1981). Because the doctrine applies only in "extreme situation[s]," it's often reserved for cases that involve fundamental liberty interests, such as termination of parental rights. *People in Interest of A.J.H.*, 134 P.3d 528, 531 (Colo. App. 2006). And while the doctrine is "rarely invoked," it may apply if an appellant reasonably relies and acts on an erroneous or misleading ruling relating to appellate procedures or deadlines. *Id.*

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[2] At least one division of this court has held that the unique circumstances doctrine cannot apply to cases that are filed past the deadline for accepting an appeal under the excusable neglect provision. *See Heotis v. Colo. Dep't of Educ.*, 2016 COA 6, ¶¶ 32-38. We needn't decide whether we agree because we conclude, at any rate, that Ybarra hasn't established unique circumstances.

¶ 23 For instance, in *P.H. v. People in Interest of S.H.*, our supreme court applied the unique circumstances doctrine to allow an untimely appeal because the case "involv[ed] fundamental values" concerning termination of parental rights and the late filing was a "direct result of [the appellant's] reliance on an erroneous trial court ruling purporting to extend the [appeal] deadline," which the trial court lacked authority to do. 814 P.2d 909, 912 (Colo. 1991).

¶ 24 Here, however, no fundamental rights are at stake, and the magistrate's orders were not erroneous or misleading.

¶ 25 We reject Ybarra's argument that the magistrate's order granting his request for an extension of time to seek post-trial relief was erroneous or misleading. Unlike the trial court in *P.H.*, the magistrate had authority to grant the extension that Ybarra says caused him to delay filing his appeal. *See id.* Ybarra's attorney's generic request for an extension of time to "determine whether post-trial relief may be warranted" included relief from clerical mistakes under Rule 60(a), which the magistrate would've had authority to adjudicate. *See* C.R.M. 5(a). Thus, when the magistrate granted the extension, she wasn't extending a deadline or authorizing a motion over which she lacked authority. Nor did anything in her

order suggest that Ybarra could file, or that she could adjudicate, a Rule 59 motion. And to the extent that Ybarra suggests that the magistrate could've clarified the scope of her authority earlier by highlighting it in her extension order or ruling sooner on his Rule 59 motion, it wasn't the magistrate's responsibility to clarify what post-trial relief Ybarra intended to seek or to forewarn him that she lacked authority over Rule 59 motions. *See Chavez v. Chavez*, 2020 COA 70, ¶ 37 ("[Courts] are not obligated to act as advocates or do the work of counsel.").

¶ 26 We also reject Ybarra's argument that the initial order by the magistrate was erroneous or misleading because it lacked a clear advisement under C.R.M. 7(b). *See* C.R.M. 7(a), (b) (requiring that a magistrate's order or judgment include an advisement of the applicable appeal process). The order included the relevant language that "[a]ny order or judgment of a magistrate entered in a proceeding in which consent is necessary is issued with consent and any appeal must be taken pursuant to C.R.M. 7(b)." Of course, it would've been clearer had the order provided only the C.R.M. 7(b) advisement without adding the C.R.M. 7(a) advisement. But we cannot say that the inclusion of the additional information was

erroneous or misleading, particularly given that Ybarra has never indicated that his attorney was confused about which route of appellate review applied in his case. Thus, this case is nothing like *C.A.B.L.*, where the appellant relied on erroneous advice from a magistrate who told her that she could appeal by filing a petition for review with the district court when, in actuality, the appeal needed to be filed with this court. 221 P.3d at 440-41.

¶ 27 Indeed, divisions of this court have declined to apply the unique circumstances doctrine in similar circumstances. For example, the division in *Heotis* declined to apply the doctrine, notwithstanding that the appellant had misunderstood the applicable process for appealing a magistrate's order issued where consent was necessary and that the record didn't indicate whether the magistrate's order had included the required advisement. *Heotis*, ¶¶ 20-23, 27, 37. Among the reasons the division cited supporting its decision were that the case didn't involve a fundamental liberty interest or an "extreme situation." *Id.* at ¶¶ 39-40, 42 (quoting *A.J.H.*, 134 P.3d at 531).

¶ 28 Although we sympathize with Ybarra's predicament in losing his appeal rights because of his attorney's apparent confusion

about the effect of his post-trial filings, we, like the division in *Heotis*, conclude that the unique circumstances doctrine cannot be extended to apply to the situation before us. We also reiterate the *Heotis* division's assessment that, "even if there is some confusion in th[e] [magistrate] rules, the solution does not lie in contorting the law of appellate jurisdiction to remedy it; the solution lies, instead, in amending the rules." *Id.* at ¶ 45.

¶ 29 We therefore decline to apply the unique circumstances doctrine. Accordingly, we lack jurisdiction over this appeal.

V. Appellate Attorney Fees and Costs

¶ 30 Zamora requests an award of her appellate attorney fees and costs under sections 15-10-504(2)(a) and 18-4-405 based on Ybarra's breach of fiduciary duty and civil theft. We agree that these statutes entitle Zamora to an award of her reasonable attorney fees and costs incurred in this appeal defending the magistrate's findings of breach of fiduciary duty and civil theft. *See* § 15-10-504(2)(a) (damages for breach of fiduciary duty may include attorney fees and costs); § 18-4-405 (damages for civil theft may include attorney fees and costs); *Tisch v. Tisch*, 2019 COA 41, ¶ 93 (awarding appellate attorney fees under section 18-4-405). *See*

generally Bailey v. Chamblee, 192 So. 3d 1078, 1083 (Miss. Ct. App. 2016) (an appellate court has jurisdiction to award appellate attorney fees even if it lacks jurisdiction to review the judgment); *Morand v. Stoneburner*, 516 So. 2d 270, 271 (Fla. Dist. Ct. App. 1987) (same).

¶ 31 Because we grant Zamora's request under sections 15-10-504(2)(a) and 18-4-405, we don't consider her alternative request for appellate attorney fees under C.A.R. 38.

¶ 32 We exercise our authority under C.A.R. 39.1 to remand the case to the district court to determine a reasonable amount of appellate attorney fees and costs to be awarded to Zamora.

VI. Disposition

¶ 33 The appeal is dismissed, and the case is remanded to the district court to determine and award Zamora her reasonable appellate attorney fees and costs.

JUDGE WELLING and JUDGE LIPINSKY concur.

SUMMARY
June 15, 2023

2023COA55

No. 22CA1076, *Estate of Liebe* — Probate — Inter Vivos Gifts; Vehicles and Traffic — Sale or Transfer of Vehicle — Transfer of Title

In this probate proceeding, a division of the court of appeals considers whether transfer of title is required to complete a gift of a vehicle. Relying on a line of Colorado cases holding that certificate of title is not necessary to determine ownership of a vehicle, the division concludes that transfer of title is not required to effectuate a gift of a vehicle. To hold otherwise would add an element to the inter vivos gift test that Colorado appellate courts have not traditionally required. Therefore, the division affirms the holding of the district court.

COLORADO COURT OF APPEALS **2023COA55**

Court of Appeals No. 22CA1076
Mesa County District Court No. 22PR30006
Honorable Christopher J. Munch, Judge

In re the Estate of Leonard Paul Liebe Sr., Deceased.

Chelsea Ducray, Personal Representative of the Estate of Leonard Paul Liebe, Sr.,

Appellant,

v.

Myranda Hunter,

Appellee.

ORDER AFFIRMED

Division A
Opinion by JUDGE FOX
Freyre and Lipinsky, JJ., concur

Announced June 15, 2023

Wegener Lane & Evans, P.C., Schyeler Gilman, Grand Junction, Colorado, for Appellant

Chris Mahre & Associates, Chris Mahre, Grand Junction, Colorado, for Appellee

¶ 1 Chelsea Ducray, the daughter of decedent, Leonard Paul Liebe Sr., and personal representative (PR) of his estate, appeals the district court's order giving effect to Liebe's gift of a vehicle during his lifetime, even though he died without transferring title. We conclude that the district court did not err and affirm.

I. Background

¶ 2 Liebe, then sixty-eight years old, was hospitalized with COVID-19 on December 28, 2021. While in an intensive care unit, Liebe called Myranda Hunter — whom he treated as his adoptive daughter — and told her that he wanted her to have his 2021 Ford Bronco. He then arranged for a video call with Ducray, his employee John Edwards, and Hunter and her husband. During that video call, Liebe effectively repeated his intent to give the Bronco to Hunter by informing Ducray why he was not gifting it to her.

¶ 3 Liebe died without a will on January 1, 2022. In the probate proceedings, Ducray refused to transfer title to the Bronco to Hunter, so Hunter asked the district court to order Ducray to do so.

¶ 4 After a May 11, 2022, hearing on the matter, the district court ordered Ducray to sign title to the Bronco over to Hunter and later entered a corresponding written order on September 1, 2022.

II. Was the Gift Valid Without Title Transfer?

A. Applicable Law and Standard of Review

¶ 5 Whether the requirements of a gift have been met (i.e., donative intent coupled with an act that consummates the gift) is a question of fact, and if the district court's determination has record support, it is binding on review. *Love v. Olson*, 645 P.2d 861, 862-63 (Colo. App. 1982), *superseded by statute on other grounds*, Ch. 280, secs. 1-6, 1991 Colo. Sess. Laws 1681-90. *Compare Hardy v. Carrington*, 87 Colo. 461, 468, 288 P. 620, 623 (1930) (the plaintiff made a valid gift of a car, having clearly expressed his intention to do so, and such intention having been consummated through acceptance of the gift), *with Slagle v. Constr. Progress Exposition*, 100 Colo. 292, 293, 67 P.2d 623, 623 (1937) (alleged gift of a car failed because the car had not been delivered to the plaintiff).

¶ 6 We review de novo the district court's conclusions of law and defer to the court's findings of fact if any evidence in the record supports them. *People in Interest of C.J.R.*, 2016 COA 133, ¶ 14.

B. Analysis

¶ 7 Ducray contends that, because Liebe never transferred title to the Bronco as required to complete a gift, the district court erred by recognizing the gift to Hunter. Before addressing Ducray's challenge, we summarize the district court proceedings.

1. District Court Proceedings

¶ 8 The district court heard the following:

- Liebe had served as a father figure to Hunter since she was a teenager; they were in each other's lives for over twenty-five years.
- Liebe's obituary — which Hunter drafted and Ducray approved — identified Hunter as Liebe's adopted daughter.
- After telling Hunter he wanted her to have his Bronco, Liebe insisted on video-recording his wish.
- Ducray, Hunter, and other close friends were present when the video recording was created.
- In the video recording, from his hospital bed and wearing an oxygen mask, Liebe asked for Ducray and inquired: "Did they explain to you why you're

not gonna get the Bronco? . . . It doesn't make sense for you to take the Bronco to Florida . . . ." (Ducray resided in Florida but traveled to Colorado the day after Liebe was hospitalized.) Ducray responded: "I know. Yep."

- Edwards testified that, while Liebe was hospitalized, Liebe instructed him to provide Hunter with a set of keys to the Bronco. Liebe also asked Edwards to deliver $25,000 in cash from his safe to Ducray. Edwards complied with those instructions while Liebe was alive.
- Liebe asked Hunter to allow Ducray to use the Bronco while she was in Colorado. After Liebe's funeral, Ducray left the second set of Bronco keys she had used and Liebe's death certificate (to facilitate title transfer) with Hunter.
- Liebe never transferred title to the Bronco to Hunter.

- On January 8, 2021, Ducray sent Hunter the following message: "Hey sis. I think your going to have to put the Bronco on your insurance for now."

¶ 9 Based on the testimony presented and the video recording, the court found that Liebe was

> lucid, clear, consistent and thoughtful in expressing his wishes. . . . [Liebe] expressed his wishes as to what should be done with his business property. He also acknowledged his intent to make two gifts. One was a gift of $25,000 to Ducray. The other was a gift of his Ford Bronco to Hunter. . . . To effectuate the gifts, before his death [Liebe] directed [Edwards] his trusted employee, to open his safe and retrieve $25,000 in cash and also retrieve the second set of keys to the Bronco. Edwards was instructed to deliver the cash to Ducray and the keys to Hunter. Edwards did so . . . . Before making the gift of the Bronco, [Liebe] had directed that the Bronco be loaned to Ducray for her use during her stay in Grand Junction.

¶ 10 The court considered, and rejected, Ducray's assertion that one may not make a gift of an automobile without signing and delivering the vehicle's title. It reasoned that title may be required to register a motor vehicle — to secure license plates and to use the vehicle on the highways — but it is not required for ownership.

¶ 11 Referencing *Sachtjen v. American Family Mutual Insurance Co.*, 49 P.3d 1146, 1149 (Colo. 2002), the court noted that certain statutory provisions, read alone, might inaccurately suggest that an ownership right requires title. But whether a gift of a vehicle has been made and completed is a factual matter determined by examining the totality of the evidence. Observing that Liebe lay intubated in a hospital's COVID-19 isolation ward and could not have visitors, the court said it was unrealistic to expect him to execute and deliver a car title. The court concluded that Liebe's announcement to Ducray (and others) that he was giving the Bronco to Hunter and his arranging for Hunter to have possession of the keys were all that was needed to complete the gift. Because the Bronco was not a part of Liebe's estate at his death, the court instructed Ducray to sign the title over to Hunter.

2. Did Liebe's Failure to Transfer Title Defeat the Gift?

¶ 12 Ducray cites Colorado's Certificate of Title Act (the Act) to support her argument that the gift was not complete as a matter of law. § 42-6-109(1), C.R.S. 2022 (providing that no purchaser shall acquire any "right, title, or interest" in a motor vehicle unless he first obtains the certificate of title).

¶ 13 The parties do not cite — and we are unaware of — any Colorado case addressing whether a vehicle can be gifted without transfer of title. However, numerous Colorado cases about vehicle sales overwhelmingly hold that a certificate of title is not necessary to determine ownership of a vehicle. *See Hall v. Hong Seung Gee*, 725 P.2d 1164, 1165-66 (Colo. App. 1986) (summarizing Colorado cases recognizing sale of a vehicle even though certificate of title was not delivered); *see also Morrison v. Droll*, 41 Colo. App. 354, 357, 588 P.2d 383, 385 (1978) (non-delivery of certificate did not prevent change of ownership as between parties to sale transaction); *Doenges-Glass, Inc. v. Gen. Motors Acceptance Corp.*, 175 Colo. 518, 522-23, 488 P.2d 879, 881-82 (1971) (noting that a Colorado title is not required to be transferred for a Colorado purchaser to acquire right, title, or interest to motor vehicle). Whether parties have transferred ownership depends on the facts of a particular case. *See Martinez v. Allstate Ins. Co.*, 961 P.2d 531, 533 (Colo. App. 1997) (certificate of title does not represent conclusive proof of ownership; rather, it evidences only a rebuttable presumption of ownership). And in the context of gifted mining shares, the Colorado Supreme Court opined that there was "no

difference between the evidence necessary to prove title in [the] case of a sale and in [the] case of a gift." *Thomas v. Thomas*, 70 Colo. 29, 31, 197 P. 243, 244 (1921) ("A delivery of possession, with intent to pass a present right of property, is a completed gift.").

¶ 14 We agree with the district court that Liebe's gift of the Bronco to Hunter was completed without titling the vehicle in Hunter's name. Liebe's videotaped instructions were clear and unambiguous. There was no question that he wanted Hunter to have the Bronco, and Liebe did more than just express a desire — he took concrete action to evidence his intent by directing Edwards to deliver the keys to Hunter. *See Love*, 645 P.2d at 862-63. Edwards did as he was directed.

¶ 15 Requiring that title be transferred to give effect to Liebe's wishes adds an element to gifts that Colorado has not traditionally required. The Colorado Division of Motor Vehicles requires a title transfer to register a vehicle, § 42-6-106, C.R.S. 2022; Div. of Motor Vehicles Rule 18, 1 Code Colo. Regs. 204-10 (effective July 31, 2021-Jan. 29, 2022), presumably to reduce instances of theft or fraud and to promote insurance coverage for third parties injured by a vehicle's driver. *See, e.g.*, *Guy Martin Buick, Inc. v. Colo.*

Springs Nat'l Bank, 184 Colo. 166, 171-72, 519 P.2d 354, 357 (1974) (certificate of title allows third parties to readily and reliably ascertain the status of a seller's title); *Am. Fam. Mut. Ins. Co. v. Allen*, 102 P.3d 333, 339-40 (Colo. 2004) (automobile insurance coverage terminates upon a change of ownership of the covered automobile unless the insurer agrees otherwise). That risk is mitigated, if not eliminated, where, as here, the trial court made a legal decision — based on facts supported by record evidence — validating the gift.

¶ 16 Ducray's temporary use of the Bronco while she was visiting Colorado also does not invalidate the gift, *see Morrison*, 41 Colo. App. at 357, 588 P.2d at 385 (sale was recognized even though the seller reserved the right to use a car and title had not yet passed to the buyer), or undo Hunter's contemporaneous acceptance when Liebe arranged for the delivery of the keys.

¶ 17 Because the district court's findings have record support, we cannot disturb them. *Love*, 645 P.2d at 862-63; *C.J.R.*, ¶ 14.

III. Other Issues

¶ 18 To the extent Ducray also argues that the Bronco was a testamentary gift that fails for lack of a writing, we need not address

that issue because we have concluded that Liebe made a valid gift during his lifetime. *See Taylor v. Taylor*, 2016 COA 100, ¶ 31 (an appellate court may affirm on any ground supported by the record); *see also Johnson v. Griffin*, 240 P.3d 404, 406 (Colo. App. 2009) (recognizing that an issue is moot when a judgment would have no practical effect on an existing controversy).

¶ 19 There are a smattering of sub-issues in Ducray's opening brief and reply brief that we will not consider because they were not presented to the district court, they are conclusory and underdeveloped, or they were raised for the first time in the reply brief. *See Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶¶ 34-35 (if an argument is undeveloped or raised for the first time on appeal, it is unpreserved for appellate review); *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1160 (Colo. App. 2008) (declining to address issue raised for the first time in reply brief).

IV. Disposition

¶ 20 The district court's order is affirmed.

JUDGE FREYRE and JUDGE LIPINSKY concur.

SUMMARY
September 28, 2023

2023COA89

No. 22CA1393, *In the Matter of Katherine E. Reece Trust* — Trusts — Enforcement and Construction of Discretionary Interests — Support and Maintenance — Standard of Living

A division of the court of appeals interprets a trust provision that instructs the trustee, when making distributions, to consider the spouse's "standard of living . . . enjoyed during [the] marriage." Relying on Restatement (Third) of Trusts § 50 cmt. d(2) (Am. L. Inst. 2003) and considering the unique facts of this case — specifically that the settlor and the spouse beneficiary were separated at the time of the settlor's death — the division concludes that the beneficiary's standard of living should be measured at the time of settlor's death.

COLORADO COURT OF APPEALS **2023COA89**

Court of Appeals No. 22CA1393
City and County of Denver Probate Court No. 21PR30546
Honorable Elizabeth D. Leith, Judge

In the Matter of Katherine E. Reece Trust,

BOKF, N.A., Trustee,

Petitioner-Appellee,

and

Alexander J. Frascona and Monica J. Frascona,

Appellees,

v.

Katherine E. Reece,

Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE KUHN
Fox and Welling, JJ., concur

Announced September 28, 2023

Goodspeed Merrill, Leia G. Ursery, Englewood, Colorado, for Plaintiff-Appellee BOKF, N.A., Trustee

Lathrop GPM LLP, Thomas A. Rodriguez, Denver, Colorado, for Appellees Alexander J. Frascona and Monica J. Frascona

Hogan Omidi, P.C., John R. Vranesic, Denver, Colorado, for Appellant

¶ 1 Katherine E. Reece, a beneficiary of the eponymous testamentary trust created by her late spouse, Oliver E. Frascona — from whom she was legally separated at the time of his death — appeals the probate court's order measuring her standard of living for distributions from the trust at the time of Frascona's death and including the period of their legal separation immediately before Frascona's death. We hold that section 50, comment d(2), of the Restatement (Third) of Trusts (Am. L. Inst. 2003) provides the appropriate measure to determine the standard of living under the facts of this case. That comment says that the standard of living for purposes of support and maintenance "is ordinarily that enjoyed by the beneficiary at the time of the settlor's death or at the time an irrevocable trust is created." We conclude that the probate court properly applied this standard, and we affirm.

I. Background

¶ 2 Reece and Frascona married in 2004. Before marrying, they entered into a marital agreement addressing their rights and obligations with respect to marital and nonmarital assets.

¶ 3 In 2011, Frascona executed his last will and testament. Under the will, Frascona established the Katherine E. Reece Trust with his

residuary estate. Reece is a beneficiary of the trust, as are Frascona's two children from his first marriage — appellees Alexander J. Frascona and Monica J. Frascona.

¶ 4 The trust is administered in accordance with article four of the will, which contains relevant standards for distributions from the trust. Article 4.2 says that the

> trustee may distribute so much of the income and principal of the . . . [t]rust to or for the benefit of one or more persons within a class consisting of my spouse and my descendants in such proportions and in such amounts as [the] trustee in its discretion may determine to be necessary or advisable for their health, education, support and maintenance; provided, however, that in exercising its discretion [the] trustee shall give primary consideration to the needs of my spouse and secondary consideration to the needs of my descendants . . . .

As pertinent here, article 4.3 further says that

> [w]ithout in any way limiting or expanding the discretion of [the] trustee over distributions of income and principal, I suggest to [the] trustee that the primary purposes [of the trust] are to provide for my spouse's support, having regard for my spouse's other means of support and *the standard of living enjoyed by my spouse during our marriage* . . . . In the exercise of its discretion hereunder, [the] trustee shall consider all circumstances relevant to the administration of the trust, including:

> (a) financial and other resources of the beneficiary(ies) which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) if applicable, the refusal by a beneficiary to provide the requested information.

(Emphasis added.) Then article 4.4 articulates Reece's rights with respect to her and Frascona's family residence. The provision, in relevant part, says that

> [w]ith regard to our family residence, being the property in which we reside at the time of my death, it is my intention to enable [Reece] to remain in the home for so long as she desires . . . . In no event shall [Reece] be obligated to contribute to rent, mortgage or trust deed payments, property taxes, assessments, insurance, maintenance, or repairs for so long as any funds remain in the [t]rust.

¶ 5 Frascona separated from Reece approximately nine years after marrying and two years after executing the will containing the trust. On June 8, 2013, Frascona and Reece executed a separation agreement. Under its terms, Reece agreed to move out of the family residence on or before July 31, 2013. Frascona also agreed to pay more than $77,000 in spousal support to Reece over a two-year period. Of that amount, approximately $29,000 would be paid in two lump-sum installments. The remaining amount would be paid

in fourteen monthly installments of $3,450, due between July 2013 and August 2014. Frascona also agreed not to convert the decree of legal separation into a decree of dissolution of marriage before September 1, 2014. By extending the marriage to a minimum of ten years, Reece would become eligible for social security benefits. And finally, the separation agreement provided that Reece would remain a trust beneficiary until the decree of dissolution of marriage had been entered.

¶ 6 The domestic relations court made the agreement a temporary order on June 26, 2013. It then incorporated the agreement into the court's decree of legal separation on September 11, 2013.

¶ 7 Frascona died in an airplane crash on August 31, 2014, just one day before he could first seek dissolution of the marriage. Consequently, Reece and Frascona were still married at the time of his death, despite being legally separated and having lived apart for over a year.

¶ 8 In 2015, after Frascona's will was admitted to probate in Weld County, the personal representative of his estate filed a petition asking the district court to provide instructions on the impact of the separation agreement on Reece's right to inherit under the will. In

early 2017, the district court ruled that, although the marriage had not been terminated at the time of Frascona's death, Reece had waived her right to inherit under the terms of the separation agreement. Reece appealed and a division of our court held that, by entering into the separation agreement, Reece had not waived her rights to receive benefits under Frascona's will and the accompanying trust. *In re Estate of Frascona*, (Colo. App. No. 17CA0340, Nov. 9, 2017) (not published pursuant to C.A.R. 35(e)). The division reversed the district court's order and remanded the matter for further proceedings.

¶ 9 On remand, the originally named trustees refused to accept appointment as trustees. Reece and Frascona's children agreed to appoint appellee BOKF, N.A. as the successor trustee. In late 2020, BOKF accepted the appointment on the condition that it be permitted to file a petition for instructions concerning the trust's interpretation and administration. BOKF filed a petition with the Denver Probate Court asking for instructions on interpreting the trust's standard-of-living provision. Specifically, BOKF asked for instructions on

(a) how to measure "the standard of living enjoyed by Ms. Reece during our marriage" as set forth in Paragraph 4.3 of the Will;

(b) whether or to what extent Ms. Reece must consume her own resources prior to receiving distributions from the Reece Trust; and

(c) the extent and nature of circumstances to be considered by the trustee in exercising its discretion.

¶ 10 In July 2022, the probate court issued a written order on the petition after hearing the parties' oral arguments. The probate court determined that the trust was a testamentary trust that became irrevocable at Frascona's death. The court found that Reece's standard of living at the time of Frascona's death, including during the period of separation, was the applicable standard for the trust administration. Reece appeals the probate court's order.

II. Analysis

¶ 11 Reece challenges the probate court's order on two separate — but inextricably linked — grounds. First, Reece contends that the probate court erred by limiting the standard of living she enjoyed "during [her] marriage" to only the time between the beginning of the legal separation (June 8, 2013) and Frascona's death (August 31, 2014). By doing that, Reece's second contention proceeds, the

probate court misconstrued Frascona's intent and effectively rewrote the trust.[1] We disagree with both contentions.

A. Standard of Review

¶ 12 The interpretation of a trust is a question of law that we review de novo. *In re Mendy Brockman Disability Tr.*, 2022 COA 75, ¶ 14. Our objective in construing the trust is to determine the intent of the settlor. *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007). The settlor's intent is ascertained from the entire trust instrument, considering the relevant circumstances and the settlor's reasonable expectations in effect at the time the instrument was executed. *In re Tr. Created by Belgard*, 829 P.2d 457, 459 (Colo. App. 1991).

B. Reece's Standard of Living Includes the Period of Legal Separation

¶ 13 We first address Reece's contention that no consideration should be given to the period of legal separation in determining the

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[1] Reece does not challenge the probate court's instructions on whether she must consume her resources before seeking distributions or the nature and extent of BOKF's discretion. We therefore deem any challenge to those rulings abandoned. *See Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38.

standard of living she enjoyed during her marriage to Frascona. We reject this contention.

¶ 14 Under section 15-11-804(2)(a), C.R.S. 2023, a decree of dissolution of marriage revokes a spouse's right to receive benefits from a revocable trust that was created by her ex-spouse. However, no such revocation occurs when the spouses have merely separated from each other. That is because a decree of legal separation does not terminate a marriage. § 15-11-804(1)(b). Rather, for a marriage to terminate, one of the spouses must move the court to convert the decree of legal separation into a decree of dissolution of marriage, and the court must do so. § 14-10-120(2), C.R.S. 2023.

¶ 15 Under the provisions governing the trust, Reece's standard of living is measured by the standard she enjoyed "during [her] marriage" to Frascona. Because the marriage was not terminated until Frascona's death, the legal separation period was part of their marriage. Therefore, the period of legal separation must be considered as part of the marriage in measuring Reece's standard of living.

C. No Error in Measuring Reece's Standard of Living by Only Considering the Period of Legal Separation

¶ 16 Reece argues that the probate court erred by measuring her standard of living from the date of the legal separation to the date of Frascona's death. Instead, Reece argues, the probate court should have ascertained her standard of living by looking at her income and expenses for the three years immediately preceding the legal separation. We don't perceive an error under the facts of this case.

¶ 17 It's true that a court must construe a testator's intent in light of the circumstances present when the will was executed. *In re Estate of Daigle*, 642 P.2d 527, 528 (Colo. App. 1982). But that principle alone doesn't answer the question in this case.

¶ 18 Reece argues that her standard of living should be assessed by looking solely at her finances in the three or four years before separating from Frascona. Everything after the separation, she further asserts, is irrelevant in interpreting the trust's standard-of-living provision in article 4.3 of the will. In making this argument, Reece relies on *In re Estate of McCart*, 847 P.2d 184 (Colo. App. 1992), where a division of this court approved using the average of the parties' income and expenses from the time the trust was

created until the time of the settlor's death to arrive at the standard of living. But the division didn't hold that this is the only way to determine standard of living. And there's no indication that there had been any change in the standard of living during the three-year period in that case. Rather, the division concluded that the trial court didn't err by using a three-year average as a measure of the standard of living. *Id.* at 187.

¶ 19 Moreover, *McCart* isn't directly applicable here. As the probate court repeatedly noted in this case, the standard of living had recently changed. The parties had entered into a separation agreement, had ceased living together, had carefully limited their shared support, and were in the process of dissolving their marriage. While we agree with the division of our court that decided *In re Estate of Frascona* that Reece is entitled to take under the will, we also agree with the probate court that it couldn't ignore the reality of the parties' financial position at the time of Frascona's death.

¶ 20 In resolving the appropriate measure of Reece's standard of living, the probate court relied on section 50 of the Restatement (Third) of Trusts. A comment to that section says that "[t]he

accustomed manner of living for . . . purposes [of support and maintenance] is ordinarily that enjoyed by the beneficiary at the time of the settlor's death or at the time an irrevocable trust is created." Restatement (Third) of Trs. § 50 cmt. d(2). And because the trust was not established — and did not become irrevocable — until Frascona's death, the court concluded that Reece's standard of living was her income and expenses at the time of Frascona's death, including the period of their legal separation. We perceive no error in this analysis under these facts.

¶ 21 "While not binding on Colorado courts, 'the restatements generally provide concise summaries of the law in a certain subject matter and can be persuasive authority.'" *Moore v. W. Forge Corp.*, 192 P.3d 427, 432 (Colo. App. 2007) (quoting *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 509 n.1 (Colo. 2007)). And while we may not adopt a restatement in the legislative sense, we may apply sections of the restatements as a formulation of the law applicable to the issue before us. *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 470 n.2 (Colo. 1995).

¶ 22 We have not found a Colorado case applying section 50 in measuring a beneficiary's standard of living. And although courts

in other states have applied section 50, we have found no case applying the rule to measure the beneficiary's standard of living in the same context as this case. *See O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 408-10 (Mo. Ct. App. 2013) (applying the rule in ascertaining the expenses for the beneficiary's support and maintenance); *In re Ralph A. Siddell Living Tr.*, Nos. 359979, 359991, 362535, 2023 WL 3397675, at *8 (Mich. Ct. App. May 11, 2023) (per curiam) (unpublished opinion) (applying the rule in determining that the measure of the beneficiary's standard of living is implied from the "support and maintenance" provision in the trust); *Gwinn v. Gwinn*, 2016 IL App (2d) 150851, ¶ 21 (applying the rule in concluding that support and maintenance expenses don't include the beneficiary's extraordinary gifts to a third party).

¶ 23 Nonetheless, we hold that the Restatement's rule is appropriate to determine Reece's standard of living under the circumstances of this case. Under that rule, the standard of living is measured at the time of Frascona's death, which is also the time when the trust became irrevocable. *See In re Estate of McCreath*, 240 P.3d 413, 418 (Colo. App. 2009) (stating that a will does not become operative until the testator's death). We recognize that the

term "during our marriage" isn't limited to the last fourteen months of Reece and Frascona's marriage. But this period best represents Reece's standard of living, considering the nature of the trust and the status of the marriage at the time of Frascona's death.

¶ 24 The application of this rule also accounts for the realities of Reece and Frascona's marriage when the trust became irrevocable. At Frascona's death, the parties had been legally separated for over a year and were no longer living together. And although Reece was receiving spousal support payments, she did not have access to the combined marital earnings and was largely responsible for her own living expenses. These facts, which are not in dispute, all suggest that Reece had a markedly different standard of living during the separation than earlier in the marriage.

¶ 25 For these reasons, we conclude that the probate court did not err by concluding that "Reece's standard of living and her expenses incurred as of [Frascona]'s death and during the period of . . .

Reece's separation from [Frascona] leading up to [Frascona]'s death shall apply as the measurement under Paragraph 4.3 of the Will."[2]

¶ 26 We also emphasize an important point the probate court made in its order. The standard of living is only one factor for BOKF to consider in evaluating a distribution request. Ultimately, the trust vests the trustee with discretion to determine what is necessary or advisable for Reece's health, education, support, and maintenance, including consideration of her standard of living. The trust's primary purpose is to provide for Reece's support, and the trustee is to consider all circumstances relevant to administration, including her finances and other resources. As the Restatement notes, "The distributions appropriate to [the standard of living at the time of death] not only increase to compensate for inflation but also may increase to meet subsequent increases in the beneficiary's needs resulting, for example, from deteriorating health or from added burdens appropriately assumed for the needs of another." Restatement (Third) of Trs. § 50 cmt. d(2). And as the probate court

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[2] Finding no error in the probate court's interpretation of the standard-of-living provision, we also reject Reece's contention that the court misinterpreted the trust.

noted, these are all factors BOKF must consider in reviewing a distribution request.

III. Disposition

¶ 27 The order is affirmed.

JUDGE FOX and JUDGE WELLING concur.

SUMMARY
November 22, 2023

2023COA111

No. 22CA0656 *Nicola v. Grand Junction* — Torts — Wrongful Death; Damages — Actions Notwithstanding Death — Limitation on Damages — One Civil Action Rule; Courts and Court Procedure — Limitations for Persons Under Disability — When a Statute Begins to Run — Death of Person Under Disability

In this wrongful death and survival action, a division of the court of appeals determines that the "one civil action" rule set forth in section 13-21-203(1)(a), C.R.S. 2023, of the Wrongful Death Act bars the plaintiff from asserting wrongful death claims in this lawsuit where the plaintiff previously filed a lawsuit asserting wrongful death claims against a different defendant, settled the claims asserted in the first lawsuit, and then voluntarily dismissed the first lawsuit without prejudice. Thus, the division affirms the district court's dismissal of the plaintiff's wrongful death claims.

The division also determines under what circumstances section 13-81-103(1)(b), C.R.S. 2023, requires the personal representative of a decedent who was a person under a disability to bring a survival claim within one year of the decedent's death. The division concludes that section 13-81-103(1)(b) applies only when a person who was under a disability at the time of their death (1) had a legal representative and (2) died after the expiration of the applicable statute of limitations but less than two years after the legal representative was appointed. Because the decedent did not have a legal representative and did not die after the expiration of the applicable statute of limitations, the division concludes that section 13-81-103(1)(b) does not bar the plaintiff's survival claims. Because the division further concludes that the plaintiff filed his complaint within the applicable statute of limitations, it reverses the district court's dismissal of his claims for negligence and premises liability.

COLORADO COURT OF APPEALS **2023COA111**

Court of Appeals No. 22CA0656
Mesa County District Court No. 20CV30323
Honorable Valerie J. Robison, Judge

John Nicola, individually and as the personal representative of the estate of Danielle Nicola,

Plaintiff-Appellant,

v.

City of Grand Junction and Public Service Company of Colorado, d/b/a Xcel Energy,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BROWN
Gomez and Taubman*, JJ., concur

Announced November 22, 2023

Killian, Davis, Richter & Kraniak, PC, J. Keith Killian, Damon Davis, Grand Junction, Colorado, for Plaintiff-Appellant

Goldman, Nicholson & Mack, PC, Michael A. Goldman, Elizabeth A. Phillips, Durango, Colorado, for Defendant-Appellee City of Grand Junction

Gordon Rees Scully Mansukhani, LLP, Franz Hardy, Stephanie S. Brizel, Denver, Colorado, for Defendant-Appellee Public Service Company of Colorado, d/b/a Xcel Energy

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiff, John Nicola, individually and as the personal representative of the estate of Danielle Nicola,[1] appeals the district court's judgment dismissing his complaint against defendants, Public Service Company of Colorado, d/b/a Xcel Energy (Xcel Energy), and the City of Grand Junction (Grand Junction). Nicola brought wrongful death and survival claims against Xcel Energy and Grand Junction arising from the death of his daughter, Danielle, who was struck by a vehicle while crossing an intersection when the streetlights allegedly were not working. Danielle died from her injuries.

¶ 2 Resolving this appeal requires us to address two matters of first impression. First, we must determine whether the "one civil action" rule set forth in section 13-21-203(1)(a), C.R.S. 2023, of the Wrongful Death Act bars a second lawsuit for wrongful death where a plaintiff previously filed a wrongful death lawsuit against a different defendant, settled the claims asserted in the first lawsuit, and then voluntarily dismissed the first lawsuit without prejudice.

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[1] For clarity, we refer to John Nicola as Nicola and to Danielle Nicola as Danielle throughout the opinion. We mean no disrespect by doing so.

We conclude that it does. As a result, we affirm the district court's judgment dismissing Nicola's wrongful death claims.

¶ 3 Second, we must determine whether section 13-81-103(1)(b), C.R.S. 2023, requires the personal representative of a decedent to bring a survival claim within one year of the decedent's death, where the decedent was a person under a disability without a legal representative. We conclude that section 13-81-103(1)(b) applies only when a person who was under a disability at the time of their death (1) had a legal representative and (2) died after the expiration of the applicable statute of limitations but less than two years after the legal representative was appointed. Because Danielle did not have a legal representative and did not die after the expiration of the applicable statute of limitations, we conclude that subsection (1)(b) does not bar Nicola's survival action.

¶ 4 Because Nicola filed his complaint within the applicable statute of limitations, we reverse the district court's judgment dismissing his survival claims for negligence and premises liability.

I. Background

¶ 5 In November 2018, Danielle was crossing a street in Grand Junction when a vehicle struck her. According to Nicola's

complaint, the streetlights in the vicinity were not working at the time of the accident. Danielle sustained serious injuries and never regained full consciousness or the ability to speak, communicate, or make decisions prior to her death nineteen days later. The parties agree that Danielle's injuries made her a "person under disability" as that term is defined in section 13-81-101(3), C.R.S. 2023. No conservator, guardian, or legal representative was appointed for Danielle before her death.

¶ 6 In May 2019, Nicola filed a lawsuit against the driver of the vehicle that hit Danielle, asserting two wrongful death claims. In March 2020, Nicola settled that first lawsuit and filed a notice of voluntary dismissal under C.R.C.P. 41(a)(1).

¶ 7 In December 2020, Nicola filed a second lawsuit against Xcel Energy and Grand Junction, asserting wrongful death claims and survival claims for negligence and premises liability. Nicola alleged that Xcel Energy and Grand Junction each had duties to maintain adequate street lighting for the area, that Grand Junction had a duty to warn of dangerous conditions on its property, and that the defendants' breach of those duties was a cause of Danielle's death.

¶ 8 Xcel Energy and Grand Junction moved to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted, arguing in relevant part that the wrongful death claims were precluded under the "one civil action" rule set forth in section 13-21-203(1)(a) of the Wrongful Death Act and that the survival claims were barred by either a one-year statute of limitations under section 13-81-103(1)(b) — calculated from the date of Danielle's death — or a two-year statute of limitations under section 13-80-102(1)(h), C.R.S. 2023 — calculated from the date of the accident. The district court granted the motions to dismiss, concluding that the Wrongful Death Act barred Nicola's second suit.

¶ 9 Because the court appeared to have erroneously dismissed the survival claims under the Wrongful Death Act, Nicola filed a C.R.C.P. 59 motion to amend the judgment as to those claims. The court acknowledged that it had erred by dismissing Nicola's survival claims under the Wrongful Death Act but nonetheless concluded that the survival claims were untimely under section 13-81-103(1)(b) and section 13-80-102(1)(h). Thus, the court dismissed Nicola's complaint.

II. Standard of Review and Generally Applicable Law

¶ 10 We review de novo a district court's judgment dismissing a complaint for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b)(5). *Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 16. We accept as true the factual allegations in the complaint and, viewing them in the light most favorable to the plaintiff, determine whether the complaint states a plausible claim for relief. *Barnes v. State Farm Mut. Auto. Ins. Co.*, 2021 COA 89, ¶ 24; *see Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24.

¶ 11 We also review de novo issues of statutory construction. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 40. In doing so, our primary task is to give effect to the legislative intent as reflected in the plain and ordinary meaning of the words and phrases used. *Id.* We read the statute in the context of the entire statutory scheme, giving consistent and sensible effect to all its parts. *Id.*; *see also* §§ 2-4-101, -201, C.R.S. 2023; *A.M. v. A.C.*, 2013 CO 16, ¶ 8. And we avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16.

When the language of a statute is clear, we enforce it as written. *Elder v. Williams*, 2020 CO 88, ¶ 18.

III. Wrongful Death Claim

¶ 12 Nicola contends that the district court erred by concluding that his wrongful death claims against Xcel Energy and Grand Junction are barred by the "one civil action" rule. Under the circumstances presented by this case, we disagree.

A. Applicable Law

¶ 13 "Under Colorado law, there exists no other cause of action for the death of another other than a statutory claim brought under the Wrongful Death Act, section 13-21-202," C.R.S. 2023. *Steedle v. Sereff*, 167 P.3d 135, 140-41 (Colo. 2007). The Wrongful Death Act allows an heir of the decedent to maintain an action and recover damages to which the decedent would have been entitled "if death had not ensued." § 13-21-202; *see also Duke v. Gunnison Cnty. Sheriff's Off.*, 2019 COA 170, ¶ 24.

¶ 14 As relevant here, the Wrongful Death Act provides that "[t]here shall be only one civil action . . . for recovery of damages for the wrongful death of any one decedent." § 13-21-203(1)(a). "The words 'only' and 'one' are self-evident, leaving no room for doubt

that Colorado law forbids multiple actions for the recovery of damages for the wrongful death of a decedent." *Hernandez v. Downing*, 154 P.3d 1068, 1070 (Colo. 2007). An "action" is "a proceeding on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or law." *Id.* (quoting *Clough v. Clough*, 10 Colo. App. 433, 439, 51 P. 513, 515 (1897)); *see also* C.R.C.P. 2 ("There shall be one form of action to be known as 'civil action.'"); C.R.C.P. 3(a) ("A civil action is commenced . . . by filing a complaint with the court . . . .").

¶ 15 Thus, the plain and unambiguous language of the statute "bars a second civil action for wrongful death based upon the death of the same decedent." *Est. of Kronemeyer v. Meinig*, 948 P.2d 119, 121 (Colo. App. 1997); *see also Hernandez*, 154 P.3d at 1069 (The statute "means what it says when it limits wrongful death claims to 'only one civil action' for the death of one decedent." (quoting § 13-21-203(1))). Under the Wrongful Death Act, "[p]ursuing in a sequential manner several wrongful death actions, against different defendants, and asserting different causes of death, is prohibited." *Kronemeyer*, 948 P.2d at 121; *see also Lanahan v. Chi Psi*

Fraternity, 175 P.3d 97, 100 (Colo. 2008) (the damages cap in section 13-21-203(1)(a) applies on a per claim basis because the statute permits one claim per decedent); *Steedle*, 167 P.3d at 136 ("The Wrongful Death Act allows a person's heirs to recover damages for the wrongful death of that person but limits damages by requiring that all claims pursuant to the death of one person be combined into one civil action.") (citations omitted).

B. Nicola's Wrongful Death Claims Are Precluded by the "One Civil Action" Rule

¶ 16 Nicola contends that the district court erred by applying the "one civil action" rule to bar his wrongful death claims because (1) his first lawsuit was not a "civil action" barring a second suit since he voluntarily dismissed it without prejudice, and (2) his settlement with the tortfeasor driver should not bar him from bringing a second suit against other, non-settling parties.

¶ 17 It is undisputed that Nicola filed and voluntarily dismissed a prior lawsuit asserting wrongful death claims against the driver of the vehicle that struck and ultimately killed Danielle. The question before us is whether that lawsuit — which ended in a voluntary dismissal without prejudice after settlement with the driver — was a

"civil action" barring subsequent actions for Danielle's wrongful death. We conclude that it was.

¶ 18 Nicola voluntarily dismissed his first lawsuit pursuant to C.R.C.P. 41(a)(1). Because the notice of dismissal did not say that it was a dismissal with prejudice, the dismissal was without prejudice. *See id.*; *USIC Locating Servs. LLC v. Project Res. Grp. Inc.*, 2023 COA 33, ¶ 16.

¶ 19 Relying primarily on federal precedent, Nicola argues that a voluntary dismissal pursuant to C.R.C.P. 41(a)(1) places the parties in the same position as if the action had never been filed. *See Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 961 (10th Cir. 1991) (noting that "[i]t is hornbook law that, as a general rule, a voluntary dismissal without prejudice leaves the parties as though the action had never been brought" when rejecting the plaintiff's argument that filing an earlier lawsuit tolled the statute of limitations). Nicola urges us to interpret Colorado's rule consistently with federal precedent to conclude that a voluntary dismissal without prejudice results in no "civil action" having been filed. *See Alpha Spacecom, Inc. v. Hu*, 179 P.3d 62, 64 (Colo. App.

2007) (federal authorities interpreting the comparable federal rule are persuasive when interpreting C.R.C.P. 41(a)(1)(A)).

¶ 20 But a voluntary dismissal under C.R.C.P. 41(a)(1) does not leave the parties *exactly* where they were had the lawsuit never been brought because a plaintiff may only voluntarily dismiss with impunity once. If the plaintiff voluntarily dismisses a second lawsuit based on or including the same claim, that dismissal operates as an adjudication on the merits. C.R.C.P. 41(a)(1). Had the first lawsuit never been filed, there would be no consequence for dismissing the second lawsuit.

¶ 21 More importantly, the parties to Nicola's first lawsuit were not left in the same positions they would have been had that action never been filed. Nicola filed a lawsuit against the tortfeasor driver and asserted wrongful death claims that were fully resolved by settlement. Before the lawsuit was filed, Nicola had not recovered, and the driver had not paid, any damages for Danielle's wrongful death; after the lawsuit was dismissed, Nicola had recovered, and the driver had paid, such damages. Thus, we conclude that

Nicola's first lawsuit against the driver was a "civil action" barring subsequent wrongful death claims for Danielle's death.[2]

¶ 22 We are not persuaded otherwise by Nicola's argument that a "civil action" requires a final adjudication on the merits by a judge or jury. Nicola cites *Hernandez* to support his contention, but *Hernandez* does not go so far. Although the supreme court reasoned that "[t]he singular nature of a civil action does not end with the filing of one complaint in one court," it did so in the context of concluding that severing certain claims and transferring them to a different venue would violate the one civil action rule even though the claims had originally been brought together in a single

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[2] We do not opine on whether a lawsuit filed and voluntarily dismissed without prejudice and without resolution of the claims through settlement constitutes a "civil action" because those are not the facts before us, and any such opinion would be purely advisory. *See Galvan v. People*, 2020 CO 82, ¶ 49 (the court "is not empowered to give advisory opinions based on hypothetical fact situations") (citation omitted). And because we do not decide whether a voluntary dismissal without some resolution of the claims constitutes a "civil action," we reject Nicola's contention that our interpretation would lead to absurd results, such as a voluntary dismissal of a federal case that could not be refiled in state court or a dismissal for filing in the wrong venue that could not be refiled in the correct venue. Our holding is limited to cases where the wrongful death claims asserted in the first lawsuit were resolved through a settlement.

complaint. *Hernandez*, 154 P.3d at 1070-71. It did not hold that a civil action does not exist without an adjudication by the trier of fact.

¶ 23 Nicola's interpretation of the one civil action rule would allow serial wrongful death lawsuits against different defendants, potentially asserting different causes of death, so long as each case was settled rather than litigated to a judgment by a judge or jury. That is not what the Wrongful Death Act contemplates. *See Hernandez*, 154 P.3d at 1070; *Kronemeyer*, 948 P.2d at 121. Nicola resolved the wrongful death claims he asserted in his first complaint, leading to his dismissal of that complaint without prejudice. Thus, his first lawsuit was a civil action.

¶ 24 We are also unpersuaded by Nicola's argument that his settlement with the driver should not preclude him from later suing non-settling parties. He argues that a "civil action" does not contemplate "pre-litigation settlements involving no judicial proceeding[s]." He urges us not to follow *Barnhart v. American Furniture Warehouse Co.*, 2013 COA 158, ¶ 2, in which a division of this court concluded that a prelitigation settlement barred a subsequent wrongful death proceeding. He contends that *Barnhart*

was wrongly decided, and we should decline to follow it. But we do not have to weigh in on *Barnhart* or otherwise decide whether a *prelitigation* settlement, standing alone, constitutes a "civil action" because we do not have such a settlement here. We have the commencement of judicial proceedings by the filing of a complaint followed by a settlement resolving the claims asserted.

¶ 25 We also note that the record shows that Nicola was aware of possible claims against Xcel Energy and Grand Junction because he served Grand Junction with a notice of intent to file a lawsuit for failure to maintain the streetlights while his first lawsuit was pending. Nicola essentially asks to be able to file a lawsuit asserting a wrongful death claim against one defendant — fully aware that other parties could be at fault, yet choosing not to name those parties — settle the wrongful death claim with the named party, and dismiss the first lawsuit; then, years later, file another lawsuit asserting wrongful death claims arising out of the same death against the parties he knew could be at fault, but he did not name in the first suit. Allowing him to do so would be contrary to the plain language of the Wrongful Death Act.

¶ 26 Under these circumstances, we conclude that Nicola's first lawsuit, in which he asserted wrongful death claims against the driver, was a civil action and that the district court correctly concluded that section 13-21-203(1)(a) bars the wrongful death claims asserted in his second lawsuit against Xcel Energy and Grand Junction.

IV. Survival Claims

¶ 27 Nicola contends that the district court erred by concluding that his survival claims are time barred under section 13-81-103(1)(b). We agree.

¶ 28 To resolve this contention, we first discuss how statutes of limitation apply to survival actions. Then we explore when statutes of limitation are tolled and when they begin to run against persons under a disability. Finally, considering these principles together, we conclude that section 13-81-103(1)(b) applies only when a person under a disability (1) had a legal representative and (2) died after the expiration of the applicable statute of limitations but less

than two years after the legal representative was appointed.[3] Because neither condition applied to Danielle, section 13-81-103(1)(b) does not bar Nicola's survival claims. And because Nicola filed his complaint within the applicable statute of limitations, the district court erred by concluding that his survival claims are untimely.

A. How Statutes of Limitation Apply to Survival Actions

¶ 29 Under section 13-20-101, C.R.S. 2023, all causes of action, except actions for slander or libel, survive the death of the person in favor of whom the action has accrued, and may be brought by the personal representative of the deceased. Because the personal representative stands in the shoes of the deceased, *see Publix Cab Co. v. Colo. Nat'l Bank of Denver*, 139 Colo. 205, 212-13, 338 P.2d 702, 706 (1959); *Sharon v. SCC Pueblo Belmont Operating Co.*, 2019 COA 178, ¶ 12, a survival action is deemed to have accrued to or

[3] In addition, for section 13-81-103(1)(b), C.R.S. 2023, to apply, the person under a disability must die before termination of their disability and the claim must be one that survives the decedent's death. It is undisputed that both of these requirements are met in this case.

against the personal representative when it would have accrued to or against the deceased had they survived, § 13-20-101(2).

¶ 30 Section 13-80-112, C.R.S. 2023, addresses how statutes of limitation run on survival claims:

> If any person entitled to bring any action dies before the expiration of the time limited therefor and if the cause of action does by law survive, the action may be commenced by the personal representative of the deceased person at any time within one year after the date of death and not afterwards if barred by provision of this article.

¶ 31 The phrase "if barred by provision of this article" is significant for two reasons. *Id.* First, it confirms that the statutes of limitation set forth in article 80 apply to survival actions. Second, it establishes that if the condition precedent is met — that is, if the person entitled to bring the action dies *before* the applicable statute of limitations expires — the personal representative can still bring the claim within one year of death, even if that date lies beyond the otherwise applicable statute of limitations.

¶ 32 Thus, if a person dies after the statute of limitations has expired on their cause of action, any survival claim is barred. But if the person dies before the statute of limitations expires, the

personal representative may commence an action within one year after the date of death or before the otherwise applicable statute of limitations expires, whichever period is greater. *See* 7 John W. Grund et al., *Colorado Practice Series, Personal Injury Torts & Insurance* § 9.23, Westlaw (3d ed. database updated Dec. 2022).

B. How Statutes of Limitation Apply to Persons Under Disability

¶ 33 Section 13-81-103 tolls the running of any statute of limitations against a "person under disability" during the period of disability. *Southard v. Miles*, 714 P.2d 891, 897 (Colo. 1986) ("Although section 13-81-103(1)(a) speaks in terms of the running of the applicable statute of limitations against a person under disability . . . and not in terms of suspending or tolling the limitation period during the period of disability, there can be no question that the statute is intended to toll the applicable statute of limitations during the period of disability."); *see also In re Estate of Daigle*, 634 P.2d 71, 75 (Colo. 1981). A "person under disability" is "any person who is a minor under eighteen years of age, a mental incompetent, or a person under other legal disability and who does not have a legal guardian." § 13-81-101(3).

¶ 34 But section 13-81-103 also establishes when a statute of limitations begins to run against a person under a disability. Under subsection (1)(a),

> If such person under disability is represented by a legal representative at the time the right accrues, or if a legal representative is appointed for such person under disability at any time after the right accrues and prior to the termination of such disability, the applicable statute of limitations shall run against such person under disability in the same manner, for the same period, and with the same effect as it runs against persons not under disability. Such legal representative, or his successor in trust, in any event shall be allowed not less than two years after his appointment within which to take action on behalf of such person under disability, even though the two-year period expires after the expiration of the period fixed by the applicable statute of limitations.

§ 13-81-103(1)(a). A "legal representative" is "a guardian, conservator, personal representative, executor, or administrator duly appointed by a court having jurisdiction of any person under disability or his estate." § 13-81-101(2). The "applicable statute of limitations" means "any statute of limitations which would apply in a similar case to a person not a person under disability." § 13-81-101(1).

¶ 35 Under subsection (1)(a), court appointment of a legal representative for a person under a disability "averts the . . . legal disability for purposes of litigating" the rights of that person, "thereby rendering inapplicable the tolling provisions." *Elgin v. Bartlett*, 994 P.2d 411, 414 (Colo. 1999), *overruled on other grounds by Rudnicki v. Bianco*, 2021 CO 80, ¶ 44. Once a legal representative is appointed, the statute of limitations begins to run as though the disability has been removed or terminated. Even so, subsection (1)(a) expressly extends the period within which a legal representative can bring a claim on behalf of the person under a disability for an additional two years from the date of appointment. § 13-81-103(1)(a).

¶ 36 Under subsection (1)(b),

> If the person under disability dies before the termination of his disability and before the expiration of the period of limitation in paragraph (a) of this subsection (1) and the right is one which survives to the executor or administrator of a decedent, such executor or administrator shall take action within one year after the death of such person under disability.

§ 13-81-103(1)(b). The parties dispute the meaning of subsection (1)(b), which we discuss in detail below.

¶ 37 Finally, under subsection (1)(c),

> If the disability of any person is terminated before the expiration of the period of limitation in paragraph (a) of this subsection (1) and no legal representative has been appointed for him, such person shall be allowed to take action within the period fixed by the applicable statute of limitations or within two years after the removal of the disability, whichever period expires later.

§ 13-81-103(1)(c). Under subsection (1)(c), a person under a disability who survives and whose disability is removed is entitled to the benefit of the longer of the applicable statute of limitations or two years from the date the disability was removed to bring an action. *See Mohammadi v. Kinslow*, 2022 COA 103, ¶ 24 (*cert. granted* May 22, 2023).

C. When Section 13-81-103(1)(b) Applies

¶ 38 The district court held that section 13-81-103(1)(b) applies when a person under a disability dies before the disability is removed — regardless of whether a legal representative has been appointed for that person — and that it requires the executor or administrator to bring a survival claim within one year after the date of death notwithstanding any other statute of limitations. Because Nicola did not file his suit against Xcel Energy and Grand

Junction within one year of Danielle's death, the court concluded that Nicola's survival claims were time barred.

¶ 39 Xcel Energy and Grand Junction contend that the district court's interpretation was correct, and that subsection (1)(b) simply provides the executor or administrator a fixed period of time — one year from the date of death — to file an action, regardless of whether the person under disability had a legal representative and notwithstanding any otherwise applicable statute of limitations. But Nicola contends that subsection (1)(b) creates a classic "if-then" statement: only *if* the limitations period in subsection (1)(a) is running and the person under a disability dies before it expires, *then* the estate has one year from the date of death to sue under subsection (1)(b). He further argues that the limitations period in subsection (1)(a) only runs — satisfying the condition for application of subsection (1)(b) — when a legal representative has been appointed for the person under a disability.

¶ 40 Based on the plain language of the statute, read in harmony with other statutes governing survival actions, we conclude that section 13-81-103(1)(b) applies only when a person under a disability (1) had a legal representative and (2) died after the

expiration of the applicable statute of limitations but less than two years after the legal representative was appointed.

¶ 41 Subsection (1)(a) provides that the statute of limitations runs against a person under disability as it would against anyone else *if* a legal representative has been appointed. *See* § 13-81-103(1)(a). "If" is "widely understood" to introduce a "condition necessary 'for the truth or occurrence of the main statement of a sentence.'" *People v. Salazar*, 2023 COA 102, ¶ 16 (quoting *United States v. Flores*, 664 F. App'x 395, 399 (5th Cir. 2016)). If the condition is not met — that is, if a person under disability does not have a legal representative — the applicable statute of limitations is tolled. *See Southard*, 714 P.2d at 897.

¶ 42 Subsection (1)(b), in turn, addresses a situation where "*the* person under disability" dies before the expiration of "the period of limitation in [subsection (1)(a)]." § 13-81-103(1)(b) (emphasis added). The definite article "the" particularizes the subject "person under disability," focusing on the "person under disability" previously referenced in subsection (1)(a) — one for whom a legal representative has been appointed. *See Coffey v. Colo. Sch. of Mines*, 870 P.2d 608, 610 (Colo. App. 1993) (applying "the familiar

principle of statutory construction that the use of the definite article particularizes the subject which it precedes").

¶ 43 The other condition that must be satisfied before subsection (1)(b) applies — that the person under disability dies "before the expiration of the period of limitation in paragraph (a) of this subsection (1)" — further supports this interpretation because there is no "period of limitation" in subsection (1)(a) that accrues, runs, or expires if the person under a disability does not have a legal representative. *See Southard*, 714 P.2d at 897 (section 13-81-103 suspends the running of the statute of limitations until either the disability is removed or a legal representative is appointed). A person under a disability who dies without a legal representative will *always* die before the expiration of the period of limitation in subsection (1)(a) because the period of limitation does not run against them until their disability is removed by death. Thus, the only way to give meaning to this condition is to conclude that subsection (1)(b) applies only when the person under a disability has a legal representative. *See Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 21 ("In interpreting a statute, we aim to give effect to every word and presume that the legislature did not use language idly.").

Only then is it possible for the person under a disability to die *after* the expiration of the period of limitation in subsection (1)(a), which runs against them only if they have a legal representative. *See Southard*, 714 P.2d at 897.

¶ 44 But what does the phrase "period of limitation in paragraph (a) of this subsection (1)" mean? § 13-81-103(1)(b). It cannot mean simply "the applicable statute of limitations" because that is a separately defined term. *See* § 13-81-101(1); *see also Colo. Med. Bd. v. Off. of Admin. Cts.*, 2014 CO 51, ¶ 19 ("[T]he use of different terms signals the General Assembly's intent to afford those terms different meanings."). Moreover, subsection (1)(a) refers to two potentially different periods of limitation — "the applicable statute of limitations" and a period "not less than two years after" the appointment of a legal representative. § 13-81-103(1)(a).

¶ 45 To determine the meaning of "period of limitation in paragraph (a) of this subsection (1)," we must interpret section 13-81-103(1)(b) in harmony with section 13-80-112, the statute that generally governs how statutes of limitation operate against survival claims. *See Elgin*, 994 P.2d at 416 ("Statutes governing the same subject must be reconciled if possible."). Under section 13-80-112, if a

person entitled to bring an action dies before the expiration of the applicable statute of limitations, their personal representative has the longer of the period remaining under the applicable statute of limitations or one year from the date of death to bring a survival action.

¶ 46 As noted, although the statute of limitations does not run against a person under a disability, *see Southard*, 714 P.2d at 897, once a legal representative is appointed, the statute of limitations runs against that person "in the same manner, for the same period, and with the same effect as it runs against persons not under disability." § 13-81-103(1)(a). In other words, if a person under a disability has a legal representative, they are treated the same for statute of limitations purposes as a person who does not have a disability (except that their legal representative is entitled to a minimum of two years to bring a claim, as discussed below). For this reason, section 13-80-112 applies equally to a survival action for a person not under a disability and to a survival action for a person under a disability who has a legal representative. In either case, if the person entitled to bring the claim dies *before* the expiration of the applicable statute of limitations, the personal

representative may bring a survival claim within the time remaining under the statute of limitations or a year from the date of death, whichever is longer. Nothing in the plain language of either section 13-80-112 or section 13-81-103 suggests otherwise.

¶ 47 Against this backdrop, interpreting section 13-81-103(1)(b) to apply when a person under a disability dies *before* the expiration of the applicable statute of limitations creates either a conflict or a superfluity with section 13-80-112. If under such circumstances section 13-81-103(1)(b) *shortens* the time to bring a survival claim by depriving the personal representative of the benefit of a longer amount of time remaining under the applicable statute of limitations, it conflicts with section 13-80-112. *See Southard*, 714 P.2d at 898 (section 13-81-103 is intended to apply to any statute of limitations in this state unless there exists a special statute pertinent to the claim that conflicts). And if under such circumstances section 13-81-103(1)(b) *extends* the time to bring a survival claim by giving the personal representative another year

from the date of death, it is superfluous because section 13-80-112 already provides that extension.[4]

¶ 48 We are obligated to interpret statutes, where possible, to avoid or resolve inconsistencies and give effect to every word. *See Larimer Cnty. Bd. of Equalization v. 1303 Frontage Holdings, LLC*, 2023 CO 28, ¶ 56. We can achieve that end by interpreting section 13-81-103(1)(b) to provide an extension of the statute of limitations for a personal representative who brings a survival action when the person under a disability dies *after* the expiration of the applicable statute of limitations — taking the claim outside the scope of section 13-80-112 — but *before* the expiration of the additional two-year period contemplated by section 13-81-103(1)(a).

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[4] Because the legislature enacted the predecessor to section 13-80-112 before the predecessor to section 13-81-103, *see* Ch. 114, sec. 1, § 13-80-112, 1986 Colo. Sess. Laws 701; R.S. 1868, § 17; Ch. 126, sec. 3, 1939 Colo. Sess. Laws 450, we presume it knew that the law already provided that when a person dies before the expiration of the applicable statute of limitations, their personal representative has either the time remaining under the statute of limitations or a year from death, whichever is greater, to bring a survival claim. *See In re Harte*, 2012 COA 183, ¶ 24. Therefore, section 13-81-103(1)(b) must mean something else. *See Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 21.

¶ 49 Recall that subsection (1)(a) grants a legal representative "not less than two years after his appointment" to commence an action on behalf of a person under a disability "even though the two-year period expires after the expiration of the period fixed by the applicable statute of limitations." § 13-81-103(1)(a). Thus, subsection (1)(a) contemplates the existence of a period after expiration of the applicable statute of limitations during which the legal representative is authorized to take action that otherwise would be barred by the statute of limitations. Subsection (1)(b) then provides that, if the person under a disability dies before the expiration of "the period of limitation in paragraph (a) of this subsection (1)," their executor or administrator must take action within a year of the date of death. § 13-81-103(1)(b). To give harmonious effect to both section 13-80-112 and section 13-81-103, "the period of limitation in paragraph (a) of this subsection (1)" must refer to the period after the expiration of the applicable statute of limitations but before the two-year anniversary of the legal representative's appointment.

¶ 50 Thus, when the statutes governing survival actions are read in harmony, they dictate the following scheme: If the person under a

disability dies before the applicable statute of limitations expires, section 13-80-112 applies. The personal representative then has the longer of the applicable statute of limitations or one year from the date of death to bring the survival action. If the person under a disability dies after expiration of the applicable statute of limitations but less than two years after the legal representative was appointed, section 13-81-103(1)(b) applies. The personal representative, who has already been given more time beyond the applicable statute of limitations, then has one year from the date of death to bring the survival action.[5] In both scenarios, the person entitled to bring the claim or their personal representative gets the full benefit of the applicable statute of limitation *plus* some additional time.[6]

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[5] Our interpretation is also consistent with section 15-12-109, C.R.S. 2023, which provides as follows:

> No statute of limitations running on a cause of action belonging to a decedent which had not been barred as of the date of his death shall apply to bar a cause of action surviving the decedent's death sooner than one year after death. A cause of action which, but for this section, would have been barred less than one year after death is barred after one year unless tolled.

[6] Xcel Energy argues that our interpretation is unsupportable because it presumes that the legislature "enacted legislation that

¶ 51 Thus, we conclude, based on the plain language of the statute, that section 13-81-103(1)(b) applies only when the person under a disability (1) had a legal representative and (2) died after the expiration of the applicable statute of limitations but less than two years after the legal representative was appointed.

¶ 52 We reject Xcel Energy and Grand Junction's contrary arguments. We acknowledge that subsection (1)(c) expressly applies when a person survives their disability and "no legal representative has been appointed" — demonstrating that the legislature knew how to say when a provision applies to a person without a legal representative — and that subsection (1)(b) does not contain similar language. § 13-81-103(1)(b), (c). But unlike subsection (1)(b), subsection (1)(c) does not refer back to "*the* person under disability"; instead, subsection (1)(c) refers to "*any* person" whose disability is terminated before "expiration of the period of limitation in [subsection (1)(a)]." § 13-81-103(1)(b), (c) (emphasis added).

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wholly left out a fairly typical circumstance where a person under disability does not have a legal representative appointed when they die." But, as we have explained, in this "fairly typical circumstance," section 13-80-112, C.R.S. 2023, applies.

¶ 53 And although subsection (1)(c)'s cross-reference to "the period of limitation" in subsection (1)(a) is confusing given that it is only possible for such period to expire if a legal representative has been appointed for a person under a disability, we are not tasked with resolving that potential ambiguity. And we note that, without reference to the period of limitation in subsection (1)(a), the supreme court and other divisions of this court have interpreted subsection (1)(c) to mean that, upon termination of the disability, the person may take action within the applicable statute of limitations or two years from removal of the disability, whichever is longer. *See Rudnicki*, ¶ 16; *Daigle*, 634 P.2d at 75; *Mohammadi*, ¶¶ 18-24.

¶ 54 Because our interpretation is based on the plain, unambiguous language of the statute, we need go no further, *see Elder*, ¶ 18, but our interpretation also furthers the end to be achieved by the statute and avoids absurd results, demonstrating that it is the only reasonable interpretation. *See id.* ("A statute is ambiguous when it is reasonably susceptible of multiple interpretations."); *Agilent Techs., Inc.*, ¶ 16 ("We must avoid constructions that would render any words or phrases superfluous

or that would lead to illogical or absurd results."); *Colo. Sun v. Brubaker*, 2023 COA 101, ¶ 47 ("An alternate interpretation is unreasonable and therefore creates no ambiguity if it 'would lead to illogical or absurd results.'" (quoting *Elder*, ¶ 18)); *Salazar*, ¶ 20 (considering whether plain language interpretation furthers the statute's purpose).

¶ 55 Our interpretation furthers the purpose of section 13-81-103, which is to toll or suspend the running of statutes of limitation to protect persons under a disability during the period of disability. *See Southard*, 714 P.2d at 897; *Elgin*, 994 P.2d at 414. By contrast, interpreting subsection (1)(b) to shorten the time a personal representative otherwise has to bring a survival action for a person under a disability — regardless of whether that person had a legal representative — would contravene that purpose.

¶ 56 Our interpretation also avoids absurd results. Under Xcel Energy and Grand Junction's interpretation of section 13-81-103(1)(b), Nicola had one year from the date of Danielle's death to bring a survival claim because she was a person under a disability when she died. In other words, because Danielle did not die the same day she was injured, but instead lived for nineteen days in an

unconscious state, Nicola had just one year from the date of her death to bring the claim. But had Danielle died the same day she was injured, Nicola would have had at least two years to bring the claim. *See* §§ 13-80-112, 13-80-102(1)(h). The legislative scheme reflects no intention or justification for such disparate treatment.

¶ 57 Grand Junction counters that our interpretation leads to a more absurd result, positing the following hypothetical:

> Suppose a person ("Sue") suffers an injury involving a motor vehicle accident on January 1, 2010 that renders her legally disabled. Sue remains disabled for the following four years without a legal representative, although she has a parent who is aware of her condition, is prepared to become the executor or administrator of her estate in the likely event of her death, and presumably would file a survival action on behalf of her estate upon her death. On January 1, 2014, still disabled and without a legal representative at the time, Sue passes away.

Grand Junction argues that "[a] clear reading" of section 13-81-103(1)(b) would require that Sue's parent act within a year of her death by bringing an action by January 1, 2015, whereas our interpretation "would allow Sue's parent until January 1, 2017 — *seven years after the injury* — to file a survival claim on behalf of Sue's estate." Grand Junction argues that such a delay is absurd.

¶ 58 Although we agree with Grand Junction's explanation of how the statutes operate under our interpretation, we disagree that the result is absurd. Tolling the statutes of limitation for persons under a disability is the unequivocal purpose of section 13-81-103, regardless of whether the person under a disability dies or their disability is removed. *See Southard*, 714 P.2d at 897. And application of section 13-81-103 has led to even longer delays than the one in the hypothetical. *See Rudnicki*, ¶ 38 (explaining that an unemancipated minor without a legal representative may bring a negligence claim as late as the minor's twentieth birthday); *Tenney v. Flaxer*, 727 P.2d 1079, 1080, 1084-85 (Colo. 1986) (even though a minor's injury occurred in 1962, the statute of limitations was tolled until guardians were appointed for the minor in 1980 and they timely brought suit two years later in 1982).

D. Nicola's Survival Claims Are Not Time Barred

¶ 59 The parties do not dispute that, because of her injuries, Danielle was a "person under disability" from the date of the accident until the date of her death, *see* § 13-81-101(3), so we will assume without deciding that this is true. As a result, the statute of limitations on her claims against Xcel Energy and Grand

Junction did not begin to run until her death removed her disability. *See Southard*, 714 P.2d at 897. Necessarily, Danielle died before expiration of the applicable statute of limitations. It is also undisputed that Danielle was not appointed a legal representative. Thus, section 13-80-112 governs Nicola's survival claim. Section 13-81-103(1)(b) does not apply.

¶ 60 Under section 13-80-112, Nicola had the longer of the applicable statute of limitations — which began to run on the date Danielle's disability was removed by her death — or one year after the date of Danielle's death to bring a survival action. Xcel Energy and Grand Junction argue that the two-year statute of limitations in section 13-80-102(1)(h) applies, while Nicola argues that the three-year statute of limitations in section 13-80-101(1)(n)(I), C.R.S. 2023, applies. But we need not resolve that dispute. Nicola filed the survival action within two years of Danielle's death, making it timely under the shorter of the two statutes of limitation. Thus, we conclude that the district court erred by dismissing Nicola's survival claims as untimely.

V. Attorney Fees

¶ 61 Xcel Energy and Grand Junction each request attorney fees and costs pursuant to section 13-17-201, C.R.S. 2023. Under section 13-17-201(1), a defendant is entitled to recover reasonable attorney fees when any tort action is dismissed before trial under C.R.C.P. 12(b). But because we have determined that Nicola's survival claims should be reinstated, we conclude that Xcel Energy and Grand Junction are not entitled to attorney fees. *See Colo. Special Dists. Prop. & Liab. Pool v. Lyons*, 2012 COA 18, ¶ 60 ("[T]he statute does not authorize recovery if a defendant obtains dismissal of some, but not all, of a plaintiff's tort claims.").

VI. Disposition

¶ 62 We affirm the part of the district court's judgment dismissing Nicola's wrongful death claims but reverse the part of the judgment dismissing Nicola's negligence and premises liability survival claims and remand the case for further proceedings on those claims.

JUDGE GOMEZ and JUDGE TAUBMAN concur.

SUMMARY
September 14, 2023

2023COA79

No. 22CA0463, *Gomez v. Walker* — Courts and Court Procedure — Limitation of Actions — General Limitation of Actions Three Years; Computation of Time

A division of the court of appeals holds that section 2-4-108(2), C.R.S. 2023, does not operate to extend the statute of limitations established by section 13-80-101, C.R.S. 2023, to the next business day when the limitations period ends on a Saturday, Sunday, or legal holiday.

COLORADO COURT OF APPEALS **2023COA79**

Court of Appeals No. 22CA0463
City and County of Denver District Court No. 19CV32345
Honorable Michael J. Vallejos, Judge
Honorable Stephanie L. Scoville, Judge

Carmelita Gomez,

Plaintiff-Appellant,

v.

Ryan Walker,

Defendant-Appellee.

JUDGMENT AND ORDER AFFIRMED,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE LUM
Bernard* and Graham*, JJ., concur

Prior Opinion Announced July 13, 2023, WITHDRAWN
Petition for Rehearing GRANTED

Announced September 14, 2023

Law Offices of John D. Halepaska, John D. Halepaska, Denver, Colorado, for Plaintiff-Appellant

Jeremy R. Maline & Associates, Andrew M. LaFontaine, Westminster, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiff, Carmelita Gomez, appeals the district court's dismissal of her complaint against defendant, Ryan Walker. She contends that the district court erred by dismissing her complaint as untimely and awarding Walker his attorney fees and costs. Because we determine that section 2-4-108(2), C.R.S. 2023, does not operate to extend the statute of limitations period in this case, we affirm the judgment. We also affirm the order awarding Walker attorney fees and costs.

I. Background

¶ 2 Gomez and Walker were involved in a car crash on June 15, 2016. Gomez filed her complaint on June 17, 2019, alleging that Walker negligently collided with her, causing her to suffer injuries.

¶ 3 Walker moved to dismiss Gomez's complaint under C.R.C.P. 12(b)(5) because it was filed beyond the applicable three-year statute of limitations period prescribed by section 13-80-101(1)(n)(I), C.R.S. 2023.[1] Because the June 15, 2019, limitations

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[1] While a statute of limitations is an affirmative defense, a defendant may raise it in a C.R.C.P. 12(b)(5) motion "where the bare allegations of the complaint reveal that the action was not brought within the required statutory time period." *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007) (quoting *SMLL, L.L.C. v. Peak Nat'l Bank*, 111 P.3d 563, 564 (Colo. App. 2005)).

deadline fell on a Saturday, Gomez maintained that the court should accept her June 17, 2019, filing because that day was the next business day that the court was open.

¶ 4 Initially, the district court agreed with Gomez, concluding that the limitations period ended on June 17, 2019, and it denied Walker's motion to dismiss. However, in April 2021, a division of this court published *Morin v. ISS Facility Services, Inc.*, 2021 COA 55, which had a similar fact pattern. In *Morin*, the division held that C.R.C.P. 6(a)(1) — which provides for the extension of a time period when the period ends on a Saturday, Sunday, or legal holiday — does not extend a statutory limitations period that expires on a weekend. *Morin*, ¶¶ 4, 13, 15. Based on *Morin*, Walker filed a "renewed motion to dismiss." Gomez opposed the motion, asserting that section 2-4-108(2) extended the applicable statute of limitations and that *Morin* did not address that statute.

¶ 5 Relying on *Morin*, the district court granted the renewed motion and dismissed Gomez's claims as untimely. Gomez moved for reconsideration, which the district court denied. Walker moved for, and was granted, attorney fees and costs. Gomez appeals.

II. Statute of Limitations

¶ 6 The parties agree that (1) Gomez's claims were subject to the three-year statute of limitations prescribed by section 13-80-101(1)(n)(I); (2) the limitations period began to run on June 15, 2016, when the collision occurred; and (3) June 15, 2019 — the end of the three-year period — was a Saturday. Thus, the only question before us is whether section 2-4-108(2), which generally acts to extend statutory time periods that expire on a Saturday, Sunday, or legal holiday, applies to the statute of limitations in this case. We conclude that it does not.

A. Standard of Review and Applicable Law

¶ 7 "We review de novo a district court's dismissal of an action based on a statute of limitations defense." *Williams v. Crop Prod. Servs., Inc.*, 2015 COA 64, ¶ 3. The issues raised in this appeal also concern statutory interpretation, which we review de novo. *See Fogg v. Macaluso*, 892 P.2d 271, 273 (Colo. 1995).

¶ 8 In construing a statute, our primary task is to give effect to the General Assembly's intent, which we do by first looking to the plain language of the statute. *Elder v. Williams*, 2020 CO 88, ¶ 18. We construe words and phrases according to their common usage

unless they have acquired a technical or particular meaning, whether by legislative definition or otherwise. § 2-4-101, C.R.S. 2023; *Ma v. People*, 121 P.3d 205, 210 (Colo. 2005). In addition, we must construe the statute as a whole, giving its terms consistent, harmonious, and sensible effect, while avoiding an illogical or absurd result. *Elder*, ¶ 18. "If the statute is unambiguous, then we apply it as written and need not resort to other rules of statutory construction." *Id.*

B. Sections 2-4-108(2) and 13-80-101(1)

¶ 9 As an initial matter, we agree with Gomez's contention that *Morin* does not control, or even address, whether section 2-4-108(2) extends a statute of limitations period that expires on a weekend. While *Morin* concluded that similar language in C.R.C.P. 6(a)(1) did not extend a limitations period under similar facts, its holding was premised on express language limiting the applicability of C.R.C.P. 6(a)(1) to periods of time "prescribed or allowed by" the rules of civil procedure.[2] *Morin*, ¶ 15 (quoting C.R.C.P. 6(a)(1)). *Morin* did not

[2] The *Morin* division also rejected the plaintiff's argument that section 24-11-110, C.R.S. 2023, applied to extend the limitations period. Gomez does not raise the applicability of that section in her appeal.

consider the effect of section 2-4-108(2), which — unlike C.R.C.P. 6(a)(1) — specifically applies to statutory time periods.[3]

¶ 10 Sections 2-4-101 through 2-4-114, C.R.S. 2023, govern how the words and phrases of statutes are to be construed.

¶ 11 Section 2-4-108(2) provides as follows: "If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday." "Period" is defined as "a portion of time determined by some recurring phenomenon." Merriam-Webster Dictionary, https://perma.cc/MXF4-N7VT; *see also Veith v. People*, 2017 CO 19, ¶ 15 (noting that courts may consult recognized dictionaries to ascertain a term's ordinary meaning). In the directly preceding sections, three different time periods are defined: a week,

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[3] We reject Walker's contention that, because section 2-4-108(2), C.R.S. 2023, was raised in the *Morin* briefing, it was "considered" by the *Morin* division in reaching its holding. First, section 2-4-108(2) was raised only in the *Morin* reply brief, and we do not consider arguments raised for the first time in a reply brief. *See Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 748 (Colo. App. 2009). Second, even if section 2-4-108(2) had been properly raised, an opinion cannot have precedential value as to an issue it did not decide. *Cf. Romer v. Bd. of Cnty. Comm'rs*, 956 P.2d 566, 570 n.4 (Colo. 1998) (where a prior decision did not address standing, it did not have precedential value as to that issue).

a month, and a year. §§ 2-4-105 to -107, C.R.S. 2023. A year is "a calendar year." § 2-4-107.

¶ 12 "Any" means "one or some indiscriminately of whatever kind." Merriam-Webster Dictionary, https://perma.cc/J97F-NUD7. The plain meaning of "any period" is inclusive; it does not exclude a certain period. Therefore, the plain language of section 2-4-108(2), in conjunction with the context of the immediately preceding sections, unambiguously declares that, if a period described in years (or any other recurring portion of time) ends on a Saturday, Sunday, or legal holiday, the period is extended to the next day that is not a Saturday, Sunday, or legal holiday.

¶ 13 Section 13-80-101(1) provides that certain tort actions, including those arising from car accidents, must be brought "within three years after the cause of action accrues, and not thereafter." Thus, section 13-80-101(1) describes a "period" of three years, which begins on the date the cause of action accrues and — under the definition of a "year" in section 2-4-107 — ends on the third calendar anniversary of that date.

¶ 14 It is tempting to give effect to both statutes by simply applying the language of section 2-4-108(2) to extend Gomez's three-year

limitations period — which ended on a Saturday — to the next date that was not a Saturday, Sunday, or legal holiday. And if section 13-80-101(1) stated only that the claim must be brought "within three years after the cause of action accrues," it would be possible to harmonize the statutes in this manner. *See People v. Steen*, 2014 CO 9, ¶ 9 (a court is obligated to construe legislative acts to avoid inconsistency).

¶ 15 However, we must also give effect to the phrase "and not thereafter." *Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005) ("[W]e must interpret a statute to give effect to all its parts and avoid interpretations that render statutory provisions redundant or superfluous."). When read in conjunction with the rest of section 13-80-101(1), the plain meaning of these words is that the action cannot be filed after the three-year anniversary of the date the cause of action accrued. Harmonizing the statutes by applying section 2-4-108(2) to extend the three-year anniversary date either renders the phrase "and not thereafter" redundant to the phrase "within three years" or reads "and not thereafter" out of the statute entirely. Therefore, we conclude that the statutes cannot be harmonized and are in conflict.

¶ 16 "If giving effect to both statutes is not possible, the more specific provision prevails over a more general provision." *Morin*, ¶ 10; *see also* § 2-4-205, C.R.S. 2023. "A general provision, by definition, covers a larger area of the law. A specific provision, on the other hand, acts as an exception to that general provision, carving out a special niche from the general rules to accommodate a specific circumstance." *Martin v. People*, 27 P.3d 846, 852 (Colo. 2001).

¶ 17 Section 2-4-108(2) is a general provision because it facially applies to all time periods described by statute. In contrast, section 13-80-101 applies only to the types of actions identified in subsections (1)(a) through (1)(n) of that statute. Through the phrase "and not thereafter," section 13-80-101(1) acts as an exception to the general rule that statutory time periods are extended when they expire on a weekend or legal holiday. *Cf. People v. Fransua*, 2016 COA 79, ¶ 21 (describing section 2-4-108(1), regarding the computation of a period of days, as a "generic statute of general applicability" and concluding it must give way to a more specific statute regarding the calculation of a period of presentence confinement), *aff'd*, 2019 CO 96.

¶ 18 Even if we were unable to determine which statute is more specific, section 13-80-101(1) would prevail because it is more recent. Section 2-4-206, C.R.S. 2023, provides that "[i]f statutes enacted at the same or different sessions of the general assembly are irreconcilable, the statute prevails which is latest in its effective date." "This directive does not differentiate between an initial enactment and an enactment subsequent to a repeal for purposes of a statute's effective date." *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 243 (Colo. 2009). Here, section 2-4-108(2) was enacted in 1973, whereas section 13-80-101(1) was enacted in 1986. *See* Ch. 406, sec. 1, § 135-1-108, 1973 Colo. Sess. Laws 1423;[4] Ch. 114, sec. 1, § 13-80-101, 1986 Colo. Sess. Laws 695. We must "assume the General Assembly is aware of its past enactments, and thus . . . conclude that by passing an irreconcilable statute at a later date, the legislature intended to alter the prior statute." *Jenkins*, 208 P.3d at 242.

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[4] Section 2-4-108 was numbered 135-1-108 in the 1973 session laws. It was renumbered to its current location in 1974 with the adoption of the 1973 C.R.S. codification. The renumbering does not change the effective date.

C. Equitable Tolling

¶ 19 We reject Gomez's contention that principles of equity apply to extend the statute of limitations period in this matter.[5]

¶ 20 "At times . . . equity may require a tolling of [a] statutory period where flexibility is required to accomplish the goals of justice." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996). Colorado has applied the doctrine of equitable tolling "where the defendant's wrongful conduct prevented the plaintiff from asserting [the] claims in a timely manner" and where "extraordinary circumstances make it impossible for the plaintiff to file . . . within the statutory period." *Id.* at 1096-97.

¶ 21 While Gomez contends, without citation to the record, that Walker engaged in wrongful conduct, she does not assert that Walker's conduct prevented her from timely filing her claim.

¶ 22 The heart of Gomez's contention is that she should be entitled to rely on her good faith, erroneous interpretation of the interplay between sections 2-4-108(2) and 13-80-101(1). But while we

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[5] The parties disagree about whether this issue was preserved for our review. Because we determine that equitable tolling does not apply, we need not resolve their dispute.

acknowledge that this is an issue of first impression and that Gomez's mistaken interpretation is not completely unreasonable, these are not the extraordinary circumstances contemplated by the doctrine of equitable tolling. A party's mistaken legal analysis is not outside of the party's control, nor does it render compliance with the statutory period "impossible." *See Dean Witter*, 911 P.2d at 1097.

¶ 23 Accordingly, we conclude that Gomez's claim is time barred.

III. Construction of "Renewed Motion to Dismiss"

¶ 24 Gomez contends that the district court erred by construing Walker's "renewed motion to dismiss" as one to reconsider its original order denying dismissal under Rule 12(b)(5) rather than as a motion for judgment on the pleadings under Rule 12(c). While resolution of this issue does not affect the outcome of our statutory analysis, it bears on whether Walker is entitled to attorney fees under section 13-17-201, C.R.S. 2023. *See infra* Part IV.C.

¶ 25 Walker contends that Gomez did not preserve this claim for review because she did not raise her Rule 12(c) argument until her motion to reconsider. And, Walker continues, although the district court ruled on Gomez's Rule 12(c) argument, its ruling was

untimely and thus cannot form the basis for appellate review.[6] We agree.

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[6] Regarding Gomez's procedural objections to the renewed motion to dismiss, Walker asserted in his answer brief that the issue was unpreserved because Gomez did not raise her argument until her motion to reconsider. Walker's preservation argument did not address the untimeliness of the court's order. We also note that Walker quoted from the untimely order to support his substantive arguments on pages 13, 14, 15, and 18 of his answer brief. However, we acknowledge that Walker made a single reference to the order's untimeliness in a separate section of his answer brief in a footnote that says, "The motion for reconsideration was not ruled on within 63 days, and thus it was denied by operation of C.R.C.P. 59(j). The district court's written order nevertheless holds persuasive value."

In his petition for rehearing, Walker directly addresses the effect of the untimeliness of the reconsideration order on the issue of preservation. While we do not address arguments raised for the first time in a petition for rehearing, *see People v. Gallegos*, 260 P.3d 15, 29 (Colo. App. 2010), we conclude that Walker's argument—that Gomez's 12(c) contention was unpreserved because it was first raised in the motion to reconsider *and* that the order addressing that argument was untimely and therefore void—was sufficiently raised in the answer brief for us to consider it now.

We modify our opinion because the petition for rehearing raises a valid preservation argument that the division overlooked and because we have an independent affirmative obligation to verify preservation. *People v. Tallent*, 2021 CO 68, ¶ 11. However, we note that Judges are not "required to hunt down arguments [the parties] keep camouflaged," *William v. Eastside Lumberyard & Supply Co.*, 190 F. Supp. 2d, 1104, 1114 (S.D. Ill. 2001), or "speculate as to what a party's argument might be," *People v. Palacios*, 2018 COA 6M, ¶ 29 (quoting *Beall Transp. Equip. Co. v. S. Pac. Transp.*, 64 P.3d 1193, 1196 n.2 (Or. Ct. App. 2003)).

¶ 26 Ordinarily, arguments raised for the first time in a post-trial motion are unpreserved. *Briargate at Seventeenth Ave. Owners Ass'n v. Nelson*, 2021 COA 78M, ¶ 66. But "where a trial court addresses an argument, whether that argument was preserved is moot." *In re Estate of Ramstetter*, 2016 COA 81, ¶ 71 n.7.

¶ 27 After the district court dismissed Gomez's action as untimely, Gomez filed a post-trial motion under C.R.C.P. 59.[7] In the motion, Gomez argued for the first time that the district court should have construed Walker's "renewed motion to dismiss" as a motion for judgment on the pleadings under C.R.C.P. 12(c) rather than a motion to dismiss under C.R.C.P. 12(b)(5). The court entered an order denying Gomez's motion some eighty days later. In the order, the court briefly addressed and then rejected Gomez's argument.

¶ 28 While the district court's ruling on Gomez's Rule 12(c) argument would normally allow us to review that otherwise-unpreserved contention, the ruling was void. The district court was required to rule on Gomez's motion within sixty-three days of the date it was filed but failed to do so. C.R.C.P. 59(j). Gomez's motion

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[7] Though titled as a "motion to reconsider," Gomez acknowledged that the motion would be considered under C.R.C.P. 59.

was thus denied by operation of law, and the court thereafter lost jurisdiction to act on it. *De Avila v. Est. of DeHerrera*, 75 P.3d 1144, 1146 (Colo. App. 2003). Effectively, the district court never ruled on Gomez's Rule 12(c) argument; therefore, it is unpreserved, and we will not review it.[8] *Briargate*, ¶ 66.

¶ 29 Gomez also asserts that the district court should have denied Walker's renewed motion to dismiss because it was procedurally and legally deficient. But even if Walker's motion was defective, "[a] trial court has inherent authority to reconsider its own rulings" and "may exercise this authority any time before it enters a final judgment." *Graham v. Zurich Am. Ins. Co.*, 2012 COA 188, ¶ 18. Because the district court had the authority to reconsider its prior order in the absence of any motion at all, we discern no reversible error.

IV. Attorney Fees and Costs

¶ 30 Gomez contends that the district court did not have jurisdiction to enter an award of attorney fees and costs to Walker

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[8] Likewise, we will not review Gomez's argument that the court should have construed Walker's motion as one for summary judgment because that argument was not raised at any stage before the district court.

after it dismissed her complaint. And even if it did, she argues that the court abused its discretion by entering an unreasonable award. We disagree.

A. Additional Background

¶ 31 After the court dismissed Gomez's complaint, Walker moved for attorney fees under section 13-17-201 as well as costs under C.R.C.P. 54(d) and sections 13-17-202 and 13-16-105, C.R.S. 2023.

¶ 32 Walker requested a total of $30,281.25 in attorney fees. The billing rate for both Walker's attorney and the attorney's paralegal was $125 per hour. Gomez did not contest the reasonableness of the hourly rate but did contest the number of hours spent on specific tasks, including drafting the original and renewed motions to dismiss and replies in support thereof; reviewing files, medical records, disclosures, and discovery; preparing for depositions; preparing discovery responses; and compiling the affidavit of attorney fees.

¶ 33 Walker also requested a total of $41,501.12 in costs, mostly for fees paid to Biodynamic Research Corporation (BRC), which provided expert witness services relating to accident reconstruction and causation, and to Dr. Hal Wortzel, an independent medical

examiner. Gomez's primary arguments before the district court were that (1) the majority of the BRC reports was "filler," "boiler plate," or "generalized" material that was present in all reports and did not require "thought or analysis"; and (2) BRC did not engage in "true analysis," but rather reached a "foregone" conclusion. Similarly, Gomez asserted that Dr. Wortzel's report was "(nearly) cookie cutter identical" to reports he prepared in other cases. Gomez did not request a hearing relating to the reasonableness of the attorney fees or expert costs.

B. Standard of Review and Applicable Law

¶ 34 Section 13-17-201 provides that a defendant "shall" be awarded reasonable attorney fees when a tort action is dismissed "on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure." § 13-17-201(1).

¶ 35 An attorney fee award must be reasonable. *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991, 998 (Colo. App. 2011). "The reasonableness of attorney fees is a question of fact for the district court, and its ruling will not be reversed on appeal unless it is 'patently erroneous' or 'unsupported by the evidence.'" *Id.*

(quoting *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 152 (Colo. App. 2003)).

> A court makes an initial estimate of a reasonable attorney fee by calculating the lodestar amount. The lodestar amount represents the number of hours reasonably expended on the case, multiplied by a reasonable hourly rate. The court's calculation of the lodestar amount carries with it a strong presumption of reasonableness.

Payan v. Nash Finch Co., 2012 COA 135M, ¶ 18 (citations omitted).

¶ 36 Rule 54(d) and sections 13-17-202 and 13-16-105 all entitle Walker to an award of costs. The amount of costs awarded must be reasonable, and we will not disturb a court's findings as to reasonableness absent a showing of an abuse of discretion. *Danko v. Conyers*, 2018 COA 14, ¶¶ 68, 70.

¶ 37 Costs include reasonable expert witness fees. *See Clayton v. Snow*, 131 P.3d 1202, 1203 (Colo. App. 2006). In exercising its discretion to determine whether such fees are reasonable, a district court must answer two questions: "1. Were the expert's services reasonably necessary to the party's case? 2. Did the party expend a reasonable amount for the expert's services?" *Danko*, ¶ 71. A

court's findings "must include an explanation of whether and which costs are deemed reasonable." *Id.* at ¶ 72 (citation omitted).

C. Analysis

¶ 38 We first reject Gomez's contention that the district court was deprived of subject matter jurisdiction to award attorney fees and costs due to the expiration of the statute of limitations period. "[I]n civil actions, an expired statute of limitations is simply an affirmative defense that deprives the plaintiff of a remedy. It does not deprive the trial court of jurisdiction." *Grear v. Mulvihill*, 207 P.3d 918, 922 (Colo. App. 2009).[9]

¶ 39 Regarding attorney fees, the district court determined that the number of hours expended was reasonable in relation to the work performed, though it deducted one four-hour charge as not properly shifted to Gomez. On appeal, Gomez largely repeats the arguments she made before the district court in claiming the hours were

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[9] Although the district court construed Walker's "renewed" motion as one to reconsider its prior order denying Walker's motion to dismiss under Rule 12(b)(5), the court stated that it dismissed the case "pursuant to C.R.C.P. 12(b)(1)" because it was divested of jurisdiction due to the lapse of the statute of limitations. To the extent the district court concluded it lacked jurisdiction to hear Gomez's claim, it erred.

excessive, and she asserts that the district court abused its discretion by finding those hours "reasonable." Because Gomez did not request a hearing, the record evidence relating to reasonableness is documentary in nature: the fee affidavits; Walker's motion and renewed motion to dismiss, along with the replies in support thereof; Gomez's expert witness disclosures; Walker's discovery responses; a deposition transcript; and certain communications between the parties relating to discovery disputes. Having reviewed these documents and Gomez's objections to the hours spent on them, we cannot say that the court's findings of reasonableness relating to these items lack evidentiary support or are "patently erroneous." *Crow*, 262 P.3d at 998 (quoting *Double Oak Constr., L.L.C.*, 97 P.3d at 152).

¶ 40 We note that Gomez also asserts Walker's counsel spent an excessive number of hours on review or preparation of many other documents that are absent from the record. As the appellant, Gomez "is responsible for providing an adequate record to demonstrate her claims of error, and absent such a record, we must presume the evidence fully supports the trial court's ruling." *Clements v. Davies*, 217 P.3d 912, 916 (Colo. App. 2009).

¶ 41 In its order awarding costs, the district court noted that it had reviewed the documentation relating to the experts' charges and concluded that the costs were reasonably necessary to Walker's defense given that the issues of causation and the extent of Gomez's injuries — both matters outside the scope of ordinary juror experience — were hotly contested. The district court also explained that BRC spent 155 hours of work on two expert opinions that involved six professionals at varying hourly rates. While the court deducted twenty hours that it found duplicative, it found the rest of the costs expended on BRC to be reasonable. The court also found that Dr. Wortzel's fees were reasonable and that the hours he spent in preparing his report were reasonably necessary. Ultimately, the district court awarded Walker $38,677.12 in costs.

¶ 42 On appeal, Gomez states only that "the amount of . . . billing for simple reports is plainly unreasonable on its face." Gomez does not explain whether she takes issue with the number of hours spent on the reports or the hourly rates of the professionals, and she does not identify any evidence in the record that would have supported her claim that the expert reports did not reflect

independent analysis but rather were copied from prior reports the experts had submitted in other cases.

¶ 43 Having reviewed the lengthy and detailed BRC report in the record, we cannot say that the costs are facially unreasonable or that the district court abused its discretion. Dr. Wortzel's report is not in the record; therefore, we presume it supports the district court's ruling. *Id.*

¶ 44 Accordingly, we conclude that the district court did not err by awarding Walker his attorney fees and costs, and we affirm that order.

V. Appellate Attorney Fees

¶ 45 We agree with Walker that, because he has successfully defended a dismissal order, he is entitled to recover reasonable attorney fees incurred on appeal. *See Kreft v. Adolph Coors Co.*, 170 P.3d 854, 859 (Colo. App. 2007). Therefore, we remand the case to the district court to determine the amount of Walker's reasonable attorney fees incurred in connection with this appeal. *See* C.A.R. 39.1.

VI. Disposition

¶ 46 The judgment is affirmed, the order for costs and fees is affirmed, and the case is remanded for proceedings consistent with this opinion.

JUDGE BERNARD and JUDGE GRAHAM concur.

SUMMARY
January 25, 2024

2024COA10

No. 23CA0004, *Stone Group Holdings v Ellison* — Remedies — Damages — Interest on Damages — Prejudgment Interest; Appeals — Final Appealable Order

Answering a question left unresolved in *Grand County Custom Homebuilding, LLC v. Bell*, 148 P.3d 398 (Colo. App. 2006), a division of the court of appeals holds that an order granting prejudgment interest is reduced to a sum certain and is therefore final and appealable when the amount is calculable on the face of the order. Prejudgment interest is facially calculable when the order states (1) the amount of the judgment; (2) the prejudgment interest rate; and (3) the date when the interest began accruing.

COLORADO COURT OF APPEALS **2024COA10**

Court of Appeals No. 23CA0004
Boulder County District Court No. 21CV30567
Honorable Dea M. Lindsey, Judge

Stone Group Holdings LLC, a Colorado limited liability company,

Plaintiff-Appellee,

v.

Todd Ellison and MC2 Boulder LLC, d/b/a Marquis Cannabis, a Colorado limited liability company,

Defendants-Appellants

and

D.J. Marcus

Attorney-Appellant.

APPEAL DISMISSED

Division IV
Opinion by JUDGE GROVE
Navarro and Lum, JJ., concur

Announced January 25, 2024

Gard Law Firm, L.L.C., Jeffrey S. Gard, Austin Q. Hiatt, Boulder, Colorado, for Plaintiff-Appellee

Ogborn Mihm, LLP, D.J. Marcus, Denver, Colorado, for Defendants-Appellants and Attorney-Appellant

¶ 1 In this dispute over a failed investment in a marijuana business, defendants, Todd Ellison and MC2 Boulder LLC, d/b/a Marquis Cannabis (MC2), and their attorney, D.J. Marcus, appeal three separate district court orders that (1) granted summary judgment to plaintiff, Stone Group Holdings LLC, on its breach of contract claim; (2) awarded attorney fees based on fee-shifting language in that contract; and (3) sanctioned Ellison, MC2, and Marcus for failing to disclose certain information during discovery. We conclude that the notice of appeal was untimely and therefore dismiss the appeal for lack of jurisdiction.

I. Background

¶ 2 MC2 was a licensed marijuana business whose principals, Ellison and Ryan Quinn, agreed to sell two-thirds of their company to Stone Group. Under the terms of the parties' contract, which was executed on April 24, 2020, Ellison and Quinn were to apply for a change of ownership once they received Stone Group's payment of $175,000. Stone Group wired that amount four days after the parties signed the contract, but no transfer of ownership ever occurred.

¶ 3 Six months later, Stone Group filed a complaint alleging breach of contract against Ellison and Quinn and unjust enrichment against all three defendants. Quinn never responded to the complaint, and the district court entered a default judgment against him. Stone Group then moved for summary judgment against Ellison and MC2 on its unjust enrichment claim. They did not respond to the motion, so on April 11, 2022, the district court granted it and ordered Ellison and MC2 to pay Stone Group "$175,000 plus statutory interest, with interest commencing on April 24, 2020."

¶ 4 Shortly thereafter, Stone Group filed a second motion for partial summary judgment, this time on the breach of contract claim. The motion sought to compel all three defendants to follow through on the contractual term that required them to transfer two-thirds of the company to Stone Group.

¶ 5 While this motion was pending, Stone Group learned that, several months earlier, MC2 had missed the deadline for renewal of its marijuana license, rendering the company valueless once its prior license expired. Stone Group sought sanctions against

Ellison, MC2, and its attorney (Marcus) for failing to disclose this development in discovery.

¶ 6 On May 18, 2022, the district court granted the motion for partial summary judgment but declined to award specific performance or other contractual damages because it found that "rescission of the [c]ontract essentially occurred" when, in the first partial summary judgment order, it ordered the return of the $175,000 that Stone Group had paid. However, relying on the contract's fee-shifting provision, the court awarded Stone Group its attorney fees stemming from the litigation of the contract claim and instructed Stone Group to submit an affidavit in support of its fee request within fourteen days.

¶ 7 On May 26, 2022, the court granted Stone Group's motion for discovery sanctions and awarded it attorney fees from the time that the defendants knew the late licensure application had been denied to the date of the order — a period of approximately four months. The court again instructed Stone Group to submit an affidavit reflecting its attorney fees incurred during that period and, on June 8, 2022, clarified that the sanctions were imposed jointly and severally against Ellison, MC2, and Marcus.

¶ 8 Also on June 8, 2022, the parties filed a stipulated motion for dismissal of the defendants' counterclaims and requested that the trial be vacated. The district court granted the motion the same day.

¶ 9 In an order issued on June 21, 2022, the court "award[ed] attorney fees in favor of [p]laintiff and against [Ellison and MC2] in the amount of $16,000.00 related to the prosecution of the breach of contract claim." The order made no reference to prejudgment or postjudgment interest.

¶ 10 Litigation over the attorney fee award and the proper amount of sanctions continued. After a hearing, the court ordered the following on October 11, 2022:

- "[Ellison, MC2, and Marcus] shall pay Plaintiff $16,000 in damages related to Plaintiff's litigation of their breach of contract claim." Importantly, the court's June 21 order applying the fee-shifting provision of the contract had only awarded fees against Ellison and MC2. We are unable to discern from the record why the October 11 order added the defendants' counsel to the fee award arising from the breach of contract claim.

- "[Ellison, MC2, and Marcus] shall pay Plaintiff $6,000 in damages [as a discovery sanction] related to [the] violation of C.R.C.P. Rules 11 and 26."
- "The Court reiterates its finding in its June 8, 2022 order that sanctions are imposed jointly and severally against [Ellison, MC2,] and their counsel."

¶ 11 Shortly thereafter, Stone Group filed a motion requesting that "final judgment be entered in the present matter." (In its reply brief, Stone Group explained that it filed the motion "so that plaintiff could begin the collections process.") Stone Group requested the entry of judgment in the following amounts:

- $215,033.65 owed jointly and severally by Ellison and MC2 on the unjust enrichment claim, which appears to be comprised of the $175,000 judgment and accrued interest, plus a previous discovery sanction of $2,629.65 and accompanying interest on that amount;
- $16,441.86 owed jointly and severally by Ellison, MC2, and Marcus on the attorney fee award under the contract, comprised of the $16,000 judgment plus accrued interest; and

- $6,000 owed jointly and severally by Ellison, MC2, and Marcus for discovery sanctions.

¶ 12 On November 15, 2022, the court granted Stone Group's motion by signing the proposed order that had been submitted together with the motion.

¶ 13 Ellison, MC2, and Marcus filed their notice of appeal on January 3, 2023 — forty-nine days after the order issued on November 15, 2022.

II. Timeliness

¶ 14 Although Ellison, MC2, and Marcus seek appellate review of three different and separately appealable judgments — the merits ruling on Stone Group's breach of contract claim, the attorney fee award arising from the contract's fee-shifting provision, and the $6,000 discovery sanction — they filed only a single notice of appeal forty-nine days after the district court ostensibly entered "final judgment" on those claims. As we explain below, however, the court's order entering "final judgment" was superfluous because each of these issues had already been fully and finally resolved weeks or months earlier.

A. Standard of Review and Principles of Law

¶ 15 Before reaching the merits of an appeal, we must first determine whether we have jurisdiction. *Atherton v. Brohl*, 2015 COA 59, ¶¶ 7-8. Considering the question de novo, *McDonald v. Zions First Nat'l Bank, N.A.*, 2015 COA 29, ¶ 33, we conclude that we do not have jurisdiction over any aspect of this appeal because it was not timely filed.

¶ 16 Appellate jurisdiction is limited by several rules, two of which are relevant to our analysis. First, a final judgment or order is a prerequisite to appellate review. § 13-4-102(1), C.R.S. 2023; C.A.R. 1(a)(1); *L.H.M. Corp., TCD v. Martinez*, 2021 CO 78, ¶ 14. Second, the notice of appeal must be timely; here, the applicable rule required filing "within 49 days after entry of the judgment, decree, or order being appealed." C.A.R. 4(a)(1).[1]

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[1] This deadline can be extended by a timely filed C.R.C.P. 59 motion. *See Amada Fam. Ltd. P'ship v. Pomeroy*, 2021 COA 73, ¶ 73. In addition, C.A.R. 4(a)(4) provides, "Upon a showing of excusable neglect, the appellate court may extend the time to file the notice of appeal for a period not to exceed 35 days after the time prescribed by [C.A.R. 4(a)]." The defendants do not assert excusable neglect but instead argue only that their notice of appeal was timely.

¶ 17 Our jurisdiction over this appeal hinges on when the three orders at issue — the order on the second partial summary judgment motion, the order awarding fees under the fee-shifting provision in the contract, and the sanctions award — became final. "'[A]s a general rule, a judgment is final and therefore appealable if it disposes of the entire litigation on its merits, leaving nothing for the court to do but execute the judgment.'" *L.H.M. Corp.*, ¶ 14 (citation omitted). But a final judgment need not necessarily be the last order that a court enters. Indeed, courts frequently issue postjudgment administrative or ministerial orders; so long as they do not "affect[] rights or create[] liabilities not previously resolved by the adjudication of the merits," *Luster v. Brinkman*, 250 P.3d 664, 667 (Colo. App. 2010) (citation omitted), they do not affect finality of the judgment. *See, e.g.*, *Bainbridge, Inc. v. Douglas Cnty. Sch. Dist. RE-1*, 973 P.2d 684, 686 (Colo. App. 1998) (holding that an order adding mandatory postjudgment interest was unnecessary and did not affect or alter the underlying judgment).

¶ 18 To be considered final, a judgment or order must address both liability and damages, *Chavez v. Chavez*, 2020 COA 70, ¶ 28, and damages must be reduced to a sum certain. *See, e.g.*, *Grand Cnty.*

Custom Homebuilding, LLC v. Bell, 148 P.3d 398, 400-01 (Colo. App. 2006). Prejudgment interest is a component of a damages award and must also be "reduced to a sum certain" before an order is considered final. *Id.* at 401.

B. Relevant Orders

¶ 19 We must consider six separate orders to determine whether this appeal is timely:

- the April 11, 2022, order granting partial summary judgment to Stone Group on the unjust enrichment claim and awarding it "$175,000 plus statutory interest, with interest commencing on April 24, 2020";
- the May 18, 2022, order granting partial summary judgment to Stone Group on the contract claim and ruling that Stone Group was entitled to attorney fees under the contract's fee-shifting provision;
- the June 8, 2022, order granting the stipulated motion for dismissal of the defendants' counterclaims and vacating the trial;

- the June 21, 2022, order awarding $16,000 in attorney fees to Stone Group, to be paid by Ellison and MC2, under the contract's fee-shifting provision;
- the October 11, 2022, order that
    - reiterated that Stone Group was entitled to $16,000 in fees under the fee-shifting provision but ruled that Ellison, MC2, *and Marcus* were jointly and severally liable for that amount; and
    - sanctioned Ellison, MC2, and Marcus, jointly and severally, in the amount of $6,000 for discovery violations; and
- the November 15, 2022, order of final judgment that calculated accrued interest on, and added that interest to, the unjust enrichment and attorney fee awards, and also reiterated the $6,000 discovery sanction.

C. Analysis

1. Merits Ruling

¶ 20 Ellison and MC2 contend that the district court incorrectly granted summary judgment against them on the breach of contract claim because Stone Group elected an unjust enrichment remedy

and, by prevailing on that equitable claim, made contractual remedies unavailable. Because Ellison and MC2 did not file a timely appeal, however, we lack jurisdiction to review the court's grant of summary judgment.

a. April 11 Partial Summary Judgment Order

¶ 21 We acknowledge that the April 11 partial summary judgment order adjudicating the unjust enrichment claim is not discussed extensively in the parties' briefs. Nonetheless, we address it first because it pertains to our jurisdiction. *See People v. S.X.G.*, 2012 CO 5, ¶ 9.

¶ 22 Standing on its own, the April 11 order was not final because, as a partial summary judgment order, it did not dispose of the entire litigation on the merits. *See L.H.M. Corp.*, ¶ 14. But given the subsequent procedural history of this case, the order's award of prejudgment interest dating back to April 24, 2020, is nonetheless central to our analysis.

¶ 23 In *Bell*, a division of this court considered whether prejudgment interest is a component of damages. It concluded that it is, and, turning to the impact of that holding on finality, the division held that "a judgment awarding prejudgment interest is not

final until the amount of such interest is reduced to a sum certain." *Bell*, 148 P.3d at 401. The division then considered the meaning of "sum certain," observing that "some courts in other jurisdictions have held that where a sum certain can be calculated from the face of the judgment, it is final for purposes of appeal." *Id.* The opinion did not reach that question, however, because under the circumstances of the case, "the amount of prejudgment interest [was] not so easily calculable from the face of the . . . judgment." *Id.* at 402.

¶ 24 As best we can tell, every jurisdiction that has considered this question has concluded that prejudgment interest is reduced to a sum certain when the interest can be calculated from the face of the order through purely ministerial or mechanical means. For example, in *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1992), the Seventh Circuit held that a judgment was final because the parties knew the interest rate and both the start and end date of interest accrual based on the controlling contractual provision. In a similar case arising under West Virginia law, the Fourth Circuit held that an order was final and a party's motion to clarify the amount of prejudgment interest

was not a motion to amend judgment because the amount of prejudgment interest was of a "ministerial nature" and was "fixed at the time of the entry of judgment" because the parties knew (1) that interest had been awarded; (2) the statutory interest rate; and (3) the timeframe for the computation. *Kosnoski v. Howley*, 33 F.3d 376, 379 (4th Cir. 1994). The Fifth and Eleventh Circuits have endorsed similar approaches. *See U.S. Sec. & Exch. Comm'n v. Carrillo*, 325 F.3d 1268, 1272 (11th Cir. 2003) ("[I]f the judgment amount, the prejudgment interest rate, and the date from which prejudgment interest accrues have been established . . . the court's failure to calculate the precise amount of prejudgment interest does not prevent the court's order from constituting a final judgment . . . ."); *Heck v. Triche*, 775 F.3d 265, 277 (5th Cir. 2014) (citing *Carrillo* with approval); *cf. Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 857 F.3d 1347, 1351 (Fed. Cir. 2017) (dismissing an appeal for lack of finality because "[t]he district court never resolved the parties' dispute regarding the date from which to begin calculating prejudgment interest or set the amount of prejudgment interest to be awarded" to the prevailing party).

¶ 25 For three reasons, we agree with the approach taken in these cases. First, it is implicit in the analysis of *Luster*, 250 P.3d at 666, which concluded that once an order exists from which prejudgment interest is facially calculable, any subsequent order stating the lump sum owed does not affect the substantive rights of either party and is thus ministerial. Instead, it is a matter of simple arithmetic — rendering the act of announcing the lump sum a ministerial act akin to that of announcing the lump sum of mandatory postjudgment interest. *See Bainbridge*, 973 P.2d at 686. Second, it promotes judicial economy by removing an unnecessary step of judicial involvement. Third, it allows the prevailing party to begin the collection process earlier.

¶ 26 Therefore, addressing the question that the *Bell* division left unresolved, we hold that, if an order announces (1) the amount of the judgment; (2) the interest rate; and (3) the date on which accrual of prejudgment interest begins, then the amount of prejudgment interest has been reduced to a sum certain as of the date of the order. Applying that test here, we conclude that the April 11 order reduced prejudgment interest on the unjust enrichment claim to a sum certain because it stated (1) the amount

of the judgment; (2) the interest rate; and (3) the date on which accrual began. Once final judgment was entered on June 8, the amount was easily calculable.

¶ 27 It follows that the April 11 order would have been immediately appealable had it resolved all of the issues in the case. It did not, however, because it only granted partial summary judgment to Stone Group. But importantly, because prejudgment interest could be calculated from the face of the April 11 order, it did not *prevent* the judgment from becoming final once the remaining issues were resolved. Thus, as we explain next, once the district court granted summary judgment on Stone Group's breach of contract claim and the counterclaims were dismissed, the judgment was final notwithstanding the court's subsequent October 11 and November 15 orders reiterating the award and declaring the exact amount of prejudgment interest.

b. May 18 Partial Summary Judgment Order and Stipulated Dismissal of Counterclaims

¶ 28 On May 18, 2022, the district court granted Stone Group's second motion for partial summary judgment. The court ruled that Ellison and MC2 had breached the contract but declined to order

specific performance or grant money damages under the contract because it found "that for the purposes of further damages, rescission of the [c]ontract essentially occurred" when it granted summary judgment on Stone Group's unjust enrichment claim.

¶ 29 Although this order resolved the merits of Stone Group's claims, it was not final because it did not resolve the counterclaims raised by Ellison and MC2. Once those counterclaims were dismissed pursuant to the parties' stipulation on June 8, 2022, the merits judgment was final, and any appeal was due within forty-nine days of that date. (The fact that the court had determined that Stone Group was also entitled to attorney fees under the contract had no impact on the finality of the merits ruling. *See L.H.M. Corp.*, ¶ 23 ("[A] judgment on the merits is final and appealable notwithstanding an unresolved issue of attorney fees.").) But Ellison and MC2 did not file their appeal until January 3, 2023. It is therefore untimely, and we do not have jurisdiction to review the merits judgment.

2. Attorney Fees

¶ 30 In a related argument, Ellison, MC2, and Marcus contend that the court erred by granting attorney fees pursuant to the fee-

shifting provision of the contract because the contract was effectively rescinded by the court's order granting Stone Group's claim for unjust enrichment. We conclude that the appeal of this order was also untimely.

¶ 31 "[A]n award of attorney fees is distinct and separately appealable from the judgment on the merits." *Kennedy v. Gillam Dev. Corp.*, 80 P.3d 927, 929 (Colo. App. 2003). That remains true whether a fee award is denominated as costs or damages. *L.H.M. Corp.*, ¶¶ 25-28.

¶ 32 In its May 18 order granting Stone Group's second motion for partial summary judgment, the court found that Stone Group was entitled to attorney fees under the fee-shifting language in the contract, and on June 21, 2022, the court reduced that order to a sum certain by awarding $16,000 in attorney fees to Stone Group, to be paid by Ellison and MC2. Then, in the October 11 order, the court added Marcus to this $16,000 award, stating that he was jointly and severally liable for that amount along with Ellison and MC2.

¶ 33 Ellison, MC2, and Marcus contend that the court erred by awarding attorney fees under the fee-shifting provision of the

contract because it had already effectively declared the contract rescinded when it granted Stone Group's motion for summary judgment on its unjust enrichment claim. If it were timely, this argument would have some force. *See Kennedy*, 80 P.3d at 930-31 ("Once [the plaintiffs] elected the remedy of rescission and it was granted by the court, the option of obtaining the benefits of a provision in the rescinded contract was no longer available to them."). But we do not have jurisdiction to review it because Ellison and MC2 did not appeal it within forty-nine days of when it became final on June 21, 2022. Instead, the notice of appeal was filed on January 3, 2023.

¶ 34 Because the June 21 order reduced the attorney fee award to a sum certain, the court's subsequent orders restating that amount and adding interest to it were superfluous and did not change the date that it became final. *See Bainbridge*, 973 P.2d at 686 ("[A] judgment creditor who falls within the coverage of a mandatory post-judgment interest statute need not obtain an additional judgment (or a modification of a previous judgment) specifying that entitlement.").

¶ 35 That said, we acknowledge that the October 11 order appears to have sua sponte added Marcus as a judgment debtor on the $16,000 attorney fee award. We have been unable to find any explanation for this apparent amendment to the judgment in the record, and we observe that, under C.R.C.P. 59(c)(4), the district court had only fourteen days after June 21, 2022, to order an amendment of its judgment on its own initiative. *See Koch v. Dist. Ct.*, 948 P.2d 4, 7-8 (Colo. 1997) ("C.R.C.P. 59(c) allows the court to order a new trial sua sponte. However, the court must act within the time allowed the parties because at the end of this period, the district court no longer has jurisdiction to grant post-trial relief under C.R.C.P. 59.") (footnote omitted). Nonetheless, even if the district court had lost jurisdiction to amend its judgment to add Marcus to the fee award by the time it issued its October 11 order, we cannot review that aspect of the court's judgment on appeal because Marcus did not appeal it within forty-nine days of that date.

3. Sanctions Order

¶ 36 Finally, we consider the timeliness of the appeal of the sanctions order.

¶ 37 The October 11 order announced sanctions in the amount of $6,000. Because the order was reduced to a sum certain on that date, the court's November 15 order entering "final judgment" was superfluous. Ellison, MC2, and Marcus filed their notice of appeal more than forty-nine days later, on January 3, 2023. Their appeal was therefore untimely, and we lack jurisdiction over it.

¶ 38 In summary, the merits ruling was final on June 8, 2022. The attorney fee award was final as to Ellison and MC2 on June 21, 2022, and as to Marcus on October 11, 2022. And the sanctions award was final on October 11, 2022. Each of these three orders was separately appealable, and each appeal had to be filed within forty-nine days of the date that the underlying order became final. Because none of the appeals was filed before its respective deadline, we lack jurisdiction to consider them on the merits and must dismiss the appeal.

III. Appellate Attorney Fees

¶ 39 Stone Group requests an award of appellate attorney fees, arguing that the appeal is frivolous because we lack jurisdiction or, in the alternative, that the fee-shifting provision of the contract

requires the losing party to cover the prevailing party's attorney fees on appeal. We decline to award fees.

¶ 40 An appeal is frivolous as filed if "there are no legitimately appealable issues because the judgment below 'was so plainly correct and the legal authority contrary to the appellant's position so clear.'" *Calvert v. Mayberry*, 2019 CO 23, ¶ 45 (citation omitted). Likewise, an appeal is frivolous as argued if a party commits misconduct in the course of arguing the appeal. *Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006).

¶ 41 It appears that both parties misunderstood finality in this case, as demonstrated by Stone Group's unnecessary request for the court to enter "final judgment" well after each of the appealed orders had become final. Given this procedural history, we cannot conclude that the late appeal was frivolous. Likewise, Stone Group does not allege any misconduct during the appellate proceedings, so the appeal is not frivolous as argued.

¶ 42 We also decline to award appellate attorney fees to Stone Group based on the contract's fee-shifting provision. *See Kennedy*, 80 P.3d at 930-31. Stone Group elected to pursue an unjust enrichment claim, and after it prevailed on that claim, the district

court found that "for the purposes of further damages, rescission of the [c]ontract essentially occurred." Once the contract was rescinded, Stone Group was no longer able to receive the benefit of the fee-shifting provision. *See id.* Accordingly, we deny Stone Group's request for appellate attorney fees.

IV. Disposition

¶ 43 We dismiss the appeal and deny the request for appellate attorney fees.

JUDGE NAVARRO and JUDGE LUM concur.