SPECIAL NOTICE
PROBATE TRIAL AND PROCEDURE COMMITTEE
PROBATE BENCH BOOK PROJECT

NOVEMBER 6, 2019
COLORADO BAR ASSOCIATION
1290 BROADWAY, SUITE 1700
DENVER, CO 80203

Dial in number: 571-317-3122; Access Code: 459-334-869

The majority of our November 6 meeting will be dedicated to the Probate Bench Book Project. Justice Boatright will attend to address our group and give guidance on the scope and format of the work. Justice Boatright is leading the Judicial effort to create a digital bench book in every practice area. We are partnering with Judicial, and retooling our efforts to make our bench book immediately useful and available to each and every judge. Those members who have volunteered for this project are strongly encouraged to attend.

We will also be requesting additional volunteers to act as both authors and editors of the book.

The following is a partial list of topics requiring authors:

1. Protective Proceedings
    a. Conservatorship – Adult
        i. Procedure to Open
        ii. Special Procedures
            1. Special Conservator
            2. Single Transaction
        iii. Authority and Responsibility of Conservator
        iv. Monitoring and Termination
        v. Right to Counsel
2. Decedent's Estates
    a. Construction of Wills
        i. Failure of testamentary provision
        ii. Effect of divorce
    b. Administration
        i. Removing a PR
        ii. Elective Share (explained more simply than the statute)
    c. Will Contests
        i. Testamentary capacity
        ii. Undue influence
    d. Special Issues
        i. Non-Probate Assets
        ii. Cost Recovery and Compensation Act

Additional editors are needed for topical areas including guardianships, conservatorships and the administration of decedent's estates.

[TOPIC NAME]

I. General Information [Provide cite to statute/authority. Note, subsections below are provided for illustrative purposes – add or subtract as necessary to fit your topic.]]

A. [Description of Fiduciary and/or list of Parties Involved.]

1. [Use multiple lines if needed to describe the parties who may be involved.]

B. [Permissible venue for filing]

C. [Legal Standard that must be met]

D. [Restrictions on Court discretion, if any]

1. [Use sub headings as needed]

E. [Required Filing or Court fees]

F. Standard Instructions and Forms Available.

1. [List all relevant instructions and forms.]

II. Court Procedure – [Provide short description here. *The purpose of this section is to describe any action the court may be asked to do, or must do, the circumstances that give rise to the court's obligation, the requirements to invoke the decision-making authority of the court, and what action the court is supposed to take. The need for court action could be triggered by a filing by a party, a deadline, a report, a duty of the court etc. The Court Action could be mandated, or discretionary.*]

A. [Provide name of filing or circumstance that gives rise to the need for Court action. (JDF cite, if any) Short description of who may/must file and when, or what gives rise to the need].

B. Requirements of [Name of Filing/circumstance]. [Cite any authority]

1. [List any authorities that explain or modify what must be included in the filing or what circumstances are necessary.]

a. [Include sub-headings as needed]

C. Court Action. [Describe what the court should or may do upon receipt of a filing or the existence of circumstances.]

1. [Add steps as necessary to describe Court Action]

III. Court Procedure – [*If the court may or must take some additional action in the same or related circumstances, add as many court procedures as needed here. Use your discretion to decide if the court actions are appropriately listed here, or if the court action should be broken out as a separate bench card. If your bench card is longer than 2 pages – it should be broken into separate bench cards.*]

Civil Proceedings Benchbook

Table of Contents

Chapter 1 | Case Management

1.1 Tips

A. Use of Management Orders

In the 9th District we use a form Delay Reduction Order and CMO (attached) that is entered automatically in every civil case. Practices vary from district to district. The attorneys are tasked with preparing the draft CMO using the form and then setting a CMC with the judge to cover any disputed issues. If the CMO is stipulated, a CMC may not be needed (assuming you agree with the proposed deadlines). This can save time by not always having a phone conference with the lawyers. CMCs always get set on my calendar at 8:00 a.m. or 8:30 a.m. (typically) for ½ hour in chambers by phone on FTR.

B. DR Cases

In DR cases when the case is set for an orders hearing we also use a form DR scheduling order that sets deadlines pre-hearing (copy attached). These are

usually set by the clerk by phone without the judge participating.

C. CR Cases

Criminal cases have their own jury trial scheduling order (copy attached) and the trial is always set by me on regular criminal docket days. I fill in the blanks by pen and the clerk then finalizes the order and files it.

D. Trial Readiness Conference

Every case set for a major hearing or trial is set for a pretrial readiness conference, typically one or two weeks prior to trial. These also occur at 8:00 or 8:30 a.m. by phone in chambers via FTR.

E. Use of Mediation

We require mediation in all civil and DR cases before a trial date is ever set. This keeps the docket from getting clogged up with cases that likely will never see a courtroom and avoids second and third settings. My experience is the attorneys like it once they get used to it. Obviously, exceptions can be made for cases that

are very unlikely to achieve settlement. Usually the parties will complete discovery and mediation then call the clerk to set a trial date. At that time a trial management order gets established that sets deadlines for witness and exhibit disclosures, trial briefs, etc. I typically task the attorneys with preparing the TMO based on our template (copy attached).

If mediation is not mandated prior to a trial date being offered, a modified CMO will need to be prepared.

F. Case Management Conferences

Case management conferences are largely unnecessary anymore now that attorneys are tasked with Rule 16 and 26 obligations. However, they can be useful for certain types of cases involving a large number of parties, particularly complex issues, or cases with pro se parties who will probably need help getting things teed up for trial.

G. Discovery Disputes

I have adopted a requirement that any discovery disputes need to be addressed on the phone with me directly before any Rule 37 motions can be filed. The

language is in the form CMO. If there is a discovery issue, the matter is set for a brief phone conference by my clerk and the attorneys must file a 3 page summary of the dispute with supporting case law at least 3 days before the conference. This procedure takes a little time, but it saves about a month of delays if you consider that you are short-circuiting the typical brief, response and reply schedule under Rule 121.

A pretrial readiness checklist is also attached that is useful for making sure your attorneys are ready for trial. The PTRC should be set at least 2 weeks in advance of the actual trial, especially for jury trials.

H. Delay Reduction Order Template

DISTRICT COURT, _____ COUNTY, COLORADO

Address

Plaintiff(s):

v.

▲COURT USE ONLY▲

Defendant(s): Case No.: CV

Division:

DELAY REDUCTION ORDER AND ORDER TO SET CASE MANAGEMENT CONFERENCE IN CIVIL CASES ASSIGNED TO

JUDGES _____

1. All parties to civil cases assigned to Judges _____ shall comply with this Order.

2. Deadlines that must be met are: (a) Returns of Service on all defendants shall be filed within 63 days after the date of the filing of the complaint or, alternatively, if that is not done, plaintiff shall file a status report and explain the difficulties in accomplishing service and request an extension of time to complete service; (b) Application for default judgment shall be filed within 30 days after default has occurred; and (c) Within 42 days after the case is at issue, the responsible attorney or, if both parties are not represented by an attorney, the plaintiff, shall notice a case management setting conference with the judicial assistant for the judge to whom the case is assigned: Vicky Goddard for Judge Boyd (970-928-3091), Nancy Risner for Judge Lynch (970-928-3093), Maria Vergara Postay for Judge Seldin (970) 925-7635, ext. 3, Kirsten Stewart (970-928-3095) for Judge Norrdin, and Lisa Stoeber (970) 928-3097 for Judge Neiley). The Case Management Conference shall be set for a time after the parties Proposed Case Management Order is filed. A Case Management Conference is required even in C.R.C.P. 16.1 cases. **Attorneys may**

request a Word version of the Proposed Case Management Order be emailed to them by contacting the respective Judge's Clerk.

3. The court will consider extending these time periods upon a motion showing good cause.

4. At the Case Management Conference, the parties and the court will discuss the parties' Proposed Case Management Order which shall comply with amended C.R.C. P 16 (b)(1) through (17) and the attached Modified Civil Case Management Order. The Case Management Conference and other conferences will be by telephone only and NOT in person unless specifically ordered by the court. The trial schedule will not be set until completion of discovery and mediation or other alternative dispute resolution.

5. Plaintiff shall mail a copy of this order to all parties who enter an appearance and who do NOT file their appearance electronically. Any party who files an appearance by E-Filing, shall take notice of this Order.

Dated: CLERK OF COURT

_____

J. Case Management Order Template

DISTRICT COURT, _____COUNTY, COLORADO	
Plaintiff(s): v. Defendant(s):	**▲COURT USE ONLY▲**
RIO BLANCO COMBINED COURTS Phone Number: (970) 878-5622	Case No.: CV Division:
FORM CIVIL CASE MANAGEMENT ORDER	

The parties shall use this Form Case Management Order when preparing the proposed Case Management Order to be submitted to the court.

Pursuant to C.R.C.P. 16(b), the parties will discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state their position briefly. If an item does not apply, it should be identified as not applicable.

This form shall be submitted to the court in editable format. When approved by the court, it shall constitute the Case Management Order for this case unless modified by the court upon a showing of good cause.

This form must be filed with the court no later than 42 days after the case is at issue and at least 7 days before the date of the case management conference. The parties will comply with the Case Management Order entered by the court

Trial to the Court or Jury will not be scheduled until completion of all discovery except for expert depositions, and completion of mandatory mediation.

The case management conference is set for _____ ___, 20_____ at __:__ _.m.

1. The "at issue date" is: _____.

2. Responsible attorney's name, address, phone number and email address:

_____

3. The lead counsel for each party, _____, and any party not represented by counsel, _____, met and conferred in person or by telephone concerning this Proposed Order and each of the issues listed in Rule 16(b)(3)(A) through (E) on _____ __, 20 ____.

4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each party): _____

5. The following motions have been filed and are unresolved:
_____

6. Brief assessment of each party's position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1): _____

7. The lead counsel for each party, _____, and any party not represented by counsel, _____, met and conferred concerning possible settlement. The prospects for settlement are: _____

8. Deadlines for:

a. Amending or supplementing pleadings: (Not more than 105 days (15 weeks) from at issue date.) _____

b. Joinder of additional parties: (Not more than 105 days (15) weeks from at issue date.) _____

c. Identifying non-parties at fault:_____

9. Dates of initial disclosures: _____
Objections, if any, about their adequacy: _____

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party's inability to provide it, provide a brief statement of reasons for that party's inability and the expected timing of full disclosures _____, and completion of discovery on damages: _____

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1):_____

Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A)): _____

Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): _____

Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): _____

Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): _____

Any physical or mental examination per C.R.C.P. 35: _____

Any limitations on awardable costs: _____

State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations: _____

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II). The Court will allow a deviation from the expert disclosure deadlines set forth in C.R.C.P 26(2)(C) for good cause:

_____

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side:_____

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2):

a. production of expert reports:

i. Plaintiff/claimant: _____

ii. Defendant/opposing party: _____

b. production of rebuttal expert reports: _____

c. production of expert witness files: _____

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C): _____

_____

14. Discovery Deadline: All discovery, except for expert depositions, shall be completed by _____. Requests to supplement discovery after this deadline must be made by written motion. Expert depositions must be completed no later than 45 days before trial unless the parties stipulate to, or the court approves, a later deadline.

15. Discovery Disputes and Rule 37 Motions: Prior to filing any Rule 37 Motion or other motions relating to discovery disputes, the parties will confer in good faith to attempt to resolve the dispute. If those attempts are not successful, the parties will contact the court's judicial assistant to set the matter for a ½ hour telephone conference with the court to address the dispute. At least three business days prior to the telephone conference the parties will each file a brief summary, not to exceed three pages in length (excluding the caption and certificate of service), describing the specific issues in controversy and citing any applicable case law or other authority. At the telephone conference the court and the attorneys will attempt to resolve the dispute. If the dispute is not resolved at that time, the parties, with leave of the court, may then file formal Motions and Responses under Rule 37.

16. Electronically Stored Information: The parties (do)(do not) anticipate needing to discover a significant amount of electronically stored information. The following is a brief report concerning their agreements or positions on search terms to be used, if any, and relating to the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs.

_____

17. Mediation: The court will not set a trial date until all discovery, except for expert depositions, and mediation is completed unless the parties can show good cause for setting a trial without mediation. Pursuant to Rule 16(b)(7) mediation or other ADR will be completed by:_____.

18. Written Motions: Whenever necessary or appropriate, the parties may submit motions that include citations to specific, applicable law. However, prior to engaging in such practice, the parties must confer per C.R.C.P. 121 § 1-15-(8). The court will not consider any motion unless there is a certificate of conferral cited in the motion or a valid reason stating why conferral did not occur. Page limits on motions are as set forth in C.R.C.P. 121 § 1-15(1)(a), and must comply with C.R.C.P 10 as amended effective April 1, 2016. Requests to exceed the page limit must be made by separate motion. If exhibits are attached to any motion, the exhibits must be separately uploaded into the e-filing system and separately designated by exhibit number or letter as well as a brief description of the exhibit so it can be quickly accessed by the court. For example "Exhibit B – Affidavit of John Doe" is acceptable. Exhibits that are merely described by number or letter, without more, will be rejected.

19. C.R.C.P. 16.1 Cases: A Motion for Exclusion from C.R.C.P. 16.1 must be filed in compliance with C.R.C.P. 16.1(d) unless the exclusion automatically applies based on the filing of the Civil Cover Sheet for cases in excess of $100,000 in damages exclusive of attorneys, interest and costs, or the case is otherwise exempt from Rule 16.1. Pursuant to C.R.C.P. 16.1(j), the court does not automatically require a case management conference in C.R.C.P. 16.1 cases, and a form Case Management Order is not required. A Case Management Conference may be requested by either party. A trial date will not be set in any C.R.C.P. 16.1 case until the parties have completed mediation and completed their required disclosures and the limited discovery permitted by the Rule. When mediation is completed, the parties may contact the court for a trial setting conference pursuant to paragraph 21 below. Once a trial date is established, the deadlines for additional discovery under C.R.C.P. 16.1(k)(2) – (8) will apply. The court will try to give Rule 16.1 cases early trial settings if possible.

20. Settlement: The court is to be immediately notified if the case settles.

21. Trial Setting Conference: If mediation is unsuccessful, plaintiff's counsel shall issue a Notice to Set Trial Setting Conference at which time the court will set trial dates and trial preparation deadlines and enter a Trial Management Order. The court requires written confirmation from the plaintiff or responsible attorney that mediation was conducted before a trial date will be given.

22. Other Matters:_____.

DATED this ____ day of _____, 20____.

_____	_____
Signature	Signature
_____	_____
Attorney for Plaintiff	Attorney for Defendant

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is and shall be the Case Management Order in this case.

Dated this ___ day of _____, 20__.

BY THE COURT:

_____
District Court Judge

K. Domestic Scheduling Order Template

District Court, _____County, Colorado Address	
In re the: ☐Marriage of: ☐Civil Union of: ☐Parental Responsibilities concerning:	
Petitioner: and Co-Petitioner/Respondent:	**▲COURT USE ONLY▲** Case No.: ___DR____ Div.: F
DOMESTIC SCHEDULING ORDER	

1. The Court hereby orders that this matter is set for a **_____Orders** hearing at the Courthouse in **Glenwood Springs, Colorado located at 109 8th Street**, on **_____ _____, 2018** (date), from **_____a.m. to _____p.m.** This is currently a **(first or second)** setting.

2. A pre-trial readiness conference is set for **_____ (date) at _____ a.m.** (7 days prior to the hearing).Counsel and all interested parties may participate in this conference by telephone. You are responsible for calling in to the Court's Clerk, _____, at (970) _____.

3. The following schedule is set:

   a. Mediation or other alternative dispute resolution with a neutral third-party is required. If not already completed, mediation shall be completed no later than ___ _____ (date) (35 days prior to the hearing). Each party will share equally the cost of the mediation. Following mediation, Petitioner shall file a status report with the Court indicating whether or not the mediation was successful. The hearing may be vacated if parties fail to engage in mediation without good cause;

   b. If both parties are represented by counsel or at least one side is represented by counsel, the parties shall confer regarding the Joint Trial Management Certificate which shall be filed no later than_____ (date) (7 days before the pre-trial conference). The Court will not accept anything other than a Joint TMC. If neither party is represented by counsel, then each party shall file with the Court a

brief written statement which sets forth the issues that are in dispute and a statement of what the party wants the Court to order. The statement is to be filed no later than _____ (7 days before the pre-trial conference);

c. Experts are to be disclosed no later than _____ (date) (63 days prior to hearing) and in accordance with Rule 16.2(g) and Rule 26(a)(2)(B);

d. Updated sworn financial statements are to be filed no later than _____ (date) (7 days before the pre-trial conference);

e. A list of witnesses shall be filed by each party no later than _____ (date) (7 days before the pre-trial conference);

f. A list of exhibits shall be filed with the court and a copy of the exhibits shall be provided to the other party no later than _____ (date)(7 days before the pre-trial conference).

Petitioner's exhibits shall be marked by numbers.
Respondent's exhibits shall be marked with letters;

g. Each party shall bring to court on the day of the hearing, two extra sets of marked exhibits which shall be placed in three-ring binders with an index. Petitioner shall use white binders, and Respondent shall use black binders. One binder shall be for the Court and the other shall be for the witness;

h. Among the exhibits to be marked and exchanged by each party shall be: (only file those that are applicable and at issue):

i. A proposed parenting plan;

ii. A child support worksheet;

iii. Updated sworn financial statements;

iv. A list of all marital and separate assets, including their value, and how you propose the property should be divided;

v. A list of all marital and separate liabilities and how you proposed the debt should be divided; and

vi. A proposed decree of dissolution to be filed by Petitioner.

Please note that some of these are forms and can be found on the State Judicial website: www.courts.state.co.us/chs/court/forms/domestic/domestic.html.

4. Prior to the hearing, the parties are ordered to confer regarding the exhibits and try to stipulate to as many exhibits as possible. At the beginning of the hearing, the parties shall be prepared to provide the Court with a list of stipulated exhibits.

5. Prior to the hearing, the parties are also ordered to confer regarding any facts that they can stipulate to. The Joint Trial Management Certificate shall contain a list of all stipulated facts.

6. Time during the hearing shall be divided approximately equally between the parties. Allocated time includes opening statements, direct examinations, cross examinations, and closing arguments. The parties may opt to submit written closings in lieu of oral closings. Plan on roughly 6 hours of actual working time for each day of trial. This results in 3 hours per side per day in a 2 party case. The Court keeps a running tally of time used by each side, and the time allocation shall be enforced, absent a showing of good cause. Time allocation is based on the parties' representations to the Court of the total number of days necessary to hear the case.

7. If any party or attorney requires interpretation services, the requesting party or attorney shall coordinate with the Court's Judicial Assistant and Interpreter Services sufficiently in advance of any hearing or trial to ensure that the interpreters have enough notice to attend. In accordance with Chief Justice Directive 06-03, the Court will not arrange, provide, or pay for language interpretation during or ancillary to a court proceeding for the purposes of trial preparation. Prosecutors and parties' attorneys are expected to arrange for language interpretation and translation for case preparation at their own expense, except as provided in CJD 04-04 and 04-05. If any party seeks to use a translation for demonstrative or other purposes during trial, such translation shall be provided to the opposing party no later than 35 days prior to trial.

8. Please do not call the Court's clerk and ask for legal advice or how to fill out the forms. She is not permitted to give any legal advice.

Dated this ___ day of _____, 2018.

BY THE COURT:

L. Criminal TMO Template

GARFIELD COUNTY DISTRICT COURT Court Address: _____ PEOPLE OF THE STATE OF COLORADO v. Defendant:	▲ ▲ Case Number: Div.: F Ctrm: A
CRIMINAL JURY TRIAL SCHEDULING ORDER	

On _____, the Defendant entered a plea of not guilty and this matter was set for a jury trial. The parties must comply with this Scheduling Order.

1. Trial Setting. This matter is set for a _____ day jury trial commencing on _____. On the first day of trial, the Court will meet with the attorneys at 8:15 a.m. Jury selection will begin at 9:00 a.m. The attorneys will appear each day thereafter at 8:30 a.m., and trial will resume at 9:00 a.m. The attorneys should plan on ending each day at 5:00 p.m. out of courtesy to the jurors.

2. Pretrial Motions. A Pretrial Motions Review date is set for _____ (6-8 weeks from the entry of plea), which is the Court's regularly scheduled criminal docket day. Depending on the nature and number of any Pretrial Motions, a Pretrial Motions Hearing will be set at that time. The Defendant does not need to be present on the Pretrial Motions Review date. All Pretrial Motions, except Motions *in limine*, must be filed at least three business (3) days prior to the Pretrial Motions Review date. Responses must be filed twenty-one (21) days after the motion is filed. There will be no replies absent a showing of good cause. The deadline for filing Pretrial Motions also includes the People providing written notice of intent to introduce similar acts evidence or uncharged misconduct under CRE 404(b), or any Defense motion *in limine* to exclude evidence of acts or conduct which the Defense believes the People will introduce as *res gestae*. Any motion to suppress statements or evidence must specify precisely what the moving party is seeking to suppress as well a specific basis for the suppression including relevant legal authority. Motions that merely cite broad constitutional grounds are not sufficient. Motions *in limine* other than *res*

gestae motions must be filed not less than ten (10) business days before the Pretrial Conference. Responses are due seven (7) days thereafter.

3. Pretrial Readiness Conference. A Pretrial Readiness Conference is set for _____ (14 days before trial) from _____ to _____ in Courtroom ____. The Pretrial Readiness Conference will also address proposed jury instructions. At least three (3) business days before the Pretrial Readiness Conference, the attorneys must exchange and file their proposed jury instructions. The parties will jointly submit any stipulated instructions and separately submit any disputed instructions. Stipulated instructions do not require citations. The filed copies must be in Word format for editing.

4. Juror Questionnaires. If either party requests juror questionnaires as part of jury selection, that must be discussed among the attorneys at least seven (7) days prior to the Pretrial Readiness Conference. Proposed questionnaire(s) must be submitted at least three (3) business days before the Conference.

5. Disclosures. Disclosure of witnesses, statements, criminal histories, documents, and other evidence is governed by Crim. P. 16 and this Order.

6. Defenses and Alibis. At least thirty-five (35) days before the first day of trial, the Defendant must give written notice to the Prosecution regarding the nature of the defenses relied on, the names, addresses and phone numbers of its witnesses and notice of alibi.

7. Expert Disclosures. As soon as practicable, but in no event less than fifty-six (56) days before the first day of trial, the Prosecution must disclose the identity, address and phone number of any expert witness whose testimony will be offered under CRE 702. Such disclosure must include any reports or statements made by the expert in connection with the case. To any extent not disclosed in a written report, the substance of any expert opinions to be offered at trial must be disclosed in a written summary by the Prosecution by the same deadline stated above. Not less than forty-nine (49) days before trial, the Defendant must disclose the identity, address and phone number of any expert witness whose testimony will be offered under CRE 702. Such disclosure must include any reports or statements made by the expert in connection with the case. To any extent not disclosed in a written report, the substance of any expert opinions to be offered at trial must be disclosed in a written summary by the Defendant by the same deadline stated above.

8. Expert Objections. If any party intends to object to the admissibility of any expert testimony under C.R.E. 702 (e.g., *People v. Shreck*, 22 P.3d 68 (Colo. 2001)), or for any other reason, such objections must be addressed in a C.R.E. 104 motion filed no later than thirty-five (35) days before trial. If such a motion is filed, the Court will decide whether a

hearing is required. Failure to file such a motion will be deemed a waiver of admissibility objections.

9. Exhibits and Witnesses. At least fourteen (14) days before trial, the attorneys must mark all exhibits they each intend to introduce at trial, and produce a copy of the marked exhibits, with an Exhibit List, to opposing the attorneys. The Prosecution must identify exhibits by numbers. The Defendant must identify exhibits by letters. On the first morning of trial, the attorneys must provide the Court with a copy of their exhibit list with an appropriate grid to track stipulated, admitted, and denied exhibits. At least fourteen (14) days before trial the attorneys must also exchange a list of witnesses they intend to call at trial and the anticipated length of their testimony. A copy of the lists must be provided to the Court at the Pretrial Readiness Conference.

10. Juror Notebooks. Members of the jury will be given juror notebooks when they are sworn as trial jurors. The Court maintains stock criminal notebooks, and the Prosecution's legal assistant should obtain those from the Court Division Clerk in advance of the trial. The attorneys must confer about the contents of the jury notebooks and be prepared to discuss the same at the Pretrial Readiness Conference. The Prosecution will then be responsible for preparing the notebooks in keeping with what is ordered at the Conference. The copy provided to the Court must be included in the record as an exemplar of the notebooks provided to the jurors. The notebooks must be completed and delivered to the Court no later than the day before trial.

11. Pretrial Readiness Conference. At the Pretrial Readiness Conference, the attorneys must provide the Court with a joint witness list which will be used to read to the jury during voir dire. On the first morning of trial, the attorneys must provide the Court with a list of exhibits that have been stipulated and agreed to. The attorneys must also identify to the Court what exhibits they intend to object to.

12. Media Aids. If any attorney plans to use special equipment it is the attorney's responsibility to ensure that the equipment is available, set up, in proper working condition, and ready for immediate use. Any diagrams, enlargements, or illustrations to be used or referred to at trial must be prepared, marked for identification, and disclosed to opposing the attorney in advance of trial and be ready for immediate use at trial. The Court can facilitate access to the Courtroom prior to the trial to test and set up media equipment and computers.

13. Pleas and Continuances. All pleas and requests for continuances must be made within fourteen (14) days prior to trial. No pleas or continuances will be considered by the Court after this deadline except for good cause.

14. Jury Selection. Jury selection will be according to the modified civil process or traditional criminal process (strike one). If the selection process is not stipulated, the attorneys will discuss this at the Pretrial Readiness Conference.

15. Alternate Jurors. _____ alternate juror(s) will be seated. Each party shall have the number of peremptory challenges as established by Crim. P. 24 which may be used against any juror. The alternate(s) juror will be the juror(s) with the highest remaining juror number(s) after all challenges have been exercised.

16. Juror Questions. Juror questions will be permitted. The questions will be reviewed by the Court and the attorneys at the bench before any questions are approved and asked of any witness.

17. Voir Dire, Openings and Closings. The Court conducts an initial voir dire using the question board. Attorney voir dire in chief shall not exceed 30 minutes per side (unless extended by the Court) and 4 minutes for each additional juror. If a prospective juror is excused after a party's completion of voir dire, the voir dire of the substitute juror will be limited to 4 minutes unless the examination discloses good cause for a longer examination. Except for good cause shown, opening statements are limited to twenty (20) minutes per side and closing arguments are limited to 45 minutes per side including rebuttal.

18. Matters requiring interpreter services: If any party or attorney requires interpretation services, the requesting party or attorney shall coordinate with the Court's Judicial Assistant and Interpreter Services sufficiently in advance of any hearing or trial to ensure that the interpreters have enough notice to attend. In accordance with Chief Justice Directive 06-03, the Court will not arrange, provide, or pay for language interpretation during or ancillary to a court proceeding for the purposes of trial preparation. Prosecutors and parties' attorneys are expected to arrange for language interpretation and translation for case preparation at their own expense, except as provided in CJD 04-04 and 04-05. If any party seeks to use a translation for demonstrative or other purposes during trial, such translation shall be provided to the opposing party no later than 35 days prior to trial.

Dated: _____

M. Civil Trial Setting Order Template

DISTRICT COURT _____ COUNTY, COLORADO	
Plaintiff, Click here to enter name, v. Defendant. Click here to enter name.	□ COURT USE ONLY □
	Case Number: Click here to enter # Div.: Courtroom
CIVIL TRIAL SETTING ORDER	

Plaintiff's Attorney: **Click here to enter name.** Defendant's Attorney: **Click here to enter name.** This civil action involves a: Jury Trial.

1. All Discovery (other than depositions of experts) already completed? **Y or N.** If no, all Discovery completed by **No Date Set** (after this deadline, requests to supplement discovery must be made by written motion and accompanying proposed order).
2. Mandatory Mediation/ADR Completed? **Y or N** Confirming Letter from Mediator? **Y or N.** If not yet completed, mandatory mediation/ADR to be completed in person by **No Date Set**.
3. Estimated # of Days for Trial: **Choose # Days**
4. Trial Date(s): Starting **No Date Set**.
5. List of all dates on which Trial shall take place: **Click here to enter dates.**
6. Any Motion to Continue the above trial date, as well as the Response(s) thereto, must be signed both by counsel and the respective party they represent.
7. Court Reporter Necessary:[1] **Y or N**.

[1] Due to budget cuts, use of a court reporter shall be at the expense of the party so selecting. However, the Court's audio recording shall constitute the official record.

8. A Telephone Status Conference shall occur on **No Date Set** at **No Time Set**.
9. Pre-Trial Management Conference (parties & counsel in person): **No Date Set** at **No Time Set**.
10. Pre-Trial Motions:[2]

a. Dispositive Motions (incl. MSJ & Shreck Motions): (90 days prior to start of trial).
b. Non-Dispositive Motions: (60 days prior to start of trial).
c. Motion in Limine: (45 days prior to start of Trial).

11. Motions Hearing date: **No Date Set** at **No Time Set**.
12. Supplemental Disclosure of Witnesses and Exhibits: **Y or N**. If yes, disclosure shall occur at least **# of Days** prior to start of Trial.
13. Exhibits pre-marked & exchanged (with list to court): (30 days prior to start of trial).

a. All exhibits to be labeled: Pltf#: Numbers Deft:#: Letters
b. All Objections to Exhibits must be filed with the Court, in writing, not later than 15 days prior to the start of trial, identifying the nature of the objection WITH PARTICULARITY, such as "foundation," "relevance", etc. with a brief, salient explanation of the legal basis of such objection. If objections are not timely and properly filed, the exhibit(s) will be deemed admitted.
c. Counsel shall provide tabbed exhibit notebooks for the court, opposing counsel and the witness.

14. Counsel shall submit joint and agreed stipulations of fact: (30 days prior to start of trial).
15. Proposed Jury Instructions: (30 days prior to start of trial)
    a. Objections due in writing: (20 days prior to start of trial).
    b. Plaintiff to prepare all stock instructions.
    c. All instructions to be tendered with one original clean copy and one with citations.
    d. Counsel shall also conduct a jury instruction conference amongst themselves no later than 10 days prior to trial to identify which are agreed to and which are objectionable, and verify to the court that the conference occurred.
16. Proposed Findings of Fact, Conclusions of Law, & Judgment with trial briefs must be submitted 15 days prior to start of trial.
17. Witness lists filed with the Court and all witnesses under subpoena or waiver: 30 days prior to start of trial. Any motion for absentee testimony must accompany the witness list. Tardy motions for absentee testimony may be summarily denied.
18. Order of Proof (Joint): 10 days prior to start of trial (Including anticipated order in which witnesses will/or may be called, the estimated time of their testimony, including cross-examination.)
19. Trial Management Order: 30 days prior to start of trial

[2] If the last day of any period of time set forth in this Order falls on a Saturday, Sunday, or legal holiday, the period shall instead run until the end of the day that is not on a Saturday, Sunday, or legal holiday.

a. Parties shall submit a Certificate of Readiness and Compliance with this Trial Management Order at least 10 days prior to start of trial, or sanctions may be imposed.
b. If the trial date is vacated and is reset to another trial date, the parties shall re-submit a Certificate of Readiness, Amended Trial Management Order, or any other material whose content has changed in a material fashion within the time frames set forth above. The parties shall engage in no new discovery without obtaining leave of the Court. Additionally, no additional motions, amendments to pleadings or addition of new parties shall be permitted without the parties first seeking leave of Court.

20. Audio-visual equipment: The parties shall inform the Court of all electronic equipment intended to be utilized during the trial and shall be responsible for providing the same. Parties utilizing electronic equipment shall physically inspect the Courtroom prior to commencement of trial and test the suitability and efficacy of such equipment.

    Whenever necessary or appropriate, the parties may submit motions that include citations to specific, applicable law.[3] However, prior to engaging in motion practice, the parties are hereby reminded of their duty to confer as per C.R.C.P 121 § 1-15(8).

    ***Court is to be notified immediately if case settles.

21. Other Court Comments: **No comments entered**.

    Date: **November 4, 2019**

[3] See C.R.C.P. Rule 121 § 1-15 (3) for requirement to incorporate legal authority or file a responsive brief.

N. Exhibit Tracking Sheet

Exhibit No./Letter	Witness	Description	Stipulation	Offered	Admitted	Refused

O. Pretrial Conference Checklist

Pretrial Readiness Conference Checklist

Conference Occurred On _____(Date) At _____(Time)

For Petitioner:

For Respondent

Trial Is Set For:

Adequate Time Set?

Status Of Witnesses – Under Subpoena If Necessary?

Status Of Exhibits – Premarked And Exchanged – Highlight Stipulated And Objected

Petitioner Use White Notebook Respondent Use Colored Notebook

Petitioner Uses Number Respondent Uses Letters

Trial Notebook For Judge With Grid For Admissions/Denied

Suggest A Separate Notebook For Stipulated Exhibits If There Are A Lot Of Exhibits

Any Contested Or Unusual Evidentiary Issues To Consider?

Joint Trial Management Certificate – 7 Days Prior

For Dr Cases – Updated Financials

Any Need For Electronic Or Telephonic Equipment?

Motions In Limine?

Or Dispositive Motions?

Advise That Parties Should Be Prepared To Submit Proposed Findings And Orders With Necessary Attachments Within 7 Days Of The Completion Of Trial To Assist Court In Preparing A Final Order – Should Submit In Word Format.

For Dr Cases The Proposed Order Should Include The Child Support Worksheets And Maintenance Worksheets As Separate Exhibits

Jury Instructions? Agreed – Highlights Of Dipsuted Instructions?

Jury Notebooks?

Questionaires?

Any Other Matters That Court Needs To Be Advised Of?

Counsel Present On Day 1 At 8:30 A.M.

1.2 Deadlines

For Civil Actions Filed on or After July 1, 2015

Action	Days from At Issue	Rule
Certificate of Review	60 after service of claim against professional § 13-20-602(1)(a)	
Case is "at issue"	0	16(b)(1)
Meet and confer regarding proposed CMO	14	16(b)(3)
Submit proposed Case Management Order (and file 7 days before CMC)	42	16(b)
At issue date		16(b)(3)
Description of case		16(b)(4)
Pending motions		16(b)(5)
Evaluation of proportionality factors		16(b)(6)
Settlement prospects		16(b)(7)
Deadline for amendments (default otherwise)	105	16(b)(8)
Deadline to identify non-parties at fault		16(b)(8)
Disclosures [see deadline below]		16(b)(9)
Computation of and discovery related to damages		16(b)(10)
Discovery limits and schedule [see deadline below]		16(b)(11)
Subjects for expert testimony and number of experts		16(b)(12)
Deadline for expert disclosures (other than presumptive)		16(b)(13)
Oral discovery motions practice of court		16(b)(14)
Discovery of electronically stored information		16(b)(15)
Trial date and estimate length (set at CMC)		16(b)(16)
Other appropriate matters		16(b)(17)

Case Management Conference	49	16(d)(1)
Trial Setting	CMC	16(b)(4)
Automatic Rule 26 disclosures	28	26(a)(1)
Discovery may commence on service of CMO	CMO	16(b)(11)
Election out of Rule 16.1	35	16.1(d)
Election into Rule 16.1	49	16.1(e)

Action	Days Before Trial	Rule
Expert disclosure by claimant	126	26(a)(2)(C)(I)
Expert disclosure by defending party(ies)	98	26(a)(2)(C)(II) or 28 days after claiming party disclosure if later
File motions for Summary Judgment	91	56(c)
Rebuttal expert disclosure	77	26(a)(2)(C)(III)
File Cross-motions for Summary Judgment	70	56(c)
File motions challenging admissibility of expert testimony	70	16(c)
Completion of discovery	49	16(b)(11)
Exchange lists of witnesses & copies of exhibits	42	16(f)(2)(B)
File pretrial motions (except summary judgment)	35	16(c)(9)
File proposed TMO	28	16(f)
Exchange designation of deposition or other preserved testimony	28	16(f)(3)(VI)(D)
Exchange response designation of deposition testimony	14	16(f)(3)(VI)(D)
File trial briefs (if any)	14	16(f)(3)(IV)
Submit itemization of expert witness time and fees	14	26(a)(2)(B)(1)(g)
Exchange reply designation of deposition testimony	7	16(f)(3)(VI)(D)
Jury instructions to court (if any)	7	16(g)
Submit deposition designations to court with objections	3	16(f)(3)(VI)(D)

1.3 Delay Prevention Order Template

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002 Plaintiff v. Defendant(s)	▲ COURT USE ONLY ▲ Case Number: Division: 06 Courtroom: 5B
Delay Prevention Order	

The case was filed on _____, 201_.

CASE STATUS

_____Proof of service has not been filed as to one or more Defendants.
_____ An answer has not been filed .
_____ An answer was filed.

REQUIRED ACTION

You are hereby **ORDERED** to take the following action(s) in this matter within thirty (30) days of the date of this Order:

_____ Complete service and file proof of service, or advise the Court in writing why other action is appropriate.

_____ File a motion for default judgment with an appropriate order containing Findings of Fact, Conclusions of Law, and Judgment pursuant to Rules 10, 52, and 121(1-14), or notify the Court in writing why other action is appropriate.

_____ File a Case Management Order or Certificate of Compliance.

_____ Set this matter for trial, or notify the Court in writing why another action is appropriate. Plaintiff's counsel is responsible. All dates shall first be cleared with opposing counsel and/or any parties appearing pro se after getting dates from this Court.

_____ File a Status Report with the Court.

FAILURE TO RESPOND TO ORDER

In the event a party does not respond to this Order within thirty-five (35) days, the Court will dismiss the claim, cross-claim, or counterclaim of the party failing to respond without prejudice pursuant to C.R.C.P. 41.

Done in Golden, Colorado this day of , 201_.

BY THE COURT:

_____

District Court Judge

Counsel for Plaintiff is ordered to send a copy of this Order to all interested parties within 48 hours and is to file a Certificate of Compliance with the Court within five (5) days.

1.4 Motions Practice

A. Authority

C.R.C.P. § Section 1-15 Determination of Motions

1.(a)…Motions shall be supported by a recitation of legal authority incorporated into the motion except for a motion pursuant to C.R.C.P. 56. Motions or briefs in excess of 10 pages in length, exclusive of tables and appendices, are discouraged.

(b) The responding party has 21 days to file a response unless the motion is filed 42 days or less before trial, then the response is due in 14 days.

(c) Except for a motion pursuant to C.R.C.P. 56, the moving party has 7 days to file a reply. For a C.R.C.P. 56 motion, the reply is due in 14 days.

B. Affidavits

The parties may file affidavits with the motion.

C. Failure to Include Authority

1. Moving Party

If the moving party fails to incorporate legal authority into the motion or fails to file a brief with a C.R.C.P. 56

motion, the court may deem the motion abandoned and may enter an order denying the motion.

2. Responding Party

Failure of a responding party to file a responsive brief may be considered a confession of the motion.

Failure to respond to a Rule 56 motion or a Rule 12(b)(5) motion cannot be deemed a confession of the issue. The Court must consider the issue on the merits under the applicable standard of review.

Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856, 858 (Colo. App. 2007)("We conclude that, like motions for summary judgment, motions to dismiss for failure to state a claim must be considered on their merits and cannot be deemed confessed by a failure to respond.")

D. Oral Arguments and Emergency Motions

1. Time to Decision

If possible, motions shall be determined promptly.

2. Oral Argument

The court *may* order oral argument or an evidentiary hearing, at its discretion.

3. Emergency Motions

Any motion requiring immediate disposition shall be called to the attention of the courtroom clerk by the party filing such motion. Forthwith or Emergency Motion – don't abuse.

E. Scheduling Hearings

A notice to set oral argument or hearing shall be filed in accordance with Practice Standard § 1-6 within 7 days of notification that oral argument or hearing is required or authorized.

F. Failure to Appear

If any of the parties fails to appear at an oral argument or hearing, without prior showing of good cause for non-appearance, the court may proceed to hear and rule on the motion.

G. Sanctions

If a motion is frivolous - reasonable attorney's fees.

H. Duty to Confer

Do it – and confer means confer.

J. Unopposed Motions

These get done faster if you make it clear.

K. Proposed Order

Clerks will reject if no order submitted.

L. Motions to Reconsider

Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored.

1. Grounds

A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice.

2. Due Dates

The motion shall be filed within 14 days from the date of the order, unless the party seeking reconsideration shows good cause for not filing within that time.

Good cause for not filing within 14 days from the date of the order includes newly available material evidence and an intervening change in the governing legal standard.

3. Denial before a Response

The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard.

M. Formatting

Expected from the lawyers and applies equally to court orders.

1. Conferral Certification

Must actually reflect conferral by lawyers. C.R.C.P. 121§1-15(8)

2. Background and Procedural Summary

Who are you?, what do you want?, cite applicable rule or statute – for the court – describe how the case got to you.

3. Fact Summary

Be concise, avoid "plaintiff" "defendant" use descriptive monikers – "wife", "father", "landlord", "tenant", or names: "ABC, LLC", "Smith."

4. Standard of Review

Be brief but accurate – this is essential information, cite to relevant case authority. Avoid string cites, avoid ancient cases unless foundational precedent.

5. Analysis and Argument

Apply the facts to the law.

6. Conclusion

Describe the relief you are seeking. For the court, describe the relief you are ordering.

7. Attachments

Less is more. The more voluminous the attachments, the less likely the lawyer is to prevail. 100 pages of deposition excerpts will not make an argument stronger.

8. Writing Tips

Omit needless words.

Make the paragraph the unit of composition: one paragraph to each topic.

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short or avoid all detail and treat subjects only in outline, but that every word tell. - *William Strunk Jr.*

1.5 Recusal

A. Generally

Recusal, or judicial disqualification, is abstaining from participation in an official action such as a legal proceeding due to a conflict of interest of the presiding court official or administrative officer.

B. Reasons and Process

1. Authority

C.R.C.P. Rule 97.

2. Reasons for Disqualification

- In an action in which the judge is interested or prejudiced.
- If the judge has been of counsel for any party.
- If the judge is or has been a material witness.
- If the judge is so related or connected with any party or attorney as to render it improper to sit on the trial or other proceeding therein.

3. Process

The disqualification may be made on the judge's own initiative, or any party may move for such disqualification and any motion by a party for disqualification shall be supported by affidavit.

- Upon the filing of such a motion, all other proceedings shall be suspended until a ruling is made on the motion.
- Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action.

C. Purpose

"[T]he purpose of the disqualification requirement is to prevent a party from being forced to litigate a matter before a judge with a 'bent of mind.'" *Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992).

"Ordinarily, the question of whether a judge should be disqualified in a civil case is a matter within the discretion of the trial court." Id. (citing *Johnson v. District Court*, 674 P.2d 952, 956 (Colo. 1984); *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988)).

The law requires the use of a reasonable person standard in the context of a motion to recuse a judge in order to discourage judge-shopping. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

D. Insufficient Reasons

"A motion and supporting affidavits which merely allege opinions or conclusions, unsubstantiated by facts supporting a reasonable inference of actual or apparent bias or prejudice, are not legally sufficient to require disqualification." *Goebel*, supra at 999 (citing Wakefield, supra at 73).

Appellate courts have repeatedly emphasized that a trial court's adverse rulings against a party cannot, standing alone, serve to imply the sort of bias or prejudice that justifies disqualification.

Mere opinions or conclusions to the effect that a judge is biased are insufficient, and adverse rulings by the trial court do not constitute grounds for recusal absent evidence that the judge is biased, prejudiced, or has a bent of mind. See Parsons ex rel. *Parsons v. Allstate Ins. Co.,* 165 P.3d 809, 820 (Colo. App. 2006).

E. Reasonable Person Standard

Even if a judge is convinced of his or her own impartiality, disqualification is nonetheless required if circumstances compromise the appearance of fairness and impartiality, such that the parties and the public are left with substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation.

It is a judge's duty to sit on a case unless a reasonable person could infer from the facts that the judge would be prejudiced against a party. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

"Reasonable person" is one who is a well-informed, thoughtful and objective observer, rather than a hypersensitive, cynical, and suspicious person. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

Chapter 2 | Resolution Without Trial

2.1 Rule 12 Primer

C.R.C.P. 12(b): Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) insufficiency of process;

(4) insufficiency of service of process;

(5) failure to state a claim upon which relief can be granted;

(6) failure to join a party under C.R.C.P. 19.

A. Purpose

To refine the pleadings and narrow the scope of issues in the pre-answer stage of litigation or to dispose of a case entirely due to fundamental defects in the claims.

"Pleading" means *only* the following: complaint, answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, a reply to an affirmative defense. C.R.C.P. 7(a).

B. Due Dates

Usually before the Answer is filed. "A motion making any of these defenses *shall* be made before pleading if a further pleading is permitted." The deadline for filing the motion is the same as for filing an Answer (21 days).

Exceptions

- Motions under 12(b)(5) and 12(b)(6) may be made by motion for judgment on the pleadings, or at the trial on the merits. C.R.C.P. 12(h)(2).
- Lack of subject matter jurisdiction 12(b)(1) is non-waivable and *can be raised at any time*.

C. Waivable Defenses

***Beware*:** if the defenses of lack of personal jurisdiction, insufficiency of process, or insufficiency of service of

process are not raised by motion or in a responsive pleading they will be deemed waived. C.R.C.P. 12(g).

The better practice is to raise these defenses by motion rather than by a pleading. If an Answer is filed and lists one of these defenses, it at least raises an issue of whether the Answer was a general "appearance" that waives the claimed defect.

The safest approach is for an attorney never to make an appearance in an action without being sure that any objection to personal jurisdiction is raised upon the first appearance.

Further, if the defense is raised in an answer or other pleading, it will **waive** the defense if any form of affirmative relief is sought from the court, e.g., a counterclaim or cross-claim, or filing a different motion.

D. Subject Matter - 12(b)(1)

1. Typical Issues

Lack of standing, governmental immunity, plaintiff's failure to satisfy statutory prerequisites. Subject matter jurisdiction is a defense that cannot be waived.

2. Burden of Proof and Hearings

The plaintiff bears the burden of establishing the trial court's jurisdiction.

- No deferential standard of review applies to the allegations in the Complaint.
- The court is not bound by the pleadings but looks to the underlying facts alleged and the relief sought.

If the **facts are disputed**, and the court cannot determine its jurisdiction on the face of the pleadings, the court should hold an evidentiary hearing.

- The court may consider evidence outside the pleadings without converting a motion to dismiss to a motion for summary judgment.

If **facts are undisputed**, a hearing is not necessary. The Court does not accord any presumption in favor of the plaintiff, but is obligated "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

The court may allow limited discovery to enable the parties to litigate the issue of jurisdiction fairly.

E. Personal Jurisdiction - 12(b)(2)

1. Background

Rule 12(b)(2) permits a party to contest personal jurisdiction by motion or by answering the complaint and preserving personal jurisdiction as a defense.

Be careful of this approach.

- There is no requirement that a party enter a "special appearance" to challenge personal jurisdiction, but the safest approach is never to make a first appearance in an action without raising the issue prominently.
- A party will be deemed to have waived the objection by seeking any form of affirmative relief from the court such as a counterclaim, cross-claim or a third-party complaint.
- A party may not simultaneously question the authority of the court over him and ask the court for affirmative relief.
- A party may always voluntarily submit to the personal jurisdiction of the court.

2. Burden of Proof and Hearings

The plaintiff has the burden to make a prima facie showing that a nonresident defendant has engaged in sufficient conduct to fairly subject the nonresident to the personal jurisdiction of the court.

- Threshold jurisdiction may be determined from the complaint, but conclusory allegations will not suffice.
- Plaintiff must allege specific actions to suggest that the defendant has voluntarily subjected to the jurisdiction of Colorado courts or has availed herself of the privilege of doing business in Colorado.

If the facts are disputed, limited discovery may be allowed and a hearing may be appropriate.

Plaintiff bears the burden of proof and the motion is not treated as a motion for summary judgment.

If the court decides jurisdiction without a hearing under a prima facie standard, defendant should request a formal evidentiary hearing.

- At that hearing the burden increases and the plaintiff must meet the preponderance of the

evidence standard. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005).

F. Process and Service - 12(b)(3) and (4).

1. Background

Rules 12(b)(3) and 12(b)(4) - same as above, either assert by motion pre-answer or in a motion. Again, it's probably better to file a motion because these defenses can be waived.

2. Process

Process means proper compliance with the formal requirements of a pleading – i.e., proper identification of the parties, signatures on the summons, necessary certifications or verifications.

3. Service

Service is proper physical service or other means of obtaining service under Rule 4. Process and service of process are founded on constitutional concerns under the Due Process Clause.

4. Remedy

The remedy for invalid service or process is typically NOT dismissal but to allow the action to stand so that the plaintiff can continue to seek proper service.

This prevents the tolling of the statute of limitations or other harm to a plaintiff.

However, a case may be dismissed for failure to prosecute or to obtain service in a reasonable time.

G. Failure to State a Claim – 12(b)(5)

1. Background

Rule 12(b)(5) motions challenge the legal sufficiency of a pleading and to terminate claims for which there is no remedy under the facts as pleaded.

- The motion does not involve an adjudication of facts.
- If "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."

2. Standards

A 12(b)(5) motion tests the formal sufficiency of a plaintiff's complaint.

- Motions to dismiss are looked upon with disfavor.
- The court must construe all well-pleaded allegations of the complaint against the defendant and in the light most favorable to the plaintiff.

The court reviews a motion to dismiss under C.R.C.P. 12(b)(5) pursuant to the standard set forth in *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

- Prior to the *Warne* decision, a complaint could not be dismissed for failure to state a claim unless the plaintiff could prove "no set of facts" in support of the claim that would entitle it to relief. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995).

Now, to withstand a motion to dismiss for failure to state a claim,

- "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Warne*, at 589.

- Because the plaintiff has an obligation "to provide the grounds of his entitlement to relief," the "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 591.
- The court must accept all allegations of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff. *Sch. Dist. No. 1 in City & Cty. of Denver v. Masters*, 2018 CO 18, ¶ 13.
- However, the court does not need to afford any deference to a complaint's bare legal conclusions. *Id.*

3. Facts to Consider

When considering a motion to dismiss for failure to state a claim, the court may consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7.

- The consideration of documents that are attached to the complaint does not convert the motion to

one for summary judgment. *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005).

- Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Begley v. Ireson*, 2017 COA 3, ¶ 7.
- If the court considers other types of information, the court must treat the motion as one for summary judgment.
- A document that is referred to in the complaint, even if not attached, is not a matter "outside the pleadings."
- An effective defense might be to respond to the motion with an affidavit to force conversion to a motion for summary judgment otherwise you risk entry of judgment without having fully briefed or articulated the disputed facts.

Dismissal of a claim under Rule 12(b)(5) based upon a statute of limitations is proper only when the bare allegations of the complaint show that the claim is outside the required statutory period.

When filed after an answer, a defendant's motion to dismiss for failure to state a claim upon which relief can be granted is properly addressed as a motion for judgment on the pleadings. Practically speaking, the standard is much the same, but the court reviews all

the pleadings in addition to the motion, response and reply.

H. Failure to Join a Party – 12(b)(6)

Whether a non-joined party must be brought into the case can be raised by pre-answer motion or in the answer. It may be raised in a motion for judgment on the pleadings or at the trial on the merits. Rule 12(h)(2).

The defense of failure to join a necessary party is not *per se* a motion to dismiss the complaint in the first instance.

- It requires a two-step process for the court to first determine whether the non-joined party is truly necessary to the action. If so, the plaintiff must try to join the party.
- Then, step two, where joinder is impossible (lack of jurisdiction or loss of venue), the court then considers whether to dismiss. C.R.C.P. 19(b).

If the parties are not necessary, the case may proceed without them. If they are indispensable the case needs to be dismissed.

J. More Definite Statement – 12(b)(e)

See C.R.C.P. 10(b) as to stating claims and defenses in separate numbered paragraphs and in separate counts or defenses. This motion is to clarify pleadings and issues.

The motion for more definite statement permits a party to obtain better detail with respect to "[a] claim which is vague, indefinite, or fails to adequately allege a material fact." Typically used to compel a party to plead fraud or other special matters more particularly as required under Rule 9.

The motion must be consolidated with other defenses then available under Rule 12(b) as required by 12(g)

K. Motion to Strike – 12(b)(f)

The moving party may file a motion to strike on the basis of "redundancy, immateriality, impertinence or scandal."

- Motion must be filed before filing a responsive pleading.
- Very limited in scope to redundancy, immateriality, impertinence or scandal.

- Often a motion to strike is purely dilatory, because a movant can hardly claim to be prejudiced by a redundant complaint.

L. Finality

Dismissal for lack of subject matter jurisdiction is not a decision on the merits and it typically a dismissal without prejudice.

- "A dismissal under C.R.C.P. 12(b)(1) is not an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted." *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 2016 COA 178, ¶ 35.
- Likewise, dismissals for lack of personal jurisdiction, failure to prosecute, failure to file a complaint under Rule 3, or failure to join a party under Rule 19 (implicating Rule 12(b)(6)) are generally without prejudice because these are technical or procedural deficiencies that might be curable. *See* C.R.C.P. 41(b)(1),

In contrast, 12(b)(5) dismissals will typically be with prejudice since they reach the merits of the claims.

Rule 54 Certification

In deciding whether to issue a Rule 54(b) certification (i.e., an express determination that there is no just reason for delay and an express direction for the entry of judgment) with respect to a decision which does not dispose of the entire case in a multiple claims action, a trial court must engage in a three-step process.

- First, it must determine that the decision to be certified is a ruling upon an entire "claim for relief."
- Next, it must conclude that the decision is final "in the sense of an ultimate disposition of an individual claim."
- Finally, the trial court must determine whether there is just reason for delay in entry of a final judgment on the claim. *Id. Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982).

Specific facts supporting the no just reason for delay must be articulated. *Galindo v. Valley View Ass'n*, 2017 COA 78.

M. Attorney's Fees

Commented [ss1]: This section is duplicative of the next, Section N.

Under 13-17-201, if a party prevails on dismissal, she gets attorney fees, but it MUST be a tort claim. This section provides in relevant part:

> In all actions brought as a result of a death or injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under C.R.C.P. 12(b) of the Colorado Rules of Civil Procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

Exception

An award of attorney fees is not warranted under this section when C.R.C.P. 12(b) was not the basis for dismissal of one or more claims in the action.

Query

If the motion to dismiss alleges lack of personal jurisdiction can the attorney request fees without waiving the jurisdictional defect?

N. Recovering Attorney's Fees

Commented [ss2]: This section is duplicative of the previous, Section M.

Under § 13-17-201, C.R.S., if a party prevails on dismissal of a tort claim under Rule 12(b), she gets her attorney fees! This section states:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action. This section shall not apply if a motion under rule 12(b) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure.

Exception – Not the Basis for Dismissal

An award of attorney fees is not warranted when C.R.C.P. 12(b) was not the basis for dismissal of one or more claims in the action.

- The fee-shifting provision in section 13–17–201 was enacted as part of the General Assembly's substantial tort reform efforts of the mid–1980s. *Id.*
- In enacting section 13–17–201, the General Assembly sought to discourage and deter the

institution or maintenance of unnecessary litigation concerning tort claims. *Emp'rs Ins. of Wausau v. RREEF USA Fund–II (Colo.), Inc.*, 805 P.2d 1186, 1188 (Colo.App.1991).

Exception – Not Primarily a Tort Action

- Section 13–17–201 applies when the trial court dismisses an **entire tort action** pursuant to C.R.C.P. 12(b).
- In determining whether the statute applies, the court focuses on the manner in which claims are pleaded. *Crow v. Penrose–St. Francis Healthcare Sys.,* 262 P.3d 991, 997 (Colo.App.2011).
- When the action contains a mix of contract and tort claims, fees may be awarded if the action is *primarily* a tort action, *US Fax Law Ctr., Inc. v. Henry Schein, Inc.*, 205 P.3d 512, 517-18 (Colo. App. 2009); *Dubray v. Intertribal Bison Coop.,* 192 P.3d 604, 607 (Colo.App.2008).
- We rely on the plaintiff's characterization of the claims in the complaint and do not consider what should or might have been pleaded. *Kennedy v. King Soopers Inc.,* 148 P.3d 385, 388 (Colo.App.2006).

- C.R.S. § 13–17–201 is applicable where both tort and non-tort claims are pled and dismissed under Rule 12(b). *Torres v. Am. Family Mut. Ins. Co.*, 606 F. Supp. 2d 1286, 1292 (D. Colo. 2009); *Crow v. Penrose–St. Francis Healthcare Sys.,* 262 P.3d 991, 997 (Colo.App.2011).
- When a plaintiff has pleaded both tort and non-tort claims, a court must determine, as a matter of law, whether the essence of the action was one in tort, in order to ascertain if section 13–17–201 applies. "The overall thrust and purpose of his claims" *Castro v. Lintz*, 2014 COA 91, ¶ 33

Defenses

A party may avoid liability under the statute by seeking a voluntary dismissal or confession of the defendant's motion. *Crow v. Penrose–St. Francis Healthcare Sys.,* 262 P.3d 991, 997 (Colo.App.2011). C.R.C.P. 41.

Fees may be awarded even if the entire suit is not dismissed, but one defendant is dismissed. *Smith v. Town of Snowmass Village,* 919 P.2d 868 (Colo.App.1996).

Section 13–17–201 provides that in certain tort actions where "the defendant" moves for and is granted

pretrial dismissal under C.R.C.P. 12(b), "such defendant" shall have an award of attorney fees. *Stauffer v. Stegemann*, 165 P.3d 713, 718 (Colo. App. 2006), *as modified on denial of reh'g (Nov. 2, 2006).*

2.2 Motion to Dismiss 12(b)(5) – Example Order

DISTRICT COURT, _____ COUNTY, COLORADO Address: Telephone: PLAINTIFF: BIFF BADGER TRUST v. DEFENDANTS: DEBBIE'S DONUT EMPORIUM, INC. BAD BURGER MEAT, INC and ROGER RABBIT and JOAN JETT, individually	**▲ COURT USE ONLY ▲** **Case No.:** 2018CV-----1

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN PART AND DENYING IN PART PURSUANT TO C.R.C.P. 12(b)(5)

This is a suit on a one million dollar promissory note ("Note"). Plaintiff is the lender/holder of the Note, and the Defendants are claimed to have defaulted under the Note and are liable for its payment and other relief. The matter is before the court on the Defendants' Motion to Dismiss for Failure to State a Claim pursuant to C.R.C.P. 12(b)(5) ("Motion"). The Motion has been fully briefed. Plaintiff opposes the Motion. After considering the Motion, the Response, and the Reply, the court grants the Motion to dismiss the Plaintiff's tort claims with prejudice because they are barred under the economic loss rule. The contractual claims against the individual Defendants are also dismissed with prejudice because they are not a party

to the Note. The court denies the Motion as to the Plaintiff's remaining contractual claims against the corporate Defendant as explained below.

I. PROCEDURAL SUMMARY

On June 15, 2018, Plaintiff, ("Trust") filed its First Amended Complaint ("Complaint") against the Defendants. The Complaint alleges eight claims for relief: fraud, negligent misrepresentation, tortious interference with contract, and civil conspiracy against Rabbit and Jett individually; breach of contract against DONUT, INC. AND BAD BURGER; and, unjust enrichment, specific performance, and breach of the implied covenant of good faith and fair dealing as to all the Defendants. The first four of these claims, fraud, negligent misrepresentation, tortious interference with contract, and civil conspiracy are torts. The remaining claims sound in contract, implied contract, or quasi-contract. Defendants filed their Motion to Dismiss on July 6, 2018. The Trust's Response was filed August 6, 2018, and Replies were then filed by all the Defendants.

In summary, the Defendants argue that the tort claims asserted against Rabbit individually are barred by the economic loss rule. With regard to the remaining contract claims, the Defendants argue that the Trust has failed to state a plausible claim for relief based on the plain language of the underlying Note, because there has been no monetary breach, any other alleged breaches are not material, the

Plaintiff waived certain rights, and the unjust enrichment claim cannot co-exist with the breach of an express contract claim. The court deals with these arguments in turn.

II. LEGAL STANDARD

A motion to dismiss tests the formal sufficiency of a complaint. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000). Motions to dismiss should only be granted when the plaintiff's allegations cannot support a claim as a matter of law. *Miller v. Bank of New York Mellon*, 2016 COA 95, ¶ 16.

The court reviews a motion to dismiss under C.R.C.P. 12(b)(5) pursuant to the standard set forth in *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). Prior to the *Warne*, decision, a complaint could not be dismissed for failure to state a claim unless the plaintiff could prove "no set of facts" in support of the claim that would entitle it to relief. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). Now, to withstand a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Warne*, 373 P.3d at 589. Because the plaintiff has an obligation "to provide the grounds of his entitlement to relief," the "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 591. The court must accept all allegations of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff. *Sch. Dist. No. 1*

in City & Cty. of Denver v. Masters, 2018 CO 18, ¶ 13. However, the court does not need to afford any deference to a complaint's bare legal conclusions. *Id*.

When considering a motion to dismiss for failure to state a claim, the court may consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7. The consideration of documents that are attached to the complaint does not convert the motion to one for summary judgment. *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005). Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Begley v. Ireson*, 2017 COA 3, ¶ 7.

III. APPLICABLE LAW – ECONOMIC LOSS RULE

The economic loss rule provides that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Town of Alma v. AZCO Constr., Inc.*, at 1264. The purposes of the rule "are to maintain a distinction between tort and contract law, enforce parties' expectancy interests so that they can reliably allocate risks and costs during their bargaining, and encourage parties to build any cost considerations into their contracts." *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004).

Our supreme court has identified three factors to determine whether a tort duty arises independently of the parties' contract: (1) whether the relief sought in tort is the same as the contractual relief; (2) whether there is a recognized common law duty of care in tort; and (3) whether the tort duty differs in any way from the contractual duty. *Id.* at 74; *see also Makoto USA, Inc. v. Russell*, 250 P.3d 625, 627 (Colo. App. 2009) (noting that to show that an independent duty of care exists under tort law, two conditions must be satisfied: (1) the duty must arise from a source other than the relevant contract, and (2) that duty must not be a duty also imposed by the contract). *Former TCHR, LLC v. First Hand Mgmt. LLC*, 2012 COA 129, ¶¶ 21-23.

A "critical question" in determining the applicability of the economic loss rule is not whether the tort claims are related to the promises that eventually form the basis of the contract, but "whether the tort claims flow from an independent duty under tort law." *Van Rees v. Unleaded Software, Inc.*, 2016 CO 51, ¶ 12. Even if a duty is separately recognized under tort law, it is not independent if it is also imposed under the parties' contract because courts assume that sophisticated parties can include the potential cost of breach of contractual duties in contracts they negotiate. *A Good Time Rental, LLC v. First American Title Agency, Inc.*, 259 P.3d 534, 537 (Colo. App. 2011); *Casey v. Colorado Higher Educ. Ins. Benefits All. Tr.*, 2012 COA 134, ¶ 28.

In that regard, "[t]here is an important distinction between failure to perform the contract itself, and promises that induce a party to enter into a contract in the first place." *Van Rees v. Unleaded Software, Inc.*, at ¶ 13. "It is thus clear that a contracting party's negligent misrepresentation of material facts prior to the execution of an agreement may provide the basis for an independent tort claim asserted by a party detrimentally relying on such negligent misrepresentations." *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, 72 (Colo. 1991). The same principle applies to intentional or fraudulent misrepresentations of material fact that are made to induce someone to enter into a contract. *See, Van Rees v. Unleaded Software, Inc.*, at ¶ 15.

IV. FACTS THAT ARE UNDISPUTED OR PRESUMED TRUE

The following facts, taken from the Complaint, the Motion, Response, and Reply as well as the exhibits attached to the Complaint (including the Note) are undisputed or presumed true under the standards described above.

On April 13, 2017, the Trust loaned DONUT, INC. one million dollars in connection with the sale of a parcel of real property located in Rifle Colorado. The maturity date of the Note is April 13, 2022. DONUT, INC. is the designated borrower under the Note. BAD BURGER is also a party to the Note, but is obligated to perform only certain limited provisions of the Note relating to the inspection and

reporting provisions of paragraph 2, the conversion provisions of paragraph 3, and the default provisions of paragraph 6(b). Rabbit signed the Note in their capacity as managers of DONUT, INC. and BAD BURGER, INC. respectively. Neither Rabbit nor Jett personally guaranteed the Note.

Paragraph 2 of the Note provides the Trust with certain inspection rights for the property and also obligates DONUT, INC. and BAD BURGER, INC. to provide the Trust with "the same quarterly financial statements of [DONUT, INC.'s] and [BAD BURGER, INC.'s], as applicable, business operations provided to [DONUT, INC.'s] members and [BAD BURGER, INC.'s] members, as defined in [BAD BURGER, INC.'s] operating agreement."

Paragraph 3 of the Note gives the Trust the option to convert up to $500,000 of the unpaid principal amount of the Note into "Class A" equity holdings in BAD BURGER, INC. subject to a 30 day advance notice requirement and a schedule of prices for such membership units (the "Conversion Right").

Finally, paragraph 16 of the Note obligates DONUT, INC. to provide the Trust with proof of insurance for certain coverages mandated by the Note. The Trust asserts that compliance with the inspection and financial disclosure provisions as well as the proof of insurance is essential for it to properly evaluate when and if it might decide to exercise its Conversion Right.

On February 6, 2018, the Trust served DONUT, INC. and BAD BURGER, INC. with a notice of default with regard to the inspection, disclosure and insurance provisions referenced above. The notice gave them until March 8, 2018, to cure. The Trust asserts that the default was not timely cured. For the purpose of the Motion, the court accepts this assertion as true.

On April 24, 2018, DONUT, INC. notified the Trust that it intended to repay the Note in full in no less than 40 days. This apparently caught the Trust off guard inasmuch as it claims that the payoff notice "unexpectedly accelerated"[4] its decision whether or not to exercise its Conversion Right. In response to the payoff notice, the Trust served DONUT, INC. and BAD BURGER, INC. with notice on May 2, 2018, that it intended to exercise its Conversion Right by June 1, 2018, ("Notice of Conversion Right"). The Trust then followed up with a renewed demand for DONUT, INC.'s and BAD BURGER, INC.'s financial and business information on May 15, 2018.

On May 25, 2018, DONUT, INC. and BAD BURGER, INC. rejected the request for such information. They then implemented a counterstroke to the Trust's Notice of Conversion Right by issuing a Notice to Exercise Call with regard to the membership interests the Trust might acquire if the Conversion Right was exercised.

[4] *See* Complaint at ¶ 16.

The Trust avers that the Notice to Exercise Call, if implemented, "would have the effect of unilaterally nullifying any value of [the Trust's] Conversion Right in violation of Defendant BAD BURGER, INC.'s obligations under Section 3(g) of the Note." Complaint at ¶ 20. Paragraph 3(g) of the Note prohibits BAD BURGER, INC. and DONUT, INC. from reorganizing or recapitalizing the business entities in any manner that would impair the Trust's Conversion Right. The court accepts as true the Trust's allegation that the membership call would impair the Conversion Right.

Finally, on May 31, 2018, the Trust served DONUT, INC. and BAD BURGER, INC. with its "Notice of Conditional Suspension of May 2, 2018, Notice of Conversion." That notice was provided on the same day the Trust filed this lawsuit. The notice stated that the Trust was "conditionally" suspending its Notice of Conversion "pending a formal declaration by the Garfield County District Court" of the Defendants' obligations under the Note. The Defendants argue that the notice effected a waiver of the Trust's rights to pursue any specific performance remedy under the Note.

V. ANALYSIS

The Court first addresses the economic loss issue. The tort claims in this case are asserted solely against the individual Defendants Rabbit and Jett. It is undisputed that Rabbit and Jett are not parties to the Note. As discussed above, for the Trust to

survive a motion to dismiss the tort claims, the court must find that the individual Defendants owed a duty to the Trust arising independently from the duties described in the Note.

The basic thrust of the tort claims against the individual Defendants is that they fraudulently or negligently represented to the Trust that DONUT, INC. and BAD BURGER, INC. would comply with the contractual terms of the Note and that they fraudulently or negligently failed to disclose that they actually intended not to comply with the Note. The specific provisions of the Note which the Trust alleges the individual Defendants never intended to honor pertain to the obligation to disclose financial and business information, the obligation to provide proof of insurance, and the obligation not to take and corporate action that would frustrate or impair the Trust's Conversion Right (i.e., the Notice to Exercise Call).

Obviously, each of these duties arises directly from the terms of the Note, and the Trust has failed to identify any independent source of such duties other than the parties' written contract to which Rabbit and Jett were not parties. It goes without saying that the economic loss rule will not bar tort claims arising from pre-contract fraudulent or negligent misrepresentations of material facts, or the failure to disclose material facts. "However, the scope of this tort pertains to conduct that leads or induces another to enter into a transaction or agreement, *not to representations*

directly related to performance of a contract." *A Good Time Rental, LLC v. First Am. Title Agency, Inc.*, 259 P.3d 534, 541 (Colo. App. 2011) (emphasis added.)

In cases where the economic loss rule was found not to apply, the liable parties either withheld or misrepresented material facts that were distinct from the express duties under the contract. For example, in *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, 71 (Colo. 1991), the buyer relied on inaccurate representations contained in video tapes, brochures, and literature that were prepared by the seller. In *Van Rees v. Unleaded Software, Inc.*, 2016 CO 51, the defendant knew at the time the contract was negotiated that it lacked sufficient staff to complete the website on time and that it was not actually performing any search-engine optimization work as represented to the plaintiff. *In re Estate of Gattis*, 2013 COA 145, ¶ 9, an expansive soils case, the defendants failed to disclose that they were the principals of entity that had performed repair work on the property and also "actively concealed" their knowledge that expansive soils underlay the residence and had already caused serious structural damage. In *First Nat'l Bank v. Rabbit*, 616 P.2d 154, 155–56 (Colo. App. 1980) the plaintiff purchased a business in reliance on incorrect statements regarding organization, inventory, and projected profits.

In contrast, the Trust here has neither shown nor even alleged that Rabbit or Jett failed to disclose material facts or made any misrepresentations about anything that was not also a contractual obligation under the Note. A claim for fraudulent

misrepresentation or concealment in the performance of a contract does not arise independently of the duties set forth in the contract except as described in the cases above. *See Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 291 (Colo. App. 2009). The claimed misstatement or omission must be extraneous to the duties created under the contract. Claims for fraudulent misrepresentation and concealment "may be barred if they arise from duties implicated by the contract and relate to the performance of that contract." *See id.* at 292–93; *Former TCHR, LLC v. First Hand Mgmt. LLC*, 2012 COA 129, ¶¶ 24-25.

That is precisely the situation here. The duties allegedly breached by Rabbit and Jett are identical to and indistinguishable from the contractual duties under the Note. The Trust's allegation that the Defendants never intended to adhere to the contract terms merely begs the question. That is no different than a claim that they intentionally breached the duties under contract. To hold otherwise would create an exception to the economic loss doctrine that would swallow the rule. Thus, the Trust's tort claims are barred by the economic loss rule because they implicate duties that are identical to the duties under the Note. The duties are not independent from the contractual duties.

This conclusion applies regardless of the fact that Rabbit and Jett are not parties to the Note and are named individually. "When the economic loss rule bars a claim against a corporate entity, it may also bar claims against that entity's officers

and directors, even if the officers and directors were not parties to the contract at issue." *Former TCHR, LLC v. First Hand Mgmt. LLC*, 2012 COA 129, ¶¶ 24-25; *see Parr v. Triple L & J Corp.*, 107 P.3d 1104, 1108 (Colo. App. 2004) (Tortious interference claim against president of landlord entity barred by economic loss rule where duty not to interfere with lease arose under contract.) Accordingly, the Trust's first, second, third, and sixth claims for relief against the individual Defendants Rabbit and Jett are dismissed with prejudice because they are bared by the economic loss rule.

The court now turns to the remaining claims for relief. The fourth claim for relief is for breach of contract against DONUT, INC. and BAD BURGER, INC.. To survive a motion to dismiss a breach of contract action, the plaintiff must plausibly allege (1) the existence of a contract; (2) that he performed his duties under the contract (or that he was justified in failing to do so); (3) that the defendant failed to perform the contract; and (4) resulting damages. *Long v. Cordain*, 2014 COA 177, ¶ 19. In viewing the allegations in the Complaint in favor of the Trust, the court finds that the Trust has sufficiently pled a claim for breach of contract against DONUT, INC. and BAD BURGER, INC..

There is no dispute that the Note is a contract and that the contract provides the Trust with certain rights under the paragraphs referenced in the Complaint. There is no dispute that the Trust funded the loan and thus performed. The Trust alleges

that the corporate defendants failed to comply with their obligations to provide financial and business information, proof of insurance, and to adhere to the Trust's Conversion Rights. Those are valid rights under the Note. The allegations in the Complaint are therefore sufficient to state a plausible claim for relief for breach of contract under the *Warne* standards. The Motion is therefore denied as to breach of contract claim against DONUT, INC. and BAD BURGER, INC..

With regard to unjust enrichment claim, Defendants argue that because there is an express contract, an unjust enrichment claim cannot also lie. The Defendants are partly correct. Unjust enrichment is a form of quasi-contract or contract implied in law. The test for recovery under an unjust enrichment theory requires a showing that: (1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Redd Iron, Inc.v. International Sales and Service Corp.* 200 P.3d 1133 (Colo. App. 2008). A party cannot recover under both a breach of an express contract theory and an unjust enrichment theory; however, recovering on a claim and asserting a claim are two different things.

It has been generally recognized that a party may plead unjust enrichment in the alternative to a breach of contract claim at the outset of litigation. Indeed, the Colorado Supreme Court has recognized that a party may plead alternative causes of action in its initial pleading under C.R.C.P. Rule 8(e)(2). *See, Super Valu Stores,*

Inc. v. District Court, 906 P.2d 72 (Colo. 1995). That party, or the court, will ultimately have to decide which claim remains viable at a later date based on the evidence produced in the case. *See* C.R.C.P. 8(e)(2). *Hermmann Management Services v. Mediacell, Inc.*, 176 P.3d 856, 860 (Colo. App. 2007)(Plaintiffs may not be permitted to recover under theories of both breach of express contract and quantum meruit, but it was not inappropriate to plead both theories of recovery in the complaint.)

Accepting the allegations of Trust's Complaint as true and in the light most favorable to the Trust, the court finds that the Trust has sufficiently pled claims to support unjust enrichment as an alternative theory to the breach of contract claim against DONUT, INC. and BAD BURGER, INC.. Accordingly, Defendants' Motion to dismiss the unjust enrichment claims is denied, but only as to DONUT, INC. and not BAD BURGER, INC..

The Motion is granted with regard to the individual Defendants Rabbit and Jett because the Complaint only alleges their claimed fraud as a basis for the unjust enrichment claim against them individually. *See* Complaint ¶ 46. It is undisputed that Rabbit and Jett are not parties to the Note. The court has already determined that any alleged fraud claim against them is barred by the economic loss rule. Furthermore, the Trust has not alleged any other fraudulent conduct by them at all,

let alone with the degree of specificity required by C.R.C.P. 9(b). Nor has the Trust stated any claim for piercing the corporate veil against the individual Defendants.

To determine whether it is appropriate to pierce the corporate veil, a court must make a three-part inquiry. First, the court must determine whether the corporate entity is the "alter ego" of the person or entity in issue. Second, the court must determine whether the corporate fiction was used to perpetrate a fraud or defeat a rightful claim. Third, the court must consider whether an equitable result will be achieved by disregarding the corporate form and holding a shareholder or other insider personally liable for the acts of the business entity. All three prongs of the analysis must be satisfied. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009). Even reading the allegations in the Complaint liberally, the Trust has failed to allege any facts that would support a claim for piercing the corporate veil. Accordingly, the Motion to dismiss is granted as to the individual Defendants on the unjust enrichment claim.

The seventh claim for relief is for specific performance of the Note. First, the court notes that specific performance is more properly pled as a remedy rather than as a stand-alone claim for relief. Before the remedy can be applied, the Trust will first need to establish that there was a breach of the contract and that there is no adequate remedy for damages or other relief under the contract. "Equity will not decree specific performance of a contract to convey land if there is an adequate

remedy at law." *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 515 (Colo. App. 2001); *Allstate Ins. Co. v. Med. Lien Mgmt., Inc.*, 2015 CO 32, ¶ 15 ("the remedy of specific performance is generally unavailable unless the promisee's remedy in damages would be inadequate.") Whether the Trust can establish these factors is a fact question that is at this time premature and incapable of resolution under the standards for C.R.C.P. 12(b)(5) dismissal.

With regard to the Defendants' argument that the Trust waived its right to demand specific performance by sending the Notice of Conditional Suspension, the court is not persuaded. Waiver is the intentional relinquishment of a known right. "Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests an intent to relinquish the right or acts inconsistently with its assertion." *In re Marriage of Robbins*, 8 P.3d 625, 630 (Colo. App. 2000). To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Burlington Northern R.R. Co. v. Stone Container Corp.*, 934 P.2d 902 (Colo.App.1997).

Here, the Notice of Conditional Suspension was clearly, by its express terms, conditional. The notice plainly states that the Trust was only conditionally suspending its Conversion Right pending a decision from the court. There was therefore no unequivocal waiver of that right. Accordingly, the court denies the

Motion with regard to the specific performance claim; however the "claim" is actually the assertion of a remedy and not a separate claim for relief and will be treated as such hereafter.

Finally, the eighth claim for relief is breach of the covenant of good faith and fair dealing asserted against all the Defendants. The covenant of good faith and fair dealing is implied in every contract and requires good faith in the discretionary performance of contractual obligations. *See City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006)*. The disclosure of financial information under the Note involved a level of discretion because that disclosure was to be the same as was provided to the companies' members. The standard is nowhere defined in the Note. Likewise, the corporate Defendants' decision to exercise a call implicates a discretionary act that may or may not violate the covenant of good faith and fair dealing. Accordingly, and for the same reasons that the court denied the Motion with regard to the breach of contract claims, the court also denies the Motion to dismiss with regard to the breach of the covenant of fair dealing claims asserted against DONUT, INC. and BAD BURGER, INC..

Likewise, and for the same reasons as previously stated, the court grants the Motion to dismiss as to the individual Defendants. As explained above, Rabbit and Jett are not parties to the Note, and as a result, they are not subject to the implied covenant of good faith and fair dealing. Again, the Trust has asserted no basis to

hold them personally liable for the acts of the corporate entities under a piercing of the corporate veil theory. The Complaint is devoid of any such allegations. The Motion to dismiss is therefore granted as to them.

V. CONCLUSION AND ORDER

Based on the forgoing, the court hereby GRANTS the Motion to Dismiss as to all claims asserted against the individual Defendants Rabbit and Jett. They are dismissed from the case, and the claims against them are dismissed with prejudice. The court DENIES the Motion to Dismiss as to the Trust's claims for breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing asserted against DONUT, INC. and BAD BURGER, INC.. The "claim" for specific performance will be preserved as a potential remedy subject to later proof. The Trust will, at some future point, be requ This is a suit on a one million dollar promissory note ("Note"). Plaintiff is the lender/holder of the Note, and the Defendants are claimed to have defaulted under the Note and are liable for its payment and other relief. The matter is before the court on the Defendants' Motion to Dismiss for Failure to State a Claim pursuant to C.R.C.P. 12(b)(5) ("Motion"). The Motion has been fully briefed. Plaintiff opposes the Motion. After considering the Motion, the Response, and the Reply, the court grants the Motion to dismiss the Plaintiff's tort claims with prejudice because they are barred under the economic loss rule. The contractual claims against the individual Defendants are also dismissed with

prejudice because they are not a party to the Note. The court denies the Motion as to the Plaintiff's remaining contractual claims against the corporate Defendant as explained below.

I. PROCEDURAL SUMMARY

On June 15, 2018, Plaintiff, ("Trust") filed its First Amended Complaint ("Complaint") against the Defendants. The Complaint alleges eight claims for relief: fraud, negligent misrepresentation, tortious interference with contract, and civil conspiracy against Rabbit and Jett individually; breach of contract against DONUT, INC. AND BAD BURGER; and, unjust enrichment, specific performance, and breach of the implied covenant of good faith and fair dealing as to all the Defendants. The first four of these claims, fraud, negligent misrepresentation, tortious interference with contract, and civil conspiracy are torts. The remaining claims sound in contract, implied contract, or quasi-contract. Defendants filed their Motion to Dismiss on July 6, 2018. The Trust's Response was filed August 6, 2018, and Replies were then filed by all the Defendants.

In summary, the Defendants argue that the tort claims asserted against Rabbit individually are barred by the economic loss rule. With regard to the remaining contract claims, the Defendants argue that the Trust has failed to state a plausible

claim for relief based on the plain language of the underlying Note, because there has been no monetary breach, any other alleged breaches are not material, the Plaintiff waived certain rights, and the unjust enrichment claim cannot co-exist with the breach of an express contract claim. The court deals with these arguments in turn.

II. LEGAL STANDARD

A motion to dismiss tests the formal sufficiency of a complaint. Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1259 (Colo. 2000). Motions to dismiss should only be granted when the plaintiff's allegations cannot support a claim as a matter of law. Miller v. Bank of New York Mellon, 2016 COA 95, ¶ 16.

The court reviews a motion to dismiss under C.R.C.P. 12(b)(5) pursuant to the standard set forth in Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016). Prior to the Warne, decision, a complaint could not be dismissed for failure to state a claim unless the plaintiff could prove "no set of facts" in support of the claim that would entitle it to relief. Rosenthal v. Dean Witter Reynolds, Inc., 908 P.2d 1095, 1099 (Colo. 1995). Now, to withstand a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Warne, 373 P.3d at 589. Because the plaintiff has an obligation "to provide the grounds of his entitlement to relief," the "factual allegations must be enough to raise a right to relief above the speculative level." Id.

at 591. The court must accept all allegations of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff. Sch. Dist. No. 1 in City & Cty. of Denver v. Masters, 2018 CO 18, ¶ 13. However, the court does not need to afford any deference to a complaint's bare legal conclusions. Id.

When considering a motion to dismiss for failure to state a claim, the court may consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. Norton v. Rocky Mountain Planned Parenthood, Inc., 2018 CO 3, ¶ 7. The consideration of documents that are attached to the complaint does not convert the motion to one for summary judgment. Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005). Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. Begley v. Ireson, 2017 COA 3, ¶ 7.

III. APPLICABLE LAW – ECONOMIC LOSS RULE

The economic loss rule provides that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." Town of Alma v. AZCO Constr., Inc., at 1264. The purposes of the rule "are to maintain a distinction between tort and contract law, enforce parties' expectancy interests so that they can reliably allocate risks and costs during their bargaining, and encourage

parties to build any cost considerations into their contracts." BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 72 (Colo. 2004).

Our supreme court has identified three factors to determine whether a tort duty arises independently of the parties' contract: (1) whether the relief sought in tort is the same as the contractual relief; (2) whether there is a recognized common law duty of care in tort; and (3) whether the tort duty differs in any way from the contractual duty. Id. at 74; see also Makoto USA, Inc. v. Russell, 250 P.3d 625, 627 (Colo. App. 2009) (noting that to show that an independent duty of care exists under tort law, two conditions must be satisfied: (1) the duty must arise from a source other than the relevant contract, and (2) that duty must not be a duty also imposed by the contract). Former TCHR, LLC v. First Hand Mgmt. LLC, 2012 COA 129, ¶¶ 21-23.

A "critical question" in determining the applicability of the economic loss rule is not whether the tort claims are related to the promises that eventually form the basis of the contract, but "whether the tort claims flow from an independent duty under tort law." Van Rees v. Unleaded Software, Inc., 2016 CO 51, ¶ 12. Even if a duty is separately recognized under tort law, it is not independent if it is also imposed under the parties' contract because courts assume that sophisticated parties can include the potential cost of breach of contractual duties in contracts they negotiate. A Good Time Rental, LLC v. First American Title Agency, Inc., 259 P.3d 534, 537

(Colo. App. 2011); Casey v. Colorado Higher Educ. Ins. Benefits All. Tr., 2012 COA 134, ¶ 28.

In that regard, "[t]here is an important distinction between failure to perform the contract itself, and promises that induce a party to enter into a contract in the first place." Van Rees v. Unleaded Software, Inc., at ¶ 13. "It is thus clear that a contracting party's negligent misrepresentation of material facts prior to the execution of an agreement may provide the basis for an independent tort claim asserted by a party detrimentally relying on such negligent misrepresentations." Keller v. A.O. Smith Harvestore Products, Inc., 819 P.2d 69, 72 (Colo. 1991). The same principle applies to intentional or fraudulent misrepresentations of material fact that are made to induce someone to enter into a contract. See, Van Rees v. Unleaded Software, Inc., at ¶ 15.

IV. FACTS THAT ARE UNDISPUTED OR PRESUMED TRUE

The following facts, taken from the Complaint, the Motion, Response, and Reply as well as the exhibits attached to the Complaint (including the Note) are undisputed or presumed true under the standards described above.

On April 13, 2017, the Trust loaned DONUT, INC. one million dollars in connection with the sale of a parcel of real property located in Rifle Colorado. The

maturity date of the Note is April 13, 2022. DONUT, INC. is the designated borrower under the Note. BAD BURGER is also a party to the Note, but is obligated to perform only certain limited provisions of the Note relating to the inspection and reporting provisions of paragraph 2, the conversion provisions of paragraph 3, and the default provisions of paragraph 6(b). Rabbit signed the Note in their capacity as managers of DONUT, INC. and BAD BURGER, INC. respectively. Neither Rabbit nor Jett personally guaranteed the Note.

Paragraph 2 of the Note provides the Trust with certain inspection rights for the property and also obligates DONUT, INC. and BAD BURGER, INC. to provide the Trust with "the same quarterly financial statements of [DONUT, INC.'s] and [BAD BURGER, INC.'s], as applicable, business operations provided to [DONUT, INC.'s] members and [BAD BURGER, INC.'s] members, as defined in [BAD BURGER, INC.'s] operating agreement."

Paragraph 3 of the Note gives the Trust the option to convert up to $500,000 of the unpaid principal amount of the Note into "Class A" equity holdings in BAD BURGER, INC. subject to a 30 day advance notice requirement and a schedule of prices for such membership units (the "Conversion Right").

Finally, paragraph 16 of the Note obligates DONUT, INC. to provide the Trust with proof of insurance for certain coverages mandated by the Note. The Trust

asserts that compliance with the inspection and financial disclosure provisions as well as the proof of insurance is essential for it to properly evaluate when and if it might decide to exercise its Conversion Right.

On February 6, 2018, the Trust served DONUT, INC. and BAD BURGER, INC. with a notice of default with regard to the inspection, disclosure and insurance provisions referenced above. The notice gave them until March 8, 2018, to cure. The Trust asserts that the default was not timely cured. For the purpose of the Motion, the court accepts this assertion as true.

On April 24, 2018, DONUT, INC. notified the Trust that it intended to repay the Note in full in no less than 40 days. This apparently caught the Trust off guard inasmuch as it claims that the payoff notice "unexpectedly accelerated" its decision whether or not to exercise its Conversion Right. In response to the payoff notice, the Trust served DONUT, INC. and BAD BURGER, INC. with notice on May 2, 2018, that it intended to exercise its Conversion Right by June 1, 2018, ("Notice of Conversion Right"). The Trust then followed up with a renewed demand for DONUT, INC.'s and BAD BURGER, INC.'s financial and business information on May 15, 2018.

On May 25, 2018, DONUT, INC. and BAD BURGER, INC. rejected the request for such information. They then implemented a counterstroke to the Trust's

Notice of Conversion Right by issuing a Notice to Exercise Call with regard to the membership interests the Trust might acquire if the Conversion Right was exercised. The Trust avers that the Notice to Exercise Call, if implemented, "would have the effect of unilaterally nullifying any value of [the Trust's] Conversion Right in violation of Defendant BAD BURGER, INC.'s obligations under Section 3(g) of the Note." Complaint at ¶ 20. Paragraph 3(g) of the Note prohibits BAD BURGER, INC. and DONUT, INC. from reorganizing or recapitalizing the business entities in any manner that would impair the Trust's Conversion Right. The court accepts as true the Trust's allegation that the membership call would impair the Conversion Right.

Finally, on May 31, 2018, the Trust served DONUT, INC. and BAD BURGER, INC. with its "Notice of Conditional Suspension of May 2, 2018, Notice of Conversion." That notice was provided on the same day the Trust filed this lawsuit. The notice stated that the Trust was "conditionally" suspending its Notice of Conversion "pending a formal declaration by the Garfield County District Court" of the Defendants' obligations under the Note. The Defendants argue that the notice effected a waiver of the Trust's rights to pursue any specific performance remedy under the Note.

V. ANALYSIS

The Court first addresses the economic loss issue. The tort claims in this case are asserted solely against the individual Defendants Rabbit and Jett. It is undisputed that Rabbit and Jett are not parties to the Note. As discussed above, for the Trust to survive a motion to dismiss the tort claims, the court must find that the individual Defendants owed a duty to the Trust arising independently from the duties described in the Note.

The basic thrust of the tort claims against the individual Defendants is that they fraudulently or negligently represented to the Trust that DONUT, INC. and BAD BURGER, INC. would comply with the contractual terms of the Note and that they fraudulently or negligently failed to disclose that they actually intended not to comply with the Note. The specific provisions of the Note which the Trust alleges the individual Defendants never intended to honor pertain to the obligation to disclose financial and business information, the obligation to provide proof of insurance, and the obligation not to take and corporate action that would frustrate or impair the Trust's Conversion Right (i.e., the Notice to Exercise Call).

Obviously, each of these duties arises directly from the terms of the Note, and the Trust has failed to identify any independent source of such duties other than the parties' written contract to which Rabbit and Jett were not parties. It goes without saying that the economic loss rule will not bar tort claims arising from pre-contract fraudulent or negligent misrepresentations of material facts, or the failure to disclose

material facts. "However, the scope of this tort pertains to conduct that leads or induces another to enter into a transaction or agreement, not to representations directly related to performance of a contract." A Good Time Rental, LLC v. First Am. Title Agency, Inc., 259 P.3d 534, 541 (Colo. App. 2011) (emphasis added.)

In cases where the economic loss rule was found not to apply, the liable parties either withheld or misrepresented material facts that were distinct from the express duties under the contract. For example, in Keller v. A.O. Smith Harvestore Products, Inc., 819 P.2d 69, 71 (Colo. 1991), the buyer relied on inaccurate representations contained in video tapes, brochures, and literature that were prepared by the seller. In Van Rees v. Unleaded Software, Inc., 2016 CO 51, the defendant knew at the time the contract was negotiated that it lacked sufficient staff to complete the website on time and that it was not actually performing any search-engine optimization work as represented to the plaintiff. In re Estate of Gattis, 2013 COA 145, ¶ 9, an expansive soils case, the defendants failed to disclose that they were the principals of entity that had performed repair work on the property and also "actively concealed" their knowledge that expansive soils underlay the residence and had already caused serious structural damage. In First Nat'l Bank v. Rabbit, 616 P.2d 154, 155–56 (Colo. App. 1980) the plaintiff purchased a business in reliance on incorrect statements regarding organization, inventory, and projected profits.

In contrast, the Trust here has neither shown nor even alleged that Rabbit or Jett failed to disclose material facts or made any misrepresentations about anything that was not also a contractual obligation under the Note. A claim for fraudulent misrepresentation or concealment in the performance of a contract does not arise independently of the duties set forth in the contract except as described in the cases above. See Hamon Contractors, Inc. v. Carter & Burgess, Inc., 229 P.3d 282, 291 (Colo. App. 2009). The claimed misstatement or omission must be extraneous to the duties created under the contract. Claims for fraudulent misrepresentation and concealment "may be barred if they arise from duties implicated by the contract and relate to the performance of that contract." See id. at 292–93; Former TCHR, LLC v. First Hand Mgmt. LLC, 2012 COA 129, ¶¶ 24-25.

That is precisely the situation here. The duties allegedly breached by Rabbit and Jett are identical to and indistinguishable from the contractual duties under the Note. The Trust's allegation that the Defendants never intended to adhere to the contract terms merely begs the question. That is no different than a claim that they intentionally breached the duties under contract. To hold otherwise would create an exception to the economic loss doctrine that would swallow the rule. Thus, the Trust's tort claims are barred by the economic loss rule because they implicate duties that are identical to the duties under the Note. The duties are not independent from the contractual duties.

This conclusion applies regardless of the fact that Rabbit and Jett are not parties to the Note and are named individually. "When the economic loss rule bars a claim against a corporate entity, it may also bar claims against that entity's officers and directors, even if the officers and directors were not parties to the contract at issue." Former TCHR, LLC v. First Hand Mgmt. LLC, 2012 COA 129, ¶¶ 24-25; see Parr v. Triple L & J Corp., 107 P.3d 1104, 1108 (Colo. App. 2004) (Tortious interference claim against president of landlord entity barred by economic loss rule where duty not to interfere with lease arose under contract.) Accordingly, the Trust's first, second, third, and sixth claims for relief against the individual Defendants Rabbit and Jett are dismissed with prejudice because they are bared by the economic loss rule.

The court now turns to the remaining claims for relief. The fourth claim for relief is for breach of contract against DONUT, INC. and BAD BURGER, INC.. To survive a motion to dismiss a breach of contract action, the plaintiff must plausibly allege (1) the existence of a contract; (2) that he performed his duties under the contract (or that he was justified in failing to do so); (3) that the defendant failed to perform the contract; and (4) resulting damages. Long v. Cordain, 2014 COA 177, ¶ 19. In viewing the allegations in the Complaint in favor of the Trust, the court finds that the Trust has sufficiently pled a claim for breach of contract against DONUT, INC. and BAD BURGER, INC..

There is no dispute that the Note is a contract and that the contract provides the Trust with certain rights under the paragraphs referenced in the Complaint. There is no dispute that the Trust funded the loan and thus performed. The Trust alleges that the corporate defendants failed to comply with their obligations to provide financial and business information, proof of insurance, and to adhere to the Trust's Conversion Rights. Those are valid rights under the Note. The allegations in the Complaint are therefore sufficient to state a plausible claim for relief for breach of contract under the Warne standards. The Motion is therefore denied as to breach of contract claim against DONUT, INC. and BAD BURGER, INC..

With regard to unjust enrichment claim, Defendants argue that because there is an express contract, an unjust enrichment claim cannot also lie. The Defendants are partly correct. Unjust enrichment is a form of quasi-contract or contract implied in law. The test for recovery under an unjust enrichment theory requires a showing that: (1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. Redd Iron, Inc.v. International Sales and Service Corp. 200 P.3d 1133 (Colo. App. 2008). A party cannot recover under both a breach of an express contract theory and an unjust enrichment theory; however, recovering on a claim and asserting a claim are two different things.

It has been generally recognized that a party may plead unjust enrichment in the alternative to a breach of contract claim at the outset of litigation. Indeed, the Colorado Supreme Court has recognized that a party may plead alternative causes of action in its initial pleading under C.R.C.P. Rule 8(e)(2). See, Super Valu Stores, Inc. v. District Court, 906 P.2d 72 (Colo. 1995). That party, or the court, will ultimately have to decide which claim remains viable at a later date based on the evidence produced in the case. See C.R.C.P. 8(e)(2). Hermmann Management Services v. Mediacell, Inc., 176 P.3d 856, 860 (Colo. App. 2007)(Plaintiffs may not be permitted to recover under theories of both breach of express contract and quantum meruit, but it was not inappropriate to plead both theories of recovery in the complaint.)

Accepting the allegations of Trust's Complaint as true and in the light most favorable to the Trust, the court finds that the Trust has sufficiently pled claims to support unjust enrichment as an alternative theory to the breach of contract claim against DONUT, INC. and BAD BURGER, INC.. Accordingly, Defendants' Motion to dismiss the unjust enrichment claims is denied, but only as to DONUT, INC. and not BAD BURGER, INC..

The Motion is granted with regard to the individual Defendants Rabbit and Jett because the Complaint only alleges their claimed fraud as a basis for the unjust enrichment claim against them individually. See Complaint ¶ 46. It is undisputed

that Rabbit and Jett are not parties to the Note. The court has already determined that any alleged fraud claim against them is barred by the economic loss rule. Furthermore, the Trust has not alleged any other fraudulent conduct by them at all, let alone with the degree of specificity required by C.R.C.P. 9(b). Nor has the Trust stated any claim for piercing the corporate veil against the individual Defendants.

To determine whether it is appropriate to pierce the corporate veil, a court must make a three-part inquiry. First, the court must determine whether the corporate entity is the "alter ego" of the person or entity in issue. Second, the court must determine whether the corporate fiction was used to perpetrate a fraud or defeat a rightful claim. Third, the court must consider whether an equitable result will be achieved by disregarding the corporate form and holding a shareholder or other insider personally liable for the acts of the business entity. All three prongs of the analysis must be satisfied. McCallum Family L.L.C. v. Winger, 221 P.3d 69, 74 (Colo. App. 2009). Even reading the allegations in the Complaint liberally, the Trust has failed to allege any facts that would support a claim for piercing the corporate veil. Accordingly, the Motion to dismiss is granted as to the individual Defendants on the unjust enrichment claim.

The seventh claim for relief is for specific performance of the Note. First, the court notes that specific performance is more properly pled as a remedy rather than as a stand-alone claim for relief. Before the remedy can be applied, the Trust will

first need to establish that there was a breach of the contract and that there is no adequate remedy for damages or other relief under the contract. "Equity will not decree specific performance of a contract to convey land if there is an adequate remedy at law." Schreck v. T & C Sanderson Farms, Inc., 37 P.3d 510, 515 (Colo. App. 2001); Allstate Ins. Co. v. Med. Lien Mgmt., Inc., 2015 CO 32, ¶ 15 ("the remedy of specific performance is generally unavailable unless the promisee's remedy in damages would be inadequate.") Whether the Trust can establish these factors is a fact question that is at this time premature and incapable of resolution under the standards for C.R.C.P. 12(b)(5) dismissal.

With regard to the Defendants' argument that the Trust waived its right to demand specific performance by sending the Notice of Conditional Suspension, the court is not persuaded. Waiver is the intentional relinquishment of a known right. "Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests an intent to relinquish the right or acts inconsistently with its assertion." In re Marriage of Robbins, 8 P.3d 625, 630 (Colo. App. 2000). To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. Burlington Northern R.R. Co. v. Stone Container Corp., 934 P.2d 902 (Colo.App.1997).

Here, the Notice of Conditional Suspension was clearly, by its express terms, conditional. The notice plainly states that the Trust was only conditionally suspending its Conversion Right pending a decision from the court. There was therefore no unequivocal waiver of that right. Accordingly, the court denies the Motion with regard to the specific performance claim; however the "claim" is actually the assertion of a remedy and not a separate claim for relief and will be treated as such hereafter.

Finally, the eighth claim for relief is breach of the covenant of good faith and fair dealing asserted against all the Defendants. The covenant of good faith and fair dealing is implied in every contract and requires good faith in the discretionary performance of contractual obligations. See City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006). The disclosure of financial information under the Note involved a level of discretion because that disclosure was to be the same as was provided to the companies' members. The standard is nowhere defined in the Note. Likewise, the corporate Defendants' decision to exercise a call implicates a discretionary act that may or may not violate the covenant of good faith and fair dealing. Accordingly, and for the same reasons that the court denied the Motion with regard to the breach of contract claims, the court also denies the Motion to dismiss with regard to the breach of the covenant of fair dealing claims asserted against DONUT, INC. and BAD BURGER, INC..

Likewise, and for the same reasons as previously stated, the court grants the Motion to dismiss as to the individual Defendants. As explained above, Rabbit and Jett are not parties to the Note, and as a result, they are not subject to the implied covenant of good faith and fair dealing. Again, the Trust has asserted no basis to hold them personally liable for the acts of the corporate entities under a piercing of the corporate veil theory. The Complaint is devoid of any such allegations. The Motion to dismiss is therefore granted as to them.

V. CONCLUSION AND ORDER

Based on the forgoing, the court hereby GRANTS the Motion to Dismiss as to all claims asserted against the individual Defendants Rabbit and Jett. They are dismissed from the case, and the claims against them are dismissed with prejudice. The court DENIES the Motion to Dismiss as to the Trust's claims for breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing asserted against DONUT, INC. and BAD BURGER, INC.. The "claim" for specific performance will be preserved as a potential remedy subject to later proof. The Trust will, at some future point, be required to choose between recovery under an express contract theory or unjust enrichment theory since recovery under both is not possible.

SO ORDERED this 1st day of November, 2018.

BY THE COURT:

Judge Harry S. Potter

2.3 Government Immunity

2.4 Default Judgment

A. Entry of Default

When a party has failed to plead or otherwise defend, and that fact is shown by affidavit or otherwise, the clerk shall enter the party's default. C.R.C.P. 55(a).

- A party entitled to a judgment by default must apply to the court.
- If the party against whom a default judgment is sought has appeared in the action, they are entitled to written notice at least 7 days prior to any hearing on the default judgment.
- The court may, if necessary to determine the amount of damages or to establish the truth of any averment or to investigate, conduct a hearing as it deems necessary and proper.
- The court must always determine that venue is proper under C.R.C.P. 98 before judgment is entered.

Note:

When a defendant answers and actively litigates but fails to appear for trial, the trial court may receive evidence in the defendant's absence and render judgment on the merits, but it may not enter an order of default. *Rombough v. Mitchell*, 140 P.3d 202 (Ct. of Appeals 2006).

B. Setting Aside Default Judgment

1. Background

- Relief from Judgment or Order. C.R.C.P. 60
- Clerical mistakes may be corrected at any time by the court. C.R.C.P. 60(a).
- The court may relieve a party from a final judgment, order or hearing for the listed reasons under C.R.C.P. 60(b).
- *See Goodman Associates, LLP v. WP Mountain Properties, LLC,* 222 P.3d 310 (Colo. 2010).

2. Burden of Proof

- Clear and convincing evidence.

- Movant bears the burden of establishing that the motion should be granted.

3. Excusable Neglect

Factors

- Factors 1 – Whether the neglect that resulted in entry of judgment by default was excusable.
- Factor 2 – Whether the moving party has alleged a meritorious claim or defense.
- Factor 3 – Whether relief from the challenged order would be consistent with considerations of equity.

Note on Factors

The 3 factors above constitute a balancing test and each must be considered in resolving the motion.

However, this does not preclude the possibility that, in a particular circumstance, the failure to satisfy just one of the factors is so significant that it requires denial of the motion to set aside.

Factual Allegations

In order to show excusable neglect for purposes of setting aside default judgment, the asserted meritorious defense must be supported by factual allegations, not just legal conclusions.

However, the truth of the allegations need not be proven as long as they are legally sufficient.

Equitable Considerations

- The promptness of the moving party in filing the motion;
- The fact of any detrimental reliance by the opposing party on the order or judgment of dismissal.
  i.e., the opposing party took significant steps in reliance on the default judgment (such as institution of a foreclosure action);
- Any prejudice to the opposing party if the motion were to be granted, including any impairment of that party's ability to adduce proof at trial in defense of the claim.

- Any prejudice to the moving party if the motion were to be denied.

Liberally Construed

- In favor of the movant.

Because resolution of disputes on their merits is favored, the criteria for vacating a default judgment should be liberally construed, especially when the motion is promptly made.

4. Default Judgment after Answer Filed

Default judgment may not enter if an answer has been filed before the clerk or court has entered the default.

- In *Colorado Compensation Ins. Auth. v. Raycomm Transworld Indus., Inc*, 940 P.2d 1000 (Colo. App. 1997).
    - Defendant did not timely respond to plaintiff's complaint.
    - On July 12, plaintiff filed a motion for default judgment.
    - On July 16, defendant filed an answer.
    - On July 21, defendant filed a response to the motion for default.

- On July 24, the trial court entered an order granting default judgment against defendant.
- Defendant then filed a motion to set aside default judgment, which the trial court denied. Id. at 1001.
- The Court of Appeals reversed, reasoning that courts "may not properly enter a default judgment if an answer has been filed before entry of default by either the clerk or the court." Id.

- *See also Reeves v. Colorado Department of Corrections*, 155 P.3d. 648 (Colo. App. 2007).

5. Defendant not Served

The Court does not have jurisdiction over the defendant or to enter a default judgment, if a plaintiff fails to properly serve a defendant. Thus, the default must be set aside.

Burton v. Colorado Access, 2015 WL 4760316 (Colo. App. 2015).

C. Attorney's Fees

Court may make payment of costs and attorney fees a condition for setting aside default judgment.

Johnston v. District Court In and For Garfield County, Ninth Judicial Dist., 196 Colo. 1, 580 P.2d 798 (1978).

D. Default Judgment vs. Entry of Default

1. The Difference

Courts distinguish a default judgment from the mere entry of default.

- *Burtnett v. King*, 33 Cal. 2d 805, 205 P.2d 657, 12 A.L.R.2d 333 (1949);
- *Stafford v. Dickison*, 46 Haw. 52, 374 P.2d 665 (1962);
- *Reilly v. Perehinys*, 33 N.J. Super. 69, 62 109 A.2d 449 (App. Div. 1954);
- *Marinchek v. Paige*, 108 N.M. 349, 772 P.2d 879 (1989);
- *Pedersen v. Klinkert*, 56 Wash. 2d 313, 352 P.2d 1025 (1960).

Commented [ss3]: Are all five citations needed?

Entry of Default

Entry of a default does not constitute a judgment.

- *Culetsu v. Dix*, 149 Conn. 456, 181 A.2d 116 (1962);
- *Johnson v. Murray*, 201 Mont. 495, 656 P.2d 170 (1982).

Rather, it is an order precluding the defaulting party from making any further defense in the case as far as his or her liability is concerned.

- *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993).

Default Judgment

Default Judgment is a final judgment that terminate the litigation and decides the dispute, whereas an entry of default is an interlocutory order that in itself determines no rights or remedies.

- *Hertz v. Berzanske*, 704 P.2d 767 (Alaska 1985).

2. Separate Events or Steps

An entry of default and an entry of default judgment are two separate events or steps.

- *Casuga v. Blanco*, 99 Haw. 44, 52 P.3d 298 (Ct. App. 2002);
- *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993);
- *Denkers v. Durham Leasing Co., Inc.*, 299 Or. 544, 704 P.2d 114 (1985).

Step 1 – Entry of Default

- *Weaver v. Travel Inn, Inc.*, 350 So. 2d 444 (Ala. 1977);
- *Casuga v. Blanco*, 99 Haw. 44, 52 P.3d 298 (Ct. App. 2002);
- *Denkers v. Durham Leasing Co., Inc.*, 299 Or. 544, 704 P.2d 114 (1985).

Step 2 – Default Judgment

- *Casuga v. Blanco*, 99 Haw. 44, 52 P.3d 298 (Ct. App. 2002).

However, the entry of the default and the default judgment may be simultaneous and by a single instrument. *See also*, AMJUR JUDGMENTS § 290

Likewise, judgment can be set aside w/o setting aside the default.

2.5 Summary Judgment Order - Example

District Court, Garfield County, Colorado Court Address: 109 8th Street Glenwood Springs, Colorado 81601 Telephone: (970) 945-5075	
Plaintiff: MICHAEL J. SOS v. Defendant: ROARING FORK TRANSPORTATION AUTHORITY, a statutory regional transportation authority	▲COURT USE ONLY▲
	Case Number: 2013CV30159 Division: F Courtroom: D
ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT	

I. PROCEDURAL SUMMARY

This is an inverse condemnation case. The matter is before the Court on Plaintiff Michael Sos' ("Sos") Motion for Partial Summary Judgment Regarding RFTA's Taking or Damaging of Plaintiff's Property, filed on April 30, 2015. On the same date, Defendant Roaring Fork Transportation Authority ("RFTA") filed its Motion for Summary Judgment dealing with essentially the same issues as those raised in Sos' Motion.

RFTA and Sos own adjacent properties. Sos claims that RFTA has taken or damaged his property by constructing a large retaining wall on RFTA's property that adversely affects Sos' use and enjoyment of his property. Sos claims this is a taking or damaging under Article II, Section 15 of the Colorado Constitution. RFTA denies that a taking or damaging has occurred. Both parties have fully briefed their respective Motions and submitted expert reports, affidavits, and other exhibits in support of their arguments. The Court has reviewed all the filings and attachments.

Sos has also filed an Amended Motion to Strike Portions of the Affidavit of Nicholas Senn and to Prohibit Further Opinion Testimony. RFTA has responded to that Motion as well, and the issue is fully briefed. The issue raised in Sos' Motion to Strike concerns RFTA's late disclosure of Nicholas Senn's expert opinion affidavit that was filed with RFTA's Response to Sos' Summary Judgment Motion. The Court has denied the Motion to Strike by a separate order filed contemporaneously with this order.

Having reviewed the Motions and all the related materials, and for the reasons stated below, the Court hereby GRANTS Sos' Motion for Partial Summary Judgment on the issue of whether a taking or damaging has occurred, DENIES RFTA's Motion for Summary Judgment, and enters the following Order:

II. UNDISPUTED FACTS

Based on the pleadings and the parties' respective Motions, the Court finds that the following basic facts are not in dispute.

1. Sos owns a parcel of real property located on Grand Avenue in Glenwood Springs, Colorado ("Sos Property"). The Sos Property is more completely described by its legal description in the First Amended Complaint ("Complaint") which the Court incorporates by reference.

2. RFTA also owns a parcel of real property on Grand Avenue in Glenwood Springs, Colorado which is further described in the Complaint and which is incorporated by reference ("RFTA Property"). The RFTA Property lies immediately to the north of the Sos Property, and the properties share a common boundary.

3. Sos operates his business, Alpine Tire Company, on the Sos Property. RFTA operates a bus transit station on the RFTA Property. The RFTA bus transit station is a relatively recent

improvement that was constructed by RFTA between 2012 and 2013 (the "Project"). The improvements on the Sos Property predate the construction of the RFTA Project.

4. As part of the Project, RFTA constructed a large structural wall on its property to support a parking area and other structural components of the bus transit station (the "Wall"). The Wall consists of various parts including earth walls and a concrete façade. The Wall is located completely within the RFTA Property and sits approximately 3 feet north of the Sos Property boundary. The area between the Wall and Sos Property boundary is sloped downward from north to the south and was excavated, filled, and otherwise altered, improved, restored, and revegetated as part of the Project.

5. Sos claims that the Wall exerts physical force onto the Sos Property and that the Wall relies on the Sos Property for lateral and subjacent support. RFTA disputes that the Wall exerts any significant force upon the Sos Property or that it relies on the Sos Property for support. Alternatively, if the Wall does any of these things, RFTA claims the impact is *de minimus* and does not rise to the level of a taking or damaging under Article II, Section 15 of the Colorado Constitution.

6. Sos claims that the Wall prevents him from fully utilizing the northeastern corner of his property. Sos intends to excavate into the sloping hillside on that portion of his property to increase the tire storage area necessary for his tire business. He claims that the existence of the Wall now requires him to take extra measures to engineer and install a retaining wall to address the added lateral and subjacent support forces imposed by the Wall. He claims that these additional measures are required to avoid undermining the support for the Wall. He has obtained an expert opinion that quantifies the additional expenses he will incur to construct a suitable retaining wall. Sos' expert estimates that the added cost to engineer the retaining wall is approximately $75,000.

7. Both parties have hired experts to render expert opinions about the Wall and its claimed impact on the Sos Property pursuant to C.R.C.P. 26(2)(B)(I). All of the specially retained experts did on-site evaluations, took various measurements, and performed calculations to determine the degree to which the Wall affected the Sos Property. The Court has reviewed the specially retained experts' opinions and their qualifications and has determined that they are all competent to render their respective opinions pursuant to C.R.E. 702.

8. Sos' expert, HP Geotech did on site evaluations, took various measurements, and issued a report dated March 19, 2015, which stated, in relevant part, as follows:

> the constructed RFTA wall and earth embankment structure supporting their parking lot do impose significant loads to the Alpine Tire Company property… If the [proposed retaining]wall had been constructed prior to the RFTA wall construction, an "active" earth pressure loading of about 50 pcf, equivalent fluid unit weight, could have been used for design…With the addition of the RFTA wall, a retaining wall would now need to be designed for the "at-rest" earth pressure loading to limit potential lateral movement, estimated at about 70pcf, equivalent fluid unit weight, plus surcharge loading consisting of the RFTA wall and additional earth weight next to the bottom of the RFTA wall (estimated at about 1 ½ feet above original ground surface). The total effect of the RFTA wall construction and grading is that a retaining wall will now need to be designed and constructed for the higher at-rest earth pressure loading plus surcharge loading from the RFTA wall and the additional 1 ½ feet of backfill depth amounting to about an additional 70% loading. The risk to the new retaining wall construction will also be much higher now due to the importance to minimize potential for ground movement of the wall excavation that could result in settlement and distress to the RFTA wall and parking lot. *Sos Exhibit 7*.

9. Plaintiff's expert Robert Pattillo of Pattillo Associates Engineers, Inc., rendered the following opinion in his March 23, 2015, report:

> With regard to the effect that the RFTA embankment wall has had on the Alpine Tire property, I believe there is no dispute among the engineers in this case that the vertical support and stability of the embankment and its façade wall depends on the subsurface lateral support provided by the earthen slope on the Alpine Tire side of the property line. This is especially the case for the eastern end of the RFTA wall where grade differences are large. The disputed issue between engineers seems to be the degree of impact…Clearly the construction of the elevated RFTA wall and the increased adjacent grades that accompanied it have resulted in a substantial

> increase in the horizontal pressures for which a new Alpine Tire retaining wall must be designed. Moreover, the mere presence of the RFTA wall significantly increases the difficulty of construction for any retaining wall that would be built near the property line because of the risks associated with the temporary excavation that would threaten the stability of the RFTA wall during the construction period." *Sos Exhibit 8*.

10. RFTA is relying on expert civil engineering reports authored by Michael Baker Jr., Inc., RockSol Consulting Group, Inc., and JVA Consulting Engineers. These reports were prepared between October 11, 2013, and April 16, 2015. *See Sos Exhibits 9, 10, and 11, Sos Reply Exhibit 2*. Michael Baker, Jr. rendered the following opinion in his report dated October 11, 2013:

> With the current RFTA walls and parking lot configuration, a retaining wall would be required for the hypothetical scenario related to removing the slope and lowering the ground surface on the property south of the Glenwood Springs Station [Sos Property], and the retaining wall would need to support a surcharge from the RFTA walls and parking lot; the surcharge would be similar in magnitude to the surcharge described in the HP Geotech memo dated August 27, 2013, but the comparative increase in load would be smaller than described in the HP Geotech memo:.. "at-rest" lateral load coefficients are not required, compared to "active" lateral load coefficients…The comparative increase in load is approximately 20% rather than 70%.

11. RockSol's Report dated June 5, 2014, states as follows:

> Foundation soil in front of and below the Bottom of Wall elevation on RFTA property, laterally to the RFTA property boundary, needs to remain undisturbed to maintain continued stability of RFTA Wall 2 and Façade 2. Because maintaining the foundation soil is important for maintaining continued stability of RFTA Wall 2 and Façade 2, we recommend the proposed cut slope configuration be determined and submitted. The proposed cut slope shall meet these constraints: If a proposed cut slope south of the property boundary [Sos Property] cannot stand up for the duration of the construction excavation condition, temporary shoring (excavation support) is necessary to support the RFTA Wall 2 foundation soil below the Bottom of Wall elevations laterally to the property boundary…HP Geotech letter, Retaining Wall Design Analysis, paragraph on page 2: We do not object to the stability analysis procedure (the lateral soil pressure loadings seem to be underestimated, the surcharge loadings seem to be overestimated, and the combined loadings are reasonable.)

12. JVA's reports dated March 22, 2015, and April 16, 2015, stated as follows:

> [W]e agree that a portion of the earth in the natural grade on the Sos property south of the property line is necessary to the stability of the RFTA retaining wall foundation…JVA is in agreement with Baker and RockSol that the forces imposed by the RFTA are far less than suggested by HP Geotech and Pattillo. *April 16, 2015, Rebuttal Report, Sos Exhibit 2, Reply*.
>
> Our analysis yielded results that showed the existing RFTA wall superimposed a maximum additional load at 5850.0' of between 29 psf and 37 psf on future construction within two feet of the property line. JVA's analysis indicates that the forces imposed by the RFTA wall on the neighboring property are more in line with the findings of RockSol and Baker, and we believe that HP Geotech's findings overestimate the impact of the wall on the Sos property…There are limits to how much grade can be lowered and removed on the Sos property without impacting the RFTA retaining wall…JVA has determined that the forces superimposed on the proposed Sos wall are relatively small. The added costs to construct a wall on the Sos property should be relatively small since the affected area is limited to a small section in the northeast corner of the property. *March 22, 2015, report*.

13. Based on the foregoing expert reports, the Court finds that Mr. Pattillo's summary of the reports is essentially correct. All the experts agree that *some* lateral or subjacent force loading is imposed on the Sos Property as a result of the construction of the Wall. The experts disagree on the amount of that loading and the resultant impacts on the Sos Property. The experts also all agree that some preventive measures will need to be taken during the construction of the Sos retaining wall and that the wall must be engineered to compensate for the additional loads imposed by the Wall. Again, the experts only disagree as to the quantitative impact, whether the additional costs would be large or, as JVA claims, "relatively small."

14. There is one additional expert opinion that the Court must address. In its Response to Sos' Motion for Partial Summary Judgment, RFTA submitted the affidavit of Nicholas Senn who is an employee of RFTA. RFTA provided a late designation of Mr. Senn as a CRCP 26(a)(2)(C)(II) expert witness *after* his affidavit had previously been submitted in response to Plaintiff's Motion for Partial Summary Judgment and after the expert disclosure window had closed.[5]

[5] It is obvious to the Court that the late disclosure of Senn's opinion was a last ditch effort by RFTA to inject a question of material fact into the

15. Senn opines that, based on the "RFTA Designers" the Wall and the concrete façade are "independently, externally, and globally stable." From this, he then renders an opinion that the Wall and the concrete façade "do not rely upon Sos' property or any other landowners' property for lateral or global support." *Affidavit ¶¶ 9 and 13*.

16. Sos moved to strike Senn's expert opinions. The Court denied that Motion under a separate order. However, notwithstanding Mr. Senn's affidavit and for the reasons stated below, the Court finds as a matter of law, that his expert opinion is purely conclusory and that it fails to create a material issue of fact that would preclude summary judgment.

17. "Expert affidavits may be used to support or resist a motion for summary judgment. However, affidavits containing mere conclusions are insufficient to satisfy the burden of showing the existence or absence of a genuine issue of material fact." *White v. Jungbauer*, 128 P.3d 263, 264 (Colo. App. 2005); *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978); *Norton v. Dartmouth Skis, Inc.*, 364 P.2d 866, 867 (Colo. 1961); *Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000).

18. The Court has reviewed the expert disclosure provided by RFTA for Mr. Senn. That disclosure is nothing more than a copy of his affidavit. The affidavit merely states that Senn is employed by RFTA and that he was the construction supervisor for the bus station project. It also states that he earned a degree in civil engineering in 1990.

19. The disclosure and the affidavit provide virtually no factual support for his opinion. Senn does not provide any CV or other documentation to demonstrate that he is qualified by education, training or experience to render such an expert opinion. He does not state that he performed any

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Motions for Summary Judgment. Notwithstanding this fact, RFTA's strategy has no bearing on the Court's analysis of his expert opinion.

independent studies or calculations specific to lateral force loads to reach this conclusion (as did the other experts in the case). He does not state that he was involved in the design or construction of the Wall, other than in his capacity as the construction supervisor. He does not state that he reviewed the plans or designs with an eye towards a loads analysis. He does not state that he has any training or expertise in calculating or evaluating lateral or subjacent loads. Nor does he explain why his opinion seems to contradict the other experts who have conducted studies in the case and come to different conclusions, including RFTA's own experts. In short, Senn's opinion is a mere conclusion with no substantive underlying factual support or explanation.

20. Moreover, even if the Court accepts Senn's opinion at face value, the fact that he concludes that the Wall does not rely upon Sos' property for support is not dispositive of the question whether a taking has occurred. The Court will accept as fact Senn's opinion that the Wall is independently stable and does not rely on the Sos property for support. However, just because the Wall is currently independently stable does not necessarily mean that it exerts no lateral forces on the adjacent property. Nor does it necessarily mean that the Wall's stability would not be affected by excavation on the Sos Property. Mr. Senn's affidavit offers no opinion specific to any impacts to the Sos Property. It is carefully limited to the Wall's current inherent stability and its current condition only *on the RFTA Property*. He avoids rendering any opinion on whether the Wall exerts lateral force on the Sos property or what effects excavation on the Sos Property might have. In contrast, RFTA's other experts make specific findings on these precise issues. Consequently, while the Court has not excluded Mr. Senn's opinion, the Court finds that it is purely conclusory and further, that even taken as true and accurate, his opinion does not create a genuine issue of material fact.

21. Accordingly, the Court finds that it is an undisputed fact that the Wall imposes some lateral force onto the Sos Property that exceeds the lateral forces that existed prior to the Wall's construction. The Court further finds that it is undisputed that if Sos develops and excavates his property as anticipated, some additional measures will need to be undertaken to maintain the stability of the Wall on the RFTA Property. The only significant dispute relates to the quantitative amount of the force on the Sos Property and the amount of additional cost that may be incurred by Sos in connection with the construction of Sos' proposed retaining wall and other improvements. These are factual issues relating to damages which must be decided by the jury.

III. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriately granted when there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *C.R.C.P. 56(c)*. The party requesting summary judgment has the burden of establishing the non-existence of a material fact. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The purpose of a motion for summary judgment is to expedite the litigation where the facts are undisputed or so certain as not to be subject to dispute and the court can determine the issue strictly as a matter of law. *Morland v. Durland Trust Co*., 252 P.2d 98 (Colo. 1952).

If the moving party meets its initial burden of demonstrating that there is no genuine issue of material fact, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). If the non-moving party cannot present sufficient evidence to make out a triable issue of fact on its claim, the moving party is entitled to summary judgment as a matter of law. *Continental Airlines v. Keenan*, supra, 731 P.2d at 713. The party opposing summary judgment may not rest upon mere allegations in the pleadings or mere argument of counsel, but its response must set forth specific facts showing that

there is a genuine issue for trial. *C.R.C.P. 56(e)*; *People in Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990). Summary judgment is a drastic remedy and is only warranted where no question of material fact exists and the issues can be resolved as a matter of law.

Because the Court has determined that there is no issue of material fact regarding whether the Wall imposes a burden of lateral or subjacent support on the Sos Property, the only disputed issue is one of law: Does the imposition by RFTA of the burden of lateral or subjacent support onto Sos' Property constitute a taking under Colorado law.

IV. TAKINGS STANDARDS

Article II, Section 15 of the Colorado Constitution provides that "property shall not be taken or damaged, for public or private use, without just compensation." "A property owner may bring an "inverse condemnation" claim when state action has the effect of substantially depriving the property owner of the use and enjoyment of the property, but the state has not formally brought condemnation proceedings." *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993); *Thompson v. City & Cnty. of Denver*, 958 P.2d 525, 527 (Colo. App. 1998). Inverse condemnation and eminent domain actions both proceed under the same constitutional provision.

To prove an inverse condemnation claim, the property owner must establish: "(1) that there has been a taking or damaging of a property interest; (2) for a public purpose without just compensation; (3) by a governmental or public entity that has the power of eminent domain but which has refused to exercise it." *Id.; see also Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386–87 (Colo. 2001). A taking may be effected by the government's physical occupation of the land or by regulation. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59, 63 (Colo. 2001). Whether a taking has occurred is a question of law for a court to decide. *Van Wyk*, 27 P.3d at 386; *Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1133 (Colo. 2011).

The specific legal standards for takings cases will vary depending upon a number of factors: whether the taking is regulatory or physical, whether the taking occurs under the Federal Constitution or the more expansive Colorado Constitution, the type of impact imposed on the claimant's property (actual physical appropriation, imposition of servient burdens, complete loss of use, or partial impairment), as well as the financial impact sustained by the property owner (diminution in value or cost of restoration/remediation). The specific facts in a particular case will determine the appropriate analytical framework the Court must apply to determine whether a taking has occurred as a matter of law. This case is not a regulatory takings case. Nor is it a physical ouster or physical appropriation case. It is a "damagings" case. Thus, to the extent the parties have cited authorities not dealing specifically with this type of takings claim, the Court finds that those decisions are not necessarily dispositive of the issues. (*See below e.g., Animas Valley*, which is a regulatory takings case but which also has useful dicta relating to inverse condemnations generally).

The Colorado Supreme Court has interpreted the "damage" language in Colorado's takings clause to provide broader rights than the federal takings clause "but only insofar as it allows recovery to landowners whose land has been damaged by the making of ... public improvements abutting their lands, but whose lands have not been physically taken by the government." *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 63 (Colo. 2001); *See Grynberg*, 846 P.2d at 179 (applying the "damage" clause to the activities of a government entity on the mineral estate underneath the surface estate owned by the plaintiff landowner). "The 'damage' clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land." *Animas Valley*, 38 P.3d at 63 (Colo. 2001). "The word 'damaged' is in the Colorado Constitution in order to grant relief to those

property owners who have been substantially damaged by public improvements made upon land *abutting* their lands, but where no physical taking by the government has occurred." *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)(emphasis in original).

To recover in an inverse condemnation damaging case, "the owner must show a unique or special injury which is different in kind from, or not common to, the general public. The damage must be to the property or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property and which is not shared with or enjoyed by the public generally. In no case has mere depreciation in value been grounds to award just compensation for a damaging of property." *Grynberg*, 846 P.2d at 179. "While we have held that depreciation in market value may be considered for the purposes of assessing damages to a property owner in a condemnation proceeding where a portion of a parcel of land is taken, we have never held that mere depreciation in value is grounds to award just compensation for a damaging of property…We continue to uphold that conclusion here." *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)(citations omitted).

Under the holdings in the cases and statutes referenced above, the Court finds that it must determine four issues as a matter of law to either grant or deny the cross motions for summary judgment:

1) has there been a taking or damaging of a property interest?

2) was the taking for a public purpose without just compensation?

3) was the taking done by a governmental or public entity that has the power of eminent domain but which has refused to exercise it?

4) Is the claimed damage a unique or special injury which is different in kind from, or not common to, the general public, and not solely a diminution in value?

V. ANALYSIS

The facts of this case involve a claim for non-regulatory taking or damaging, by a regional transportation authority, where there has been no actual physical appropriation or ouster of the Sos Property. It is undisputed that the Wall and its related improvements lie entirely on the RFTA Property. Instead Sos seeks compensation for the imposition of the additional burden of support imposed on the northeast corner of his property. The measure of damages claimed by Sos for the claimed taking is the added engineering and construction costs imposed by the added lateral force to ensure that the excavation and development of the Sos Property does not damage the Wall.

1. Has there been a taking or damaging of a property interest?

Under the specific facts of this case, the Court finds as a matter of law that a "damaging" has occurred to the Sos Property as a result of RFTA's activities in constructing the Wall and imposing a lateral support obligation on the Sos Property. The decisions and standards articulated in *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993) and *William E. Russell Coal Co. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 270 P.2d 772, 775 (Colo. 1954) are particularly persuasive and controlling in this determination.

Both *Grynberg* and *Russell Coal* involved claims for subjacent support where there was no physical appropriation of the plaintiff's property. Both cases involved an analysis of the claimed economic impact the alleged taking had on the plaintiffs' ability to use and enjoy their adjacent properties. Although both cases involved the relationship between the owner of the surface estate and underlying mineral estate, the Court finds that this is distinction without a difference. What matters is that the two property estates were immediately adjacent, and the defendants' activities on the adjacent estate arguably imposed a burden of support that did not exist previously. Both

cases recognized the principle that the imposition of a burden of support on an adjacent property can sustain a takings claim.

In *Russell Coal*, the County and the State Highway Department condemned certain parcels of land for the construction of the Denver-Boulder Turnpike. A portion of the condemned property was the surface estate overlying Russell Coal's separate sub-surface mineral estate lying underneath the newly condemned roadway. Russell Coal argued that by condemning the surface estate and constructing a roadway thereon, the Defendants had increased the burdens on its mineral estate by creating a duty of subjacent support that did not previously exist. This new burden of subjacent support interfered with Russell Coal's mining operations and limited the amount of coal it could extract without causing injury to the defendants' surface estate. The Supreme Court found that a taking had occurred and stated:

> When the land in question was condemned and a highway constructed, that a servitude upon the underlying mineral estate was created admits of no argument. This being true, that servitude caused damage and the amount thereof is a question for a jury or a commission, and not to be escaped by an administrative determination that the servitude estate was freed from liability. *Id.* at 775.

This decision recognizes the general rule that a property owner owes a duty of lateral support to adjacent properties, and one who withdraws lateral support necessary to the support of land in another's possession can be held liable for a subsidence of the land, as well as for harm to artificial additions resulting from the subsidence. *Restatement (Second) of Torts* § 817 (1979). Colorado also recognizes the converse of this rule; specifically, that it is a "fundamental notion that a landowner cannot, by placing improvements on its land, increase its neighbor's duty to support the land laterally. Otherwise, the party with the duty to maintain the lateral support would be responsible for improving the support to hold more than the natural land would have held." *Vikell Investors Pac., Inc. v. Hampden, Ltd.*, 946 P.2d 589, 594 (Colo. App. 1997).

Grynberg was an inverse condemnation case and involved similar facts to *Russell Coal*. There, the owner of the adjacent surface estate proposed to build a reservoir over Grynberg's subsurface mineral estate (also a coal mining interest). The claim asserted by Grynberg was essentially the same as that in *Russell Coal*; that is, the burden of subjacent support owed to the surface estate interfered with Grynberg's ability to mine his coal. The *Grynberg* court disagreed and found that a taking had not occurred. The court distinguished *Russell Coal* on the grounds that in the *Grynberg* case, the surface estate had already been severed from the mineral estate when Grynberg acquired his mineral interest; thus, the activities of the adjacent property owner did not impose any new burden on his mineral estate.

> Therefore, when Northglenn acquired the surface estate, the obligation of the mineral estate owner to provide subjacent support to the surface estate owner was one of the "bundle of rights" acquired by Northglenn along with title to the surface estate for the west half of Section 36. Grynberg, as the lessee, was bound by the mineral estate owner's duty of support so that Northglenn's purchase of the surface caused no change to him; Grynberg lost nothing that he had had previously. *Grynberg*, at 181.

In the current case, RFTA's construction of the Wall has created a new burden of lateral support on the Sos Property that did not previously exist. RFTA has essentially created a *de facto* "slope easement" on the Sos property.[6] The retained expert engineers all agree that the Wall has imposed *some* measurable force load or burden on the Sos Property. The fact that the amount of the load is in dispute is not wholly dispositive to finding a taking has occurred.

[6] Condemnors typically acquire and pay for slope easements as necessary to maintain lateral support for improvements. "A slope easement is an easement reserved to the condemnor to use whatever portion of the property is needed to provide lateral support for the roadbed." *City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, 260 P.3d 29, 32-33 (Colo. App. 2010).

RFTA argues that no taking has occurred because the increased burden is *de minimus*. RFTA is correct in arguing that the injury under a damaging claim must be "substantial". "The intent of including the word 'damaged' in the constitution was to grant relief to property owners who had been s*ubstantially damaged* by the making of such public improvements abutting their lands.." *Grynberg*, at 179 (emphasis added). However, the Court disagrees that the claimed damage in this case does not meet that standard. *Grynberg* is instructive on this point.

The plaintiff in *Grynberg* argued that an unauthorized drill hole into the mineral estate constituted a taking. The court disagreed, holding that although the drilling of the test hole was a "physical invasion" of Grynberg's property, it did not rise to the level of a taking because it did not "interfere with Grynberg's use, possession, enjoyment, or disposition of his coal lease. The drilling of the test hole, a single, transitory physical invasion of Grynberg's coal lease, does not translate to an exercise of dominion and control of the coal lease." *Grynberg*, 846 P.2d at 182.

In the present case, the Court finds as a matter of law that the newly imposed burden of lateral support is not a single transitory invasion of the Sos Property. Although the force may be less than Sos' engineers have asserted (and the Court will assume those experts are correct for purposes of summary judgment) the fact remains that the lateral force and the burden of support are permanent intrusions into Sos' property rights. The expert dispute pertains only to the degree of force not its existence on the Sos Property. As in *Russell Coal*, the burden, whatever its scope, permanently interferes with the use of the Sos Property. It therefore effectively diminishes Sos' "use, possession, enjoyment, or disposition" of his property. It is undisputed that Sos must address that new burden through engineering designs and additional costs for construction. The amount of these additional costs is a factual issue for the jury to decide when it considers damages and is not dispositive of the question whether a taking or damaging has occurred.

For the same reasons, the Court rejects RFTA's argument that the lateral force load is not a taking because it is "intangible." Unlike the noise, electric fields, and radiation discussed in *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001), the lateral force loads in this case have a tangible and measurable effect on the use of the Sos Property. The lateral support burden requires an engineering remedy to physically address the added forces imposed by the wall. The intangible forces in the *Van Wyk* case did not share these traits.

RFTA next argues that Sos cannot establish a taking because no actual "physical invasion" of the property has occurred. The Court is not persuaded. RFTA appears to be applying the more stringent Fifth Amendment constitutional standard for non-regulatory takings. Moreover, RFTA's argument is directly contrary to the decision in *Grynberg.* The damaging clause in the Colorado Constitution is intended "to grant relief to property owners who had been substantially damaged by the making of such public improvements abutting their lands, *but whose land had not been physically taken by the government.*" *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993)(emphasis added); *See City of Pueblo v. Strait*, 36 P. 789, 791 (Colo. 1894). "Physical invasion is not required for a plaintiff to state a claim for relief in inverse condemnation proceedings." *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 742 (Colo. 2007). A plaintiff must show a legal interference that substantially impairs his use or possession of the property or that interferes with his power of disposition over his property. *See Bd. of County Comm'rs v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984). The creation of a new servitude on another's property meets this requirement. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v. Dickinson*,

331 U.S. 745, 748, 67 S. Ct. 1382, 1385, 91 L. Ed. 1789 (1947); *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 387 (Colo. 2001).

Finally, RFTA argues that a taking did not occur because RFTA did not intend to impose a burden of support on the Sos Property. RFTA relies on *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo. 1993), and argues that as in *Trinity* it should not be found liable for a taking where the alleged damage arises from acts that are essentially negligent. The Court is not persuaded. First, *Trinity* is clearly distinguishable on its facts. The claims in that case arose from a leaky water tank that flooded the plaintiff's property. Obviously, the city in that case did not intend to build a leaky water tank or cause the claimed damage. Here, the claim is not that RFTA was negligent but rather that its construction activities, as designed, created a new burden on the Sos Property.

RFTA reads the *Trinity* decision too narrowly. Under the *Trinity* test a plaintiff may prove either (1) an intent on the part of the defendant to take the plaintiff's property; or (2) an intent on the part of the defendant to do an act which has the natural consequence of taking the property. *See Trinity*, 848 P.2d at 921–22. "The first prong focuses on the subjective intent of the defendant, while the second prong focuses on objective causation. Because it is presented in the disjunctive, the *Trinity* test provides a property owner two separate grounds for establishing a taking." *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007). Here, the second prong of the *Trinity* test is applicable. The construction of the Wall by RFTA was an intentional act, the natural consequence of which was to impose a burden of lateral support on the Sos Property. It does not matter whether RFTA subjectively intended to impose that burden, the construction of the Wall naturally created the lateral burden.

For the foregoing reasons, the Court finds as a matter of law that Sos has met his burden to demonstrate a taking and "damaging" under Article II, Section 15.

2. **Was the taking for a public purpose without just compensation?** It is undisputed by the parties that RFTA has not paid any compensation to Sos for the taking. It is equally indisputable that the taking for the construction of the Wall and the operation of the RFTA bus station was for a public purpose. In condemnation proceedings, "the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit." *City & Cnty. of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1144 (Colo. App. 2003); *Denver West Metropolitan District v. Geudner*, 786 P.2d 434, 436 (Colo. App. 1989).

"[I]n determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration." *Larson v. Chase Pipe Line Co.*, 183 Colo. 76, 514 P.2d 1316 (1973).

Here, there is no doubt that the development of the bus terminal was for a "public use". RFTA's own public resolutions admit as much. With regard to the RFTA resolution authorizing the acquisition of the properties needed to build the bus transit stations, RFTA stated:

> WHEREAS, a public purpose and public use exists to acquire the Subject Parcels and Easements or associated interests, in order to serve the public transportation needs of the citizens of the Roaring Fork Valley, through the construction of nine (9) BRT Stations and related facilities and improvements; …RFTA is authorized to acquire property through its power of eminent domain in accordance with Section 38-1-101 et seq., C.R.S. *See, Plaintiff's Exhibit 3 in Reply is Support of Motion for Partial Summary Judgment*.

Consequently, the taking of the Sos Property is likewise for that public use. *See also, Pub. Serv. Co. of Colorado v. Shaklee*, 784 P.2d 314, 318 (Colo. 1989).

3. Was the taking done by a governmental or public entity that has the power of eminent domain but which has refused to exercise it?

RFTA claims there is a disputed question of law whether it is a regional transportation authority with the power of eminent domain. RFTA's argument on this point does not withstand scrutiny. In his First Amended Complaint, ¶ 2, Sos alleges that RFTA, "now and at all times relevant herein, was a statutory regional transportation authority created pursuant to C.R.S. § 43-4-601 *et seq*. as amended…" RFTA admits this allegation.

In ¶ 3 of the First Amended Complaint, Sos alleges that RFTA "is by law vested with the authority to exercise the power of imminent (*sic*) domain to acquire property for public use, pursuant to C.R.S. § 38-1-202 *et seq*, but only through formal action of its board of directors pursuant to C.R.S. § 43-4-604, *et seq*." In response to ¶ 3, RFTA states that those allegations "state conclusions of law, which are for the Court to determine." RFTA is correct. In all condemnation cases, "[a]ll questions and issues, except the amount of compensation, shall be determined by the court unless all parties interested in the action stipulate and agree that the compensation may be so ascertained by the court." § 38-1-101, C.R.S.

Pursuant to § 38-1-202(1), C.R.S., regional transportation authorities, such as RFTA, are expressly given the power of eminent domain:

> The following governmental entities, types of governmental entities, and public corporations, in accordance with all procedural and other requirements specified in this article and articles 2 to 7 of this title and to the extent and within any time frame specified in the applicable authorizing statute, may exercise the power of eminent domain:
>
> (XXXIX) A regional transportation authority created pursuant to section 43-4-603, C.R.S., as authorized in section 43-4-604(1)(a)(IV), C.R.S.

Pursuant to § 43-4-604(1)(a)(IV), C.R.S., RFTA's board of directors has the power to exercise eminent domain to acquire properties it deems necessary for its statutory purposes but

may not delegate that power. "The board, by resolution, may delegate any of the powers of the board to any of the officers or agents of the board; except that, to ensure public participation in policy decisions, the board shall not delegate the following: (IV) Instituting an eminent domain action, which may be at a public hearing or in executive session…"

RFTA argues that because § 43-4-605, C.R.S. does not specifically list eminent domain among its enumerated powers that the Court cannot infer that power. No inference is necessary. The preface to § 605 specifically states that the powers listed therein are "[i]n addition to any other powers granted to the authority pursuant to this part 6…" As stated, § 604(1)(a)(IV) expressly provides that the board has the power of eminent domain and that such power cannot be delegated. RFTA also ignores the expressly created eminent domain power under § 38-1-202(1), C.R.S.

Finally, RFTA's own actions belie the argument. In its Resolution No. 2011-12, wherein the acquisition of properties necessary for it bus rapid transit facilities, including the Project, was authorized, RFTA's board of directors stated that it has the power of eminent domain:

> WHEREAS, RFTA is authorized to acquire property through its power of eminent domain in accordance with Section 38-1-101 et seq., C.R.S.; NOW, THEREFORE, BE IT RESOLVED, that if compensation to be paid for any of the Subject Parcels, Easements and/or other interest cannot be agreed upon by the parties interested…then legal counsel for RFTA is hereby authorized to institute an prosecute to conclusion such proceedings as are available under Article I of Title 38, Colorado Revised Statutes, through the exercise of the power of eminent domain. *See, Plaintiff's Exhibit 3 in Reply is Support of Motion for Partial Summary Judgment.*

The Court therefore finds as a matter of law that RFTA has the power of eminent domain and that it authorized the exercise of that power in connection with the Project.

4. Is the claimed damage a unique or special injury which is different in kind from, or not common to, the general public, and not solely a diminution in value?

It is indisputable that the lateral force loads applied to the Sos Property are unique and different in kind from, and not common to, those of the general public. The Wall is only adjacent to the Sos Property, and the need for lateral support is specific to the Sos Property. The impact to the Sos Property is not a damage or injury that is common to the general public. Sos has therefore satisfied the first prong of this requirement; however, RFTA argues that Sos cannot prove a taking because there has been no diminution in value to the Sos Property. RFTA relies on its expert appraisal from Chase and Company which concluded that "there is no diminution in the value of the property attributable to the project." *Exhibit 1 to RFTA Motion for Summary Judgment*. This expert opinion seems to be unrefuted. However, the Court finds that the Chase appraisal is not dispositive.

If Sos was asserting a damage claim solely for diminution in value, RFTA would have a valid point. It is clear that a mere diminution in value will not support a taking where the claim is one for "damaging" rather than a physical appropriation of property. "While we have held that depreciation in market value may be considered for the purposes of assessing damages to a property owner in a condemnation proceeding where a portion of a parcel of land is taken, we have never held that mere depreciation in value is grounds to award just compensation for a damaging of property…We continue to uphold that conclusion here." *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 388 (Colo. 2001)(citations omitted).

Sos is not arguing that the measure of his damages is solely a diminution in value. Sos is seeking damages for the additional costs imposed on the Property to construct an engineered retaining wall to compensate for the added lateral support loads. This measure of damages is akin to restoration damages which the Court has the discretion to allow. Thus, the Chase opinion does

not resolve the question of whether a taking or damaging has occurred.[7] Restoration damages such as those sought by Sos are an appropriate remedy here.

A property owner is entitled to just compensation in an inverse condemnation action. "The role of just compensation is to put the landowner in the same pecuniary position as though the taking had not occurred" and to "award the compensation necessary to 'reimburse the plaintiff for losses actually suffered.'" *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 805-806 (Colo. 2001)(*Fowler II*)(citing *Board of County Commissioners v. Slovek*, 723 P.2d 1309,1316 (Colo. 1986). "The trial court has broad discretion when determining the standard of compensation." *Scott v. Cnty. of Custer*, 178 P.3d 1240, 1248 (Colo. App. 2007). The objective of just compensation is to afford "sufficient flexibility trial courts need to achieve fair results." *Fowler II*, at 805.

"Generally, the proper measure of compensation for injury to real property is the diminution of market value." *Id.* However, other measures of damages, such as the cost of restoration may be a suitable remedy in an appropriate case. "[T]he cost of restoration may be proper where the 'injury is susceptible of remedy at moderate expense, and the cost of restoring it may be shown with reasonable certainty.'" *Fowler II*, at 805-806 (citing *Big Five Mining Co. v. Left Hand Ditch Co.*, 73 Colo. 545, 549, 216 P. 719, 721 (1923)).

"When determining whether to depart from the diminution of value standard, the court considers the nature of the owner's use and of the injury." *Scott* at 1248. "The court must also 'be vigilant not to award damages that exceed the goal of compensation and inflict punishment on the

[7] The Court also notes that the Chase opinion is suspect because it starts from the premise that no taking has occurred. "Since there has been no physical taking of any portion of the subject property by RFTA, all subsequent takings references in this report shall be termed "alleged takings." *Report at p. 2.*

defendant or encourage economically wasteful remedial expenditures by the plaintiff.'" *Id*. (citing *Bd. of Cnty. Comm'rs of Weld Cnty. v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986)). "The landowner is not entitled to a windfall at the taxpayer's expense based on speculative considerations." *Fowler II*, at 804.

Here, the Court finds that there is good reason to depart from the diminution in value standard. The primary reason is obvious. In a "damaging" case, a mere diminution in value is never sufficient to support a takings claim. Thus, some alternative measure of damages *must* be considered by the Court or there would never be an available damages remedy for such takings. Sos has produced an expert opinion that estimates the cost to compensate for the lateral loads is approximately $75,000. Assuming that Sos actually constructs the wall and the additional engineering and construction costs are incurred, Sos would be entitled to such damages as necessary to put him "in the same pecuniary position as though the taking had not occurred" and to reimburse him "for losses actually suffered.'" *Fowler II*, at 805-806. RFTA will certainly argue that the claimed costs to remedy the taking are excessive and speculative. It is up to the jury to determine damages in this case, and they will consider whether these claimed damages are supported by the evidence or not. The Court finds as a matter of law that Sos has satisfied the fourth prong of the test. The claimed damages are unique to the Sos Property, and Sos is not solely seeking damages for a claimed diminution in value. Damages to remedy the forces imposed by the Wall are appropriate in this case.

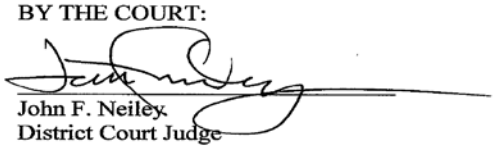
Sos has therefore proven, as a matter of law, that a taking or damaging has occurred pursuant to Article II, Section 15 of the Colorado Constitution.

VI. CONCLUSION AND ORDER

For the reasons stated above, the Court GRANTS Sos' Motion for Partial Summary Judgment and DENIES RFTA's Motion for Summary Judgment. The court trial set for September 18, 23, 24, and 25, 2015, is vacated. The jury trial on damages remains set for November 16 through 20, 2015.

Done this 22nd day of July, 2015.

BY THE COURT:



John F. Neiley
District Court Judge

Chapter 3 | Trial

3.1 Jury Trial Procedure Order Template

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002	
____, Plaintiff v. _____, Defendant(s)	▲ COURT USE ONLY ▲ Case Number: __CV__ Division: 06 Courtroom: 5B
DIVISION SIX JURY TRIAL PROCEDURE ORDER	

THIS MATTER is currently set for a ____-day jury trial to commence on ____, 201_. The Court hereby issues the following Order regarding procedure.

I. JURY INSTRUCTIONS: The Court orders parties to submit proposed jury instructions no later than seven days before trial. The parties must submit one set of stipulated jury instructions with citations. Each party shall also submit one copy of their proposed disputed jury instructions with citations.

The proposed jury instructions (stipulated and disputed) must be e-filed and e-mailed to the Court's Law Clerk. The copies sent to the Court's Law Clerk must be in Microsoft Word format with one proposed instruction on each page. The Law Clerk should receive one Word document containing stipulated jury instructions, one Word document containing Plaintiff's proposed disputed jury instructions, and one Word document containing Defendant's proposed disputed jury instructions. The Court's Law Clerk may be reached at (xxx) xxx-xxxx or at _____@judicial.state.co.us.

Additionally, parties shall prepare and submit to the Court an instruction setting forth a stipulated statement of the case. See Colo. Jury Instr., Civil 2:1.

II. JURY NOTEBOOKS: The Court provides each juror with a notebook containing writing materials. If stipulated between the parties, further materials may be

proposed to be included in a jury notebook. Such materials must be submitted to the Court for approval no less than seven days before trial begins.

III. COURT REPORTERS: This jurisdiction does not provide a court reporter for civil jury trials. If parties intend to retain a court reporter, please inform the Law Clerk in advance of trial.

IV. PRE-TRIAL CONFERENCE: The Court does not, as a matter of course, schedule a pre-trial conference. However, please note that the Court will not address any motions on the morning of trial. Other than motions in limine, all pre-trial motions must be filed no later than 35 days before the trial date, and the Court will issue its rulings in advance of trial. Motions in limine are to be filed no later than 5 days before trial. If parties believe a pre-trial conference is necessary or would be beneficial, parties may request that one be set.

V. MISCELLANEOUS TRIAL MANAGEMENT:

a. The Court does not generally seat an alternate juror.

b. Time limitations will be as follows:
   i. Voir dire – 20 minutes per side
   ii. Opening statements – 15 minutes per side
   iii. Closing arguments – 20 minutes per side

c. The Court will allow juror questions. Juror questions will be submitted to the Court after cross examination.

d. If parties plan to use technology during the trial they must contact the Law Clerk prior to trial to schedule a time to set up and/or test the equipment.

e. The Court may amend these rules upon a good cause showing that a particular case requires such amendment.

Done in Golden, Colorado, this ___ day of _____, 201_.

BY THE COURT:

_____

District Court Judge

3.2 Jury Selection Outline

[Law clerk has assembled the jury panel and they have been seated in the jury box and in the back.]

Introduction

[Call case]

Good morning ladies and gentlemen. Welcome to Courtroom _____ of the District Court _____. My name is _____, and I will be the judge presiding over this case.

[If it's an issue, comment on acoustics.]

Please let me know if you cannot hear me or the attorneys.

In this courtroom we handle civil cases, not criminal cases. You have been summoned to serve as jurors in a civil case.

Before we begin the jury selection process, let me introduce some of the people who will be involved in this trial:

- Law clerk:
- Division Clerk:
- Court Reporter:

Thank you for being here. We realize appearing for jury duty can be an inconvenience, but our system only function if people like you take time out of your busy lives and participate as jurors.

The person who brings a civil case is called the "plaintiff." The person against whom the case is brought is called the "defendant." In this case, the plaintiff is _____ and is represented by

_____. Please introduce yourself and your client. The defendant is _____ and is represented by _____. Please introduce yourself and your client.

Statement of Case

[This should be supplied by the parties at the same time that the submit proposed jury instructions. If there is a disagreement, you will have to resolve it at the pre-trial conference or the first day of trial.]

Burden of Proof

[CJI-Civ. 2:1]

The plaintiff has the burden of proving his/her claims by a preponderance of the evidence

The defendant has the burden of proving any affirmative defense by a preponderance of the evidence

To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not.

"Burden of proof" means the obligation a party has to prove his/her claims or defenses by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.

If a party fails to meet his/her burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must reject that claim or defense.

Time Estimate

Based on my discussions with counsel, I anticipate that this trial will be completed in approximately _____ days. Those of you who are selected will begin hearing evidence today. Estimates

like this are always qualified because there are so many variables which can affect timing. More importantly, there is no time limit on jury deliberations.

Schedule

During trial, we start hearing evidence at 8:30 a.m. and finish by 5:00 p.m. We will have one recess in the morning and one in the afternoon, and we generally will break for lunch between noon and 1:30. There are two reasons for the longer lunch break. First, it gives me time to address legal issues with the lawyers while you are gone so we can minimize interruptions in the presentation of evidence while you are here. Second, it gives you time to attend to personal business and life issues which inevitably arise.

[Of course, you can adapt this to allow for your own schedule.]

Trial Phases

There are four phases to a civil trial.

1. We are just beginning the first phase, which is jury selection. The purpose of this process is to allow the parties to get to know each of you better so that the lawyers then can make intelligent choices as to who will serve on the jury and so that we can be sure of seating a fair and impartial jury for this case. The jury will consist of 6 jurors and ____ alternate(s). [The parties have agreed that the alternate(s) will be allowed to deliberate. (Alternatively: I will not disclose the identity of the alternate until the evidence and argument has been completed, because all of you need to pay close attention throughout the trial to the parties' presentations.)] At the end of the process, the

rest of you will be excused and you either will be free to go, or you will be instructed to return to the jury room for reassignment.

[The parties must both agree to allow the alternate to deliberate, and it is best practice to get this agreement on the record. You may not allow an alternate to deliberate over a party's objection. Be sure the parties are clear as to which juror is the alternate.]

2. Once the jury is selected and sworn, we will proceed to phase 2 of the trial. That is the evidentiary stage of the trial. Because the plaintiff has the burden of proof, he/she must come forward with some evidence. Then the defendant will have the opportunity to present evidence. Most evidence comes from the testimony of witnesses. Evidence also can be in the form of exhibits, such as documents, photographs, objects and diagrams.

3. Once the evidence is completed, we will move to phase 3, which consists of my giving the jury the instructions on the law and the attorneys giving their closing arguments. The jury will be duty bound, upon their oath, to follow the law as contained in my instructions. It is a juror's job to follow the law.

4. The final phase of the trial is the jury's deliberations and verdict. The jury will deliberate in a private jury room. A verdict must be unanimous. When a verdict is reached, the foreperson will sign the appropriate blank on the verdict form, and I will announce the verdict in open court.

Jury Selection

Now, we will begin the selection process. First, I will ask you certain questions to make sure you meet the statutory qualifications for being a juror. But

because you are required by law to answer all these questions truthfully, I am required by law to place you under oath. So please stand and raise your right hands.

[The entire panel takes this oath, not just the ones in the jury box.]

Oath

[CJI-Civ. 1:19]

Do you and each of you solemnly swear or affirm to answer truthfully the questions asked by the Court or the attorneys concerning your service as a juror in this case and to volunteer fully any information concerning your ability to render a just verdict? If so, please say "I do."

Statutory Qualifications

[C.R.S. §13-71-105]

Next, I need to determine of all of you are legally qualified to serve as jurors in this case. The jury commissioner already should have screened you for these things, but sometimes people slip through for various reasons. We are not here to embarrass you or make you feel uncomfortable. If any of these questions raise personal or private issues that you would rather not discuss in public, please let us know; we can then have a private conversation at the bench.

Please raise your hand if any of these applies to you:

[Entire panel answers these questions.]

1. If you are not a citizen of the United States, not age 18 or older, or not a resident of the City and County of Denver at the time you received your juror summons;

2. If you are unable to read, speak or understand the English language;

3. If you have any physical or mental disability which would make it impossible for you to serve as a juror;

4. If you are the sole daily caregiver for a permanently disabled person living in your household;

5. If you have served on a jury for 5 or more days in any court within the last 12 months;

6. If you have already appeared for jury duty this calendar year;

7. If you have served as a juror in each of the last two calendar years.

[If anyone raises their hand in response to the above, you should question them on the record; if they truly do not qualify, they should be dismissed.]

Initial Cause Qualifications

Even jurors who meet the statutory qualifications may be excused for cause. Usually, a juror is excused for cause because he or she has some connection to the case or the parties, such that it would be difficult to be fair and impartial. Please listen carefully to the following questions, and raise your hand if any of these applies to you:

1. Do you know the parties or any of the lawyers in this case, or their law firms?

2. Do any of you have a business or personal relationship with any of the parties, the lawyers or their law firms?

3. Before you came into the courtroom this morning, had you heard anything about the incident that forms the basis for this case?

4. Were you a witness to any event connected to the case?

5. Do any of you know me or my staff?

6. Do any of you know each other?

7. As you sit here right now, do any of you have a bias for or against the plaintiff or for or against the defendant?

8. Have you formed an opinion about how the case should come out, even before hearing any evidence about the case?

9. [If requested: Are you a shareholder, director, officer, employee or agent of _____ Insurance Company?]

[The parties typically will stipulate to the court asking this question; absent a stipulation, it should not be asked.]

10. Now I am going to read a list of the witnesses expected to testify at this trial. Raise your hand if you think you may know any of them.

[The parties should have provided a list of anticipated witnesses in advance of trial. The names should be read from these lists.]

11. Is there any reason you know of now why you could not be a fair or impartial juror in this case? If anything come to mind during jury selection that you think might affect your ability to be fair and impartial in this case, please raise your hand and volunteer that information, even if no one has specifically asked you about it.

Hardship

We all recognize that you have other places you would rather be, business and family matters to attend to and lots of other life issues. But jury service is one of the ONLY obligations each of you have as a citizen of this country. You don't even have to vote if you don't want to. Trial to a jury of your peers is one of the most vital parts of our democracy, and I want you to know that I view each citizen's obligation to perform this

duty as just that – and obligation and a duty of each citizen of this country and our state.

[This is a matter of personal style, and you should adapt it as you see fit. Some judges are more pointed; others are more flexible.]

With that said, and understanding the schedule that I have described, would any of you suffer extreme hardship if required to serve on this jury? "Extreme hardship" is more than mere inconvenience. It is surgery, medical appointments, longstanding travel plans, and the like.

[Let every potential juror who claims a hardship speak. Do not dismiss anyone immediately, because it will only encourage other jurors to manufacture "hardships." Once you have let every juror who claims a hardship speak, confer with counsel at the bench to

determine whether they will stipulate to the dismissal of any jurors. Those jurors should then be dismissed.]

Further Explanation

Now, we are going to turn our attention to those of you in the front [meaning those jurors in the jury box]. I'm going to ask each of you the questions on the chart, and then the lawyers will ask questions.

For those of you in the back, you are not off the hook. In fact, I'm sure we will be calling some of you up to replace those in the box who get dismissed for whatever reason. So relax a little, but also follow along with the conversation we have with the jurors in the box. That way, if you are then called up, you can jump right into the discussion.

Those of you up front, answer our questions honestly and completely. There are no right answers. We are not interested in embarrassing you or making you uncomfortable. The sole purpose here is to select a

jury of people who can be fair in impartial and willing to listen to both sides. If you are uncomfortable answering a question in open court, please just say so. We can always have a private conversation at the bench.

As you answer the questions, please be sure to hand the microphone off to whomever is speaking.

Chart Questions

1. Name
2. Employment; or, if retired, former employment
3. Education
4. Marital status
5. Children
6. Interests and hobbies
7. Have you ever served on a jury before

I am now going to turn the questioning over to counsel, starting with plaintiff.

[Length of voir dire should be covered in your pre-trial order, the trial management order, or at the pre-trial conference.]

Lawyer Questions

Cause Challenges

[This can be handled numerous ways. One way is to allow both sides to complete voir dire, and deal with all cause challenges at the bench. Jurors that are dismissed are replaced by those not in the jury box. The new jurors should be taken through the standard questions and then the lawyers should be allowed a short additional voir dire of the new jurors only.]

Preemptory Challenges

[4 per side plus one additional per side if one or two alternates. C.R.C.P. 47(b).]

Now that questioning is complete, each side may exercise what we call "preemptory challenges." That is, each side may in turn eliminate 4/5/6 of you, until we get to our jury of six plus ___ alternates. They do not have to give any reason for eliminating you, and you should not feel embarrassed or take it as an insult if you are eliminated (though this rarely happens). This is the method our system has developed over two centuries for giving the parties a say in who will serve as jurors, and it ensures that we get the fairest possible panel.

[Again, how you handle this is a matter of personal preference. One way is to have your clerk generate a three-column list with the name of each juror in one column and then a column for "plaintiff" and "defendant." The list gets passed back and forth with each side indicating a strike by checking the appropriate box. (*E.g.*, if plaintiff strikes Mr. Smith,

plaintiff places a check under the "plaintiff" column next to Mr. Smith's name.) This gives a clear record of the challenges and can be useful in the event of a *Batson* challenge at the conclusion of the jury selection process.]

[Once the preemptory challenges are complete, make sure neither side has any issues with the jury as constituted. You may then dismiss the eliminated jurors and the panel.]

Oath

[CJI-Civ. 1:20]

Ladies and gentlemen, you have been selected as our jury in this case. Would you all stand, and raise your right hands?

Do you, and each of you, solemnly swear or affirm that you will fairly consider and decide the case now before you between [name of plaintiff] and [name of defendant] and that you will reach a true verdict based upon the evidence and the law contained in the instructions of the Court?

If so, please say "I do."

After Oath & Before Openings

[CJI Civ. 1:7, modified slightly]

Before we begin the trial, I would like to tell you about what will be happening. I want to describe how the trial will be conducted and explain what we will be doing.

The first step in the trial will be opening statements. The attorneys for the parties my make an opening statement if they choose to do so. Opening statements are not evidence. Their purpose is only to help you understand what the evidence will be.

Next, the plaintiff will present evidence. Evidence consists of the sworn testimony of the witnesses, the exhibits received in evidence, and stipulated, admitted or judicially noticed facts.

After the plaintiff's evidence, the defendant may present evidence by is not required to do so.

The attorneys for the parties are permitted to question the witnesses presented by the opposing party. This is called "cross-examination." You may have to decide what testimony to believe.

[CJI-Civ. 3:16]

You will be the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency of lack of consistency

in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, in any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based upon these considerations, you may believe all, part or none of the testimony of a witness

[CJI-Civ. 3:15]

You may hear evidence in this case from persons who have testified as experts. The law allows experts to express opinions on subjects involving their special knowledge, training and skill, experience or research. The jury shall determine what weight, if any, should be given their testimony as with any other witness.

At the conclusion of the evidence I will tell you the rules of law – called "instructions" – which you are

to use in reaching your verdict. I will read those rules of law to you and you will be allowed to take them with you to the jury room during your deliberations.

After you have heard all the evidence and the instructions, the attorneys for the plaintiff and defendant may make closing arguments. Like opening statements, closing arguments are not evidence. The plaintiff's attorney will have the opportunity to reply the closing argument made by the defendant's attorney.

You will then go to the jury room to deliberate on a verdict. Your purpose as jurors is to decide what the facts are, and your decision must be based solely upon the evidence and the law I will give you in my instructions.

At times during trial the lawyers may make "objections." This simply means that the lawyer is requesting that I make a decision on a particular rule of law. It is the duty of the lawyer to object to evidence

which the lawyer believes may not properly be offered. If I "sustain" an objection or strike evidence, you must disregard that evidence. If I "overrule" the objection, it means that I am deciding the point against the attorney who made the objection. Do not draw any conclusions from the objections or from my rulings on the objections. If I sustain an objection to a question, the witness may not answer it. As jurors, you must draw no inference from the question or speculate as to what the witness would have said if permitted to answer. At other times, I may instruct you not to consider a particular statement that was made. You must not consider any evidence to which an objection has been sustained or which I have instructed you to disregard. Such evidence is to be treated as if you had never seen or heard it.

It is my duty to decide what rules of law apply to the case. You must follow all of the rules as I explain them to you. You may not follow some and ignore

others. Even if you disagree or do not understand the reasons for some of the rules, you must follow them. You will then apply these rules to the facts which you have determined from the evidence.

During the trial I may need to talk with the lawyers out of your hearing about questions of law. Sometimes you may be asked to leave the courtroom while I discuss such matters with the lawyers. We will try to limit these interruptions as much as possible. Do not infer from any ruling or anything I say during trial that I hold any views either for or against any party to this case.

- [If notebooks provided, give instruction CJI-Civ. 1:9]
- [If note taking allowed, give instruction CJI-Civ. 1:8]
- [If juror questions are allowed, give instruction CJI-Civ. 1:17]

- [Read CJI-Civ. 1:4 and 1:5 to the jury.]
- [Finally, cover any local or specific courtroom issues that you may have.]

3.3 Expert Admissibility

Factors for testimony admissible through an expert under C.R.E. 702 when, under the totality of the circumstances.

- *People v. Shreck,* 22 P.3d 68 (Colo. 2001); *Masters v. People,* 58 P.3d 979 (Colo. 2002).
- See also, C.R.E. 702-705.
- Note *People v. Ramirez,* 155 P.3d 371 (Colo. 2007) holding that a "reasonable degree of medical probability or certainty" is no longer the standard for admissibility of medical expert testimony, but, rather, considerations derived from C.R.E. 702, *viz.,* whether the scientific principles underlying the testimony are reliable, and the expert is qualified to opine concerning such matters.

A. Science is Reliable

The **scientific principles** underlying the testimony are reasonably **reliable**.

There is no one set of specific factors which is determinative. Among those which may be helpful

- How "exact" is the science or method of inquiry? (Inexact sciences such as social sciences are not necessarily excluded from consideration *per se*.)
- Is there recognition of the qualifications of experts in the field and/or subspecialty?
- Has the particular expert been qualified to testify previously?
- Is the evidence to be elicited generally accepted within the science community in question?
- Is there any body of literature concerning the evidence in question? How large a body of literature?
- How long, or how extensively has the question been studied?
- Have studies been systematic, or more anecdotal?
- Has the technique been replicated?
- Are there control group studies?
- The known and potential rate of error for studies or techniques?
- What standards control the operation of the technique?
- What is the relationship of the technique to other methods of scientific analysis?
- How similar is the technique relied upon in the past to the conditions which the technique

attempts to replicate, and/or the hypothesis it attempts to prove/disprove?

- Is a particular technique regarded as superior to others said to accomplish similar results? Why? (This may be more of a weight factor under *Shreck* than a bar to admissibility.)
- What are the non-judicial uses for the technique, if any?
- What is the frequency and type of error demonstrated while using the technique?
- Can it exclude other conclusions? Why/not?
- Has evidence from a particular technique been offered in previous cases to support or dispute the merits of a particular scientific procedure?
- Has the particular technique been "peer-reviewed"?
- Has the research developed predictive capacity?
- Whether the same information has been accepted in other courts, particularly using Rule 702 standards?
- If there are opposing points of view concerning the science or method of inquiry, how well-accepted are the opposing points of view? What is the nature of the disagreement, or the grounds

therefore? It is substantial, or merely "technical"?

- Does the science deal with historic, unobserved facts, never to be repeated? If so, is there a "faith" component to it?
- Is the "science" in any sense connected with a philosophy, or "world-view"? If so, how open is it to inquiry or critique?

B. Expert is Qualified

The **expert** is **qualified** to opine on such matters.

- The usual expert qualification issues in terms of education and experience, board certification, DORA licensure.
- Was the expert's degree from a program accredited by the ___ (American or National) Association?
- Did the expert do his/her dissertation utilizing original empirical research?
- Certification in forensic _____?
- What observations the expert made—were they sufficient to provide a foundation for his opinion?
- How often has the expert tried, or relied upon the technique?

- If there are other techniques, is he/she familiar with the distinctions, advantages/disadvantages of each relative to the technique in question?
- Have others relied upon the technique, following his/her lead in doing so?
- Can the expert testify as to articulable and objective conclusions from observation, or is there mere "hunch" involved at any point in the analysis? Or *ipse dixit*?

C. Useful to the Jury

Does it "fit", e.g., is there logical relevance between the evidence and some fact at issue?

- *See also, People v. Martinez,* 74 P.3d 316, 323 (Colo. 2003).
- Prosecutor may be asked to indicate what elements or issue the evidence is designed to address.
- "On this *subject* can a jury from *this person* receive appreciable help?" (*Masters,* at 989).

Would an untrained layman be qualified to determine intelligently and to the best possible degree the issues without this expert assistance? (*Id.*)

It must be validly and scientifically related to the issues.

- These issues would include: the elements of the offense;
- The nature and extent of other evidence in the case;
- The expertise of the proposed witness;
- The sufficiency of foundational evidence upon which his testimony is based;
- And the scope and content of the opinion itself.

Does it explain something unique, and outside ordinary experience of jurors?

Does it explain something otherwise seemingly illogical or incomprehensible?

There must be a framework by which the jury can understand the evidence and apply it to the facts at hand in the particular case.

Admissibility may not necessarily be for all purposes propounded by the proponent!

D. Unfair Prejudice?

Under **C.R.E. Rule 403 balancing test**, the probative value of the evidence is not substantially outweighed by unfair prejudice.

- The expert may not invade the province of the jury by passing upon credibility of witnesses or weight of disputed evidence.
- Is there any tendency to mislead the jury where the witness may be testifying as both a fact and expert witness?
- The expert may testify that a person fits characteristics commonly found in those who have committed offenses of the type in question (if relevant); and to discuss those typical characteristics.
- The test *favors* the introduction of evidence (*Masters,* at 1001; *People v. Spoto,* 795 P.2d 1314 (Colo. 1990)).
- The danger of unfair prejudice must *substantially outweigh* the probative value of the evidence.
- Can cautionary instructions reduce the danger of prejudice acceptably?

- Will it lead to decision-making on an improper basis, such as sympathy, hatred, contempt, retribution, or horror?
- Is the evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect"?

Balance the importance of the fact for which the evidence is offered **with**;

- The strength and length of the chain of inferences necessary to establish the fact of consequence;
- The availability of alternate means of proof;
- Whether the fact of consequence is disputed;
- And, the effect of a limiting instruction in the event of admission of the evidence.

3.4 Jury Instructions and Verdict Tips

A. Earlier the Better (mostly)

When the parties have to sit down and go through jury instructions, it forces them to think closely and strategically about what they have to prove, and what they actually *can* prove.

Some judges create early deadlines by which to complete jury instructions, others are more lenient.

The balance is in achieving some productivity before trial (and without court assistance), with the degree to which the judge wishes to risk feeling onerous on the parties. This judge recommends requiring draft jury instructions seven days before trial begins.

B. Word Format, Always

Consider requiring that the parties e-mail their proposed instructions to your law clerk after they have been filed.

Also, they should always create the instructions in one document (or one document per party), with each instruction beginning at the top of a new page and titled "Instruction No. __."

Remember, you or your clerk will be compiling these, by not numbering them up front and by not having them in individual documents, this saves a lot of time for the person who puts the document together during trial.

C. Design an Efficient System

Jury instructions become most onerous for a judge when they come in several different sets.

This requires the judge to compare and contrast differing instructions, and also, evaluate the degree to which they may or may not differ from stock instructions.

To avoid unnecessary work, require that the parties work together to identify what is stipulated and what is contested. For instance, the judge might require three sets of instructions:

- Stipulated instructions;
- Plaintiff's instructions to which Defendant objects; and
- Defendant's instructions to which Plaintiff objects.

Or, the judge might require one set of instructions where all non-disputed language is in normal font, Plaintiff's suggested language is in *italics* and Defendant's suggested is in <u>underline</u>.

By requiring the parties to evaluate and list what they do, and don't, agree upon, the judge's job becomes much more manageable.

D. The Dreaded 2:1 or 2:2 Instruction:

Encourage the parties to agree upon a form of instruction under 2:1 or 2:2 (description of the case).

More often then not, they will not agree. This judge recommends that you draft one yourself, in very "bare bones" style, such that it cannot reasonably be objectionable.

If the parties inform you they have different case description drafts, hand them your draft and see if anyone wishes to object. They probably won't.

Read the basic description to the jury and be done with it.

E. Take Control of the Process

Before you get to jury instruction conference, create a "master" instruction document and verdict form.

- This should be a presumptive set the judge believes will be given to the jury, and excluding all that look properly excluded on initial review.

When you get to the instruction conference, give your set to the parties and inform them

- This is the initial set;
- They need to state objections to anything in that set if they object; and
- They need to offer any additional instructions not included (even if they filed them previously).

Then, go through the "presumptive" set in conference, followed by Plaintiff's, followed by Defendant's.

As you rule on objections and make decisions about the instructions, the law clerk should make edits in the "master" set.

By giving a set order and a presumptive set, the parties are discouraged from arguing stridently about trivial issues, and they understand they need to await their turn for offering their own versions or edits.

F. Be on the Record

Some judges allow jury instruction conferences "off the record," then allow the parties to place objections on the record thereafter.

This judge views that simply being on the record eliminates any human recollection failure that may occur regarding objections after long trial days.

Plus, there really is no down side to staying on the record unless it is to keep a court reporter from fatigue in the rare civil case that has a reporter.

G. Less Formality May Be Okay

Some judges allow that the attorneys be less formal at the instruction conference.

- This may include excusing the parties (if they wish),
- allowing the attorneys to remain seated during conference, and
- loosening ties or removing suit jackets for comfort.

H. Verdict Forms

As with the "statement of case," this is often an area of disagreement and confusion.

If it appears there will be contested issues and complex arguments, consider resolving them yourself up front with a proposed form.

- This tends to limit significantly the number of objections and argument.

Chapter 4 | Post Resolution Proceedings

4.1 Attorney Fees

4.2 Costs

Chapter 5 | Special Actions & Relief

5.1 FED – Forcible Entry and Detainer

A. Background

1. Four Separate Actions

Four separate & distinct detainer actions for unlawful possession 10 COPRAC §8.41.

Note

Although we call these actions "FED"s, they are nearly always actions in unlawful detainer pursuant to C.R.S. 13-40-104.

- Forcible entry and detainer C.R.S. 13-40-101
- Forcible entry C.R.S. 13-40-102
- Forcible detainer C.R.S. 13-40-103
- Unlawful detainer C.R.S. 13-40-104

2. Unlawful detainer occurs when:

- Occupant made entry, w/o right/title, into any vacant or unoccupied lands/tenements

- Occupant made entry, wrongfully, into any public lands, tenements, mining claims or other possessions which are claimed or held lawfully by another
- Lessee holds over after expiration or termination of tenancy;
- Lessee holds over after default in rent and 3 days' notice has been served requiring payment or possession;
- Tenant/lessee holds over, w/o landlord's permission, contrary to any condition/covenant, the violation of which is defined as a substantial violation in C.R.S. 13-40-107.5, and notice in writing has been duly served upon such tenant/lessee in accordance with C.R.S. 13-40-107.5;
- Lessee holds over contrary to any other condition/covenant and 3 days' notice has been served requiring compliance/possession;
- Property has been sold under power of sale in mortgage or deed of trust, title has been perfected and purchaser has demanded possession - See Brief on *Goodman v. KeyBank National Association*, 05CA2138, 2006 WL 4391647

- Property has been sold under judgment/decree; and after redemption party refuses to surrender possession after demand;
- Heir/devisee continues in possession after sale and after demand;
- Vendee, under agreement to purchase, defaults on agreement and w/holds possession after demand.

B. Process

1. Notice

Prior to filing Summons and Complaint, the Landlord must serve either a "demand for possession or compliance" or a "notice to quit."

Demand for Possession or Compliance

Also called a “3-day notice”, this document must include *in the alternative* a demand for payment within 3 days or possession. C.R.S. §13-40-104(1)(d)

The 3-day notice must:

- Be in writing;

- Specify the grounds of the defendant's right to possession of the premises;
- Describe the property (address);
- State the time when the property shall be "delivered up"; and
- Be signed by the claimant, agent or attorney.
- C.R.S. §13-40-106

Notice to Quit

Terminates tenancy by notice in writing served not less than the respective period before the end of the applicable tenancy. C.R.S. 13-40-107.

Length of Tenancy	Notice Required
1 Year or Longer	91 Days
6 Months to < 1 Year.	28 Days
1 Month to < 6 Months	7 Days
1 Week to < 1 Month; & Tenancy at Will	3 Days

< 1 week	1 Day
Mobile home out of compliance w/ rules/regulations C.R.S. 13-40-110	30 Days

A **holdover** is implied to be for a "like term" unless the lease has specific language to the contrary.

- Most leases contain a "holdover provision" that limit the new tenancy to a month-to-month tenancy.
- A month-to-month tenant is entitled to 7 days notice from the landlord.
- *Danyew v. Phelps*, 676 P.2d 707 (Colo. App. 1983).

No Notice to Quit needed for a tenant whose term is, by agreement, to end at a time certain.

- C.R.S. 13-40-107(4).

The Notice to Quit must:

- Be in writing;
- Be served in accordance with the above time requirements;
- Describe the property;
- Set forth the particular time when the tenancy will terminate; and
- Be signed by the claimant, agent or attorney.

- C.R.S. 13-40-107(2),

Service of Notice to Quit/Demand for Possession or Compliance C.R.S. 13-40-108 is made by ONE of the following:

- Delivery of a copy to tenant or other person occupying the premises, OR
- Leaving a copy w/some person, a member or tenant's family over the age of 15, residing on or in charge of the premises, OR
- If no one is on the premises at the time service is attempted, by posting such copy in some conspicuous place on the premises.

Notice in a Foreclosure Action

Sometimes referred to as "notice to a bona fide tenant."

If title to a property is transferred as the result of a foreclosure proceeding, a "bona fide tenant" must be given 90-days notice before termination of the lease, pursuant to the federal, Protecting Tenants at Foreclosure Act, section 702.

The demand can be for immediate possession.

2. Summons & Complaint

Complaint

- Complaint must be filed, then summons issued.
- C.R.S. 13-40-110.

Summons

- Summons shall command defendant to appear on a day not less than 7 business days nor more than 14 calendar days from the day or issuance of the summons.
- Generally C.R.S. 13-40-111; 2A COPRAC 71.21; Form 2A COPRAC § 71.34.

Who May Issue Summons

- 6 COPRAC 3.3.

Contents

- Summons must contain language re: the requirement of payment into the court registry if the defendant is asserting a defense of breach of warranty of habitability.
- C.R.S. 13-40-111; 6 COPRAC § 3.4.

Service

- Personal service required for money damage; other alternative--posting and mailing
- Must be at least 7 days before the appearance date specified in the summons.
- C.R.S. 13-40-112.

3. Possession Hearing

Hearing should be set "as expeditiously as possible following defendant's answer."

- *Butler v. Farner*,704 P.2d 853 (Colo.1985).
- Even though counsel will argue otherwise, there is nothing in the statute which requires a possession hearing to be set within 7 days of date Answer is filed.

- Counsel will argue C.R.S. 13-4-114, which is discussed below.

Motion to Continue Hearing

If either party requests delay in trial longer than 5 days, bond may be required by the Court.

- C.R.S. 13-40-114.

Findings & Order

- Property must be located in Jefferson County--venue under Rule 398.
- Plaintiff is the property owner or other individual or entity identified as the landlord or lessor on the lease.
- Lease agreement--term, signatures of parties, when rent due, rent amount, etc.
- Complying "notice to quit" OR "demand for possession or compliance" which was properly served/posted.
- Unlawful detainer occurred.
- Writ of restitution will issue in 48 hrs.; court can order "no move out" until _____.

- Burden--preponderance of the evidence.

4. Trial

Bifurcation - Possession & Damages

- FED actions can generally be bifurcated; bifurcation may be proper where separate trials will avoid substantial prejudice that cannot be mitigated by other measures. C.R.C.P. 342(b);
- A possession hearing involves an equitable issue (no monetary damages), so there is no right to a jury trial. If there are money claims, those must be tried before a jury, if a jury is demanded.

Judgment for Restitution/Possession of Premises

- Ct. shall issue writ of restitution if finds in favor of plaintiff-landlord.
- Writ automatically stayed for 48 hours C.R.S. 13-40-122.
- Remains in effect for 49 days, expires automatically. C.R.S. 13-40-115(3).

- Re: damage during execution of writ of restitution (move-out by sheriff) - See C.R.S. 13-40-122.

Money damages

Per C.R.S. 13-40-115(2), the court can award:

- The amount of rent, if any, due to the plaintiff from the defendant at the time of trial;
- The amount of damages, if any, sustained by plaintiff due to the unlawful detainer generally (such as late fees);
- The amount of damages, if any, sustained to the time of trial as a result of injuries (the legislature's word, not mine) to the premises;
- Reasonable attorney's fees; and
- Costs.

Only rewarded if the Defendant was personally served with the S&C. C.R.S. 13-40-115(1).

5. Deposit Payment Rule

(i.e. Mailbox Rule)

Generally, payment by mail is not effective until receipt by the creditor.

Exception

- Unless the creditor expressly, by implication, or through a course of dealing, directs or consents otherwise.
- If payment by mail is directed or authorized by the creditor, however, the time of delivery is the time that the payment, properly addressed with postage prepaid, is put in the mail.
- *Werne v. Brown*, 955 P.2d 1053 (Colo. App., 1998).

6. Failure to Prove Possession

- If action is dismissed/fails to prove plaintiff's right to possession, defendant gets judgment and award of costs.
- C.R.S. 13-40-116.

C. Domestic Violence Victims

Victim of domestic violence may break lease if notice given to landlord, proof of victim status provided, and one month's rent paid.

Claim of being a victim of domestic violence can be a defense to termination for noncompliance with lease provision action, but not for non-payment of rent.

Victim must show proof by presenting police report or protection order documents.

- C.R.S. 38-12-402; C.R.S. 13-40-104(4) and C.R.S. 13-40-107.5(5)(c)(I).

D. Abandonment by Tenant

Abandonment of the premises/real property by tenant requires:

- Proof of act of abandonment, and
- Intent to relinquish premises to landlord.
- See *Martinez v. Steinbaum*, 623 P.2d 49 (Colo.1981).

A landlord properly can take possession of an abandoned apartment without resort to legal process.

- *Martinez v. Steinbaum*, 623 P.2d 49 (Colo.1981) (citing *Ruple v. Taughenbaugh*, 72 Colo. 171, 210 P. 72 (1922).

E. Covenant of Quiet Enjoyment

1. Background

Occurs when there is a ***disturbance of the lessee's possession*** by the lessor which renders the premises unfit for occupancy for the purposes leased.

Or, deprives the lessee of the beneficial enjoyment of the premises, causing the lessee to abandon them.

Actual abandonment is not required.

- *Carder, Inc. v. Cash*, 97 P.3d 174 (Colo.App. 2003); *Bedell v. Los Zapatistas, Inc.*, 805 P.2d 1198 (Colo. App. 1991) (citing *Kirkland v. Allen*, 678 P.2d 568 (Colo.App.1984)).

2. Waiver

In the absence of an agreement to the contrary, there is an implied covenant for the quiet enjoyment of the leased premises.

The tenant is entitled to the possession of the premises to the exclusion of the landlord.

- *Carder, Inc. v. Cash*, 97 P.3d 174 (Colo.App. 2003); *Boyle v. Bay*, 81 Colo. 125, 254 P. 156

(1927); *Cusack Co. v. Pratt*, 78 Colo. 28, 239 P. 22, 44 A.L.R. 55 (1925); *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376 (Colo. 1909).

3. Abandonment

To establish breach of covenant of quiet enjoyment, a showing of abandonment is not required in all cases.

- *Isbill Associates, Inc. v. City and County of Denver*, 666 P.2d 1117 (Colo. App. 1983).

4. Damages

Measure of damages requires comparison between fair rental value of property before and after time at which property became uninhabitable.

- *Bedell v. Los Zapatistas, Inc.*, 805 P.2d 1198 (Colo. App. 1991).

5. Special Notes

The statute, C.R.S. 38-12-501 et. seq., established a warranty of habitability in lease contracts and the law applicable to claims of breach of that warranty, but has not have affected a tenant's ability to assert breach of

the covenant of quiet enjoyment or constructive eviction.

Per case law, a covenant of quiet enjoyment can be waived in a written lease.

Per statute, C.R.S. 38-12-503(5), any agreement waiving or modifying a warranty of habitability is void as contrary to public policy.

F. Constructive Eviction

1. Generally

Will often arise as a defense to rent payment. 10 COPRAC 8.33; 2A COPRAC 71:5.

"[A]ny disturbance of the lessee's possession by his lessor which renders the premises unfit for occupancy for the purposes for which they were leased, *or* which deprives the lessee of the beneficial enjoyment of the premises, causing him to abandon them. . ." provided abandoned within a reasonable time.

- *Kirkland v. Allen*, 678 P.2d 568, (Colo. App. 1984) (quoting *Radinsky v. Weaver*, 170 Colo. 169, 460 P.2d 218 (1969).

- See *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376 (Colo. 1909) (Constructive eviction found where conduct of persons occupying adjacent premises for immoral purposes, which the landlord owned and controlled, and which he knowingly permitted to be occupied for such purposes.)

2. Re-entry

Re-entry or willful act by the landlord that materially disturbs the possession of the tenant (e.g., changing the locks) has been held to constitute eviction and thus termination of the lease.

1. *Deeb v. Canniff*, 488 P.2d 93 (Colo. App. 1970).

3. Lack of Proper Notice

Failure of landlord to give proper notice can result in determination of wrongful eviction or constructive eviction.

2. *Clark v. Morris*, 710 P.2d 1130 (Colo. App. 1985).

4. Abandoned in Reasonable Time

Generally

Depends upon facts of each case.

3. *H & K Automotive Supply Co. v. Moore & Co.*, 657 P.2d 986 (Colo.App.1982) (Not reasonable when the condition existed since execution of lease, tenants remained on premises for a year and a half before commencing action against landlord, and for nearly three years before making claim for constructive eviction.);

Abandonment may not be required in all cases.

4. *see* *Kirkland v. Allen*, 678 P.2d 568 (Colo.App. 1984) and *Isbill Associates, Inc. v. City and County of Denver*, 666 P.2d 1117 (Colo.App. 1983).

Elements

1. The act of abandonment within a reasonable time; and

2. Intent to relinquish the premises.
   - *Martinez v. Steinbaum*, 623 P.2d 49 (Colo. 1981).

Analysis

What constitutes abandonment "within a reasonable time"?

- *See Candell v. Western Fed. Svgs.*, 156 Colo. 552, 400 P.2d 909 (1965).

What constitutes "reasonable" period depends upon facts of each case.

- *H & K Automotive Supply Co. v. Moore & Co.*, 657 P.2d 986 (Colo. App. 1982).

Tenants did not waive claim of constructive eviction by failing to abandon the premises immediately after noise became intolerable whereas they were making a good-faith effort to work out a solution to the noise problem.

- *Eskanos and Supperstein v. Irwin*, 637 P.2d 403 (Colo. App.1981).

A tenant may abandon his rooms, treating himself as evicted, where his landlord rents adjacent rooms to lewd women, knowing the purposes for which they will

be used, and thereafter, on complaint as to their noisy and offensive conduct, takes no step to remove them.

- *Lay v. Bennett*, 35 P. 748 (Colo. App. 1894).

5. Damages

Usual measure of damages in constructive eviction cases is rental value of unexpired term of lease, less rent reserved, together with other losses which are actual, natural, direct and proximate result of the wrongful eviction.

- *Radinsky v. Weaver*, 170 Colo. 169, 460 P.2d 218 (1969).
- *See* 233k172(2)

G. Damage or Loss of Personal Property

1. During Move-Out

Re damage during execution of writ of restitution - See C.R.S. 13-40-122.

2. Wrongful Eviction

Upon showing of wrongful eviction and conversion of property seized from leased premises, tenant was entitled to damages that were the actual, natural, direct and proximate result of wrongful eviction and conversion of the property including:

- compensation of damaged property,
- Cost of moving,
- Compensation for time and money spent in pursuit of converted property,
- Interest on value of property from time of the conversion.
- *Clark v. Morris*, 710 P.2d 1130 (Colo. App. 1985).

3. After Tenancy Terminated

After tenancy has been lawfully terminated, landlord is under no obligation, statutory or otherwise, to store or maintain tenant's possessions.

However, if landlord actively participates in removing tenant's property from the premises, or if he assumes possession or control of tenant's property after writ of restitution has been executed, a bailment is created

between landlord and tenant which may subject landlord to liability for damage to tenant's property.

- *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

H. Attorney Fees & Costs

In FED action, one party's unlawful detainer--and therefore, the other party's right to possession--triggers attorney fees award, rather than any other factors that may be relevant to determining the prevailing party in other contexts.

- *Integra Financial, Inc. v. Grynberg Petroleum Co.*, 74 P.3d 347 (Colo.App. 2002).

Claims that do not bear on the right to possession are not part of a FED action for purposes of awarding attorney fees.

- *Integra Financial, Inc. v. Grynberg Petroleum Co.*, 74 P.3d 347 (Colo.App. 2002).

Judgment Order

If the court finds the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff for possession and shall issue a writ of

restitution. The court shall also enter judgment for money damages and reasonable attorney's fees and costs.

- C.R.S. 13-40-115(2).

Damages

Attorney's fees are awarded to prevailing party.

- C.R.S. 13-40-123

Exception

Attorneys fees are not recoverable in an eviction action involving a residential lease unless they are provided for in the lease agreement *and* the provision is reciprocal.

J. Mobile Homes

- Good demand for rent or removal - Jeffco Case 2011C44423.
- C.R.S. Title 38, Article 12, Part 2.

Commented [ss4]: Will Judges across the state have access to this case file?

K. Protections to Tenants in Foreclosures

The Protecting Tenants at Foreclosure Act of 2009 (the "PTFA")

Definition of Bona Fide Lease or Tenancy

- 12 U.S.C. 5220 (also known as §702 of PL111-22):

Shall be considered bona fide only if:

- The mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
- The lease or tenancy was the result of an arms-length transaction; and
- The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

Notice of Foreclosure

To "Bona Fide Tenant, the PTFA provides that in the event of any foreclosure on a

> "Federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest"

subject to both

1. Notice

The successor's providing a notice to vacate to any *bona fide tenant* at least 90 days before the effective date of such notice; ***and***

2. Lease Termination

The rights of any *bona fide tenant* as of the date of the notice of foreclosure; either:

- **Situation A**

  Under a lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease.

  - **Except**

A successor may terminate the lease effective upon the date the property is sold to a purchaser who will occupy the property as a primary residence.

- **Or, Situation B**

  Without a lease or with a lease terminable at will.

L. Title to Property

County Court does not have authority to determine title to a property.

However, that does not mean a tenant can defeat the Court's jurisdiction simply by contesting the landlord's title in the Answer.

Beeghly v. Mack, 20 P.3d 610, 615 (Colo. 2001)

> [Defendants] claim that their challenge to ownership of the property removed this dispute from the context of an unlawful detainer action... We reject this argument. We do not interpret Lindsay to require that an FED action is automatically terminated every time an issue of ownership is raised in such an action. To do so would render the FED statutory scheme meaningless, as

parties would merely need to raise an issue of ownership to avoid the expedited proceedings, regardless of the merits of such a claim.

Commented [ss5]: Could this be made into a parenthetical citation instead? For example, "holding that dismissal every time ownership is raised would render the FED statutes meaningless."

Hamill v. Bank of Clear Creek County, 45 P. 411, 413 (Colo. 1896)

If the determination of this defense necessitated a trial of the titles of the parties in the county court, and in disposing of it the county court in reality was engaged in settling titles, there was no authority for such action. If, on the other hand, an inquiry into the titles was incidental merely, and only as bearing upon the right of possession, and thus involved only to that extent, the act of the county court in such respect was proper. Upon this question it may be stated the authorities generally hold in ordinary actions of forcible entry or unlawful detainer, that the title of property is not involved, and cannot be tried, and where a determination of the rights of the parties cannot be had without a trial of the title the plaintiff must fail… Indirectly, but only as bearing upon the right of possession, the title may be inquired into. It is certain that there is nothing in the complaint which requires the trial of title. If that issue is in the case, it is raised by the answer. But title is not brought

into a case merely because the pleader alleges that it is involved. That depends, in the first instance, upon the facts which are pleaded, and, ultimately, upon the evidence.

Commented [ss6]: This is a long direct quote from a very old case. Is the full quote needed, or can key holdings be extracted and rephrased?

M. Oral Leases

If outside the Statute of Frauds;

The validity of an oral contract for lease of property depends upon proof of:

- A definite agreement as to the extent and bounds of the property leased.
- A definite and agreed term. and
- A definite and agreed price of rental, and the time and manner of payment.
- *L.U. Cattle Co. v. Wilson*, 714 P.2d 1344 (Colo. App. 1986) (quoting *Carlson v. Bain*, 182 P.2d 909 (Colo. 1947).

The existence of a contract is a question of fact to be determined by consideration of all facts and circumstances.

- *Id.*; See *I.M.A., Inc. v. Rockey Mountain Airways, Inc.*, 713 P.2d 882 (Colo. 1986).

N. Wrongful Eviction

- C.R.S. 38-12-510;
- *Dwelling Unit* is defined at C.R.S. 38-12-502.

5.2 Preliminary Injunction Order - Example

District Court, Rio Blanco County, Colorado 555 Main Street; P.O. Box 1150 Meeker, CO 81641	
Plaintiff: **ROBERT M. REGULSKI, an individual domiciled in Rio Blanco County** v Defendant(s): **ELK CREEK RANCH DEVELOPMENT, INC., a Colorado corporation; ELK CREEK RANCH OWNERS ASSOCIATION, a Colorado Non-profit corporation; SOC EXCAVATING, INC., a Colorado corporation; and INTER-FLUVE, INC., a Montana corporation**	**▲COURT USE ONLY▲** Case No.: 14CV30031 Div.: 1
ORDER ON MOTION FOR PRELIMINARY INJUNCTION	

I. PROCEDURAL BACKGROUND

This matter is before the Court on the Motion for Preliminary Injunction ("Motion") filed by Plaintiff Robert Regulski ("Regulski"). The Defendants, Elk Creek Ranch Development, Inc. ("ECRD"), Elk Creek Ranch Owner's Association, Inc. ("ROA"), SOC Excavating, Inc. ("SOC"), and Inter-Fluve, Inc. ("Interfluve") oppose the Motion. The Court held a hearing on the Motion on October 23, 2014. The Court previously denied a request for a temporary restraining order on October 16, 2014. The evidence presented at the hearing supplemented the written materials

submitted by the parties in connection with the request for the temporary restraining order.

At the hearing, the following witnesses were called to testify for Regulski: Lon Mikkelson, the principal of Inter-Fluve, Dr. Edmund Andrews, an expert in fluvial geomorphology, and Robert Regulski. The following witnesses testified for the Defendant ROA: Lon Mikkelson, who was qualified as an expert in aquatic habitat improvement, Brett Harvey, the Elk Creek Ranch manager, and Michael Claffey, an expert in wetlands and hydrology and the federal permitting process. Plaintiffs Exhibits B, C, D, E, L, O, Q, R, and T were admitted into evidence. Defendant's Exhibits 1 through 20 were admitted into evidence by stipulation.

Regulski owns the Sleepy Cat Ranch which located immediately downstream on the White River from the ROA property. Regulski seeks to temporarily enjoin and restrain a stream habitat improvement project occurring on the ROA property. The proposed project will create point bar and pool structures on 10,300 feet of the White River and 17,200 feet of Elk Creek and remove numerous log drop structures currently installed on Elk Creek. The ROA has obtained the required Army Corps of Engineers 404 Permit, dated December 5, 2013, an Army Corps Regional General Permit 12, dated October 11, 2011, and a Rio Blanco County Floodplain Development Permit dated October 1, 2011. The ROA hired SOC and Inter-Fluve to perform the stream improvement and restoration work. Regulski does not

challenge the permits. Instead, Regulski avers that the stream project will cause irreparable damage to his property.

Specifically, Regulski is concerned about sedimentation impacts on the aquatic habitat where the White River crosses his property. He is also concerned that the alterations in stream flow and bed structure will irreparably damage the headgate and ditch embankments on the LaCamp Ditch that takes its water from the White River and provides irrigation supply to his ranch. Regulski also believes that the stream work is likely to cause the re-establishment of an old stream channel that is currently located on his property as well as erosion of the river bank adjacent to his residence. The ROA denies that such damages will occur and further asserts that an injunction would result in significant monetary damages due to the delays in completing the work during the current low water conditions on the river. The Court has reviewed all of the pleadings and exhibits filed by both parties in the case as considered all the testimony presented at the hearing. The Court now makes the following findings and enters the following order.

II. STANDARD OF REVIEW

The legal standard for preliminary injunctive relief is well established under *Rathke v. MacFarlane,* 648 P.2d 648, 653–54 (Colo.1982). The six elements a court must consider in issuing a preliminary injunction are: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which

may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Id.*; *Dallman v. Ritter*, 225 P.3d 610, 620 (Colo. 2010). The Plaintiff bears the burden of proving each of the elements by a preponderance of the evidence.

III. FACTUAL FINDINGS

As currently postured, the facts are not largely in dispute. The scope of the proposed work is not contested. Regulski does not challenge the validity of the permits the ROA obtained. Under the permits, the ROA has the authority to conduct the in-stream improvements; however, the permits themselves are not a license to cause damage on the Sleepy Cat property. If the facts disclose that the proposed work does pose a substantial likelihood of irreparable damage to Regulski's property, the permits are not a defense, and an injunction would be appropriate.

Mr. Regulski testified that he has personally experienced damages to other ditches and headgates he owned on other properties and that these damages were caused by neighboring property owners making changes to the river. These observations were made in connection with property he previously owned on the Colorado River. Mr. Regulski did not testify that the damage caused in these other incidents was a result of similar types of point bar/pool improvements or whether

those river alterations had been professionally designed. Mr. Regulski is not an expert in hydrology or aquatic design, so the Court affords little significance to his experiences on a different river and under unknown circumstances.

Mr. Regulski also stated that he has personally observed turbidity in the White River and sedimentation on the river banks due to the work on this project. The Court likewise accords little significance to these observations since that is precisely the type of impact that is to be expected from the work. The permits allow such discharges of sediment, and the sediment deposits will be cleared out during spring run-off. While the Court has no doubt that Mr. Regulski is legitimately concerned about the impacts of the work on his ditch, headgate, and property, he is not qualified to render an expert opinion on whether such damages are likely.

Dr. Andrews is an expert in fluvial geomorphology. It was his expert opinion that the studies performed by Inter-Fluve underestimated the stream's "hydraulic roughness". He further opined that the proposed point bar/pool design was inherently unstable and would likely result in significant erosion during high water depositing material into the river channel. This would lead to bank destabilization and a probable failure of the berm adjacent to the ditch and less water entering the headgate. Dr. Andrews stated that he believed the damage to the Sleepy Cat property would be irreparable. The Court notes that Dr. Andrews was retained by Regulski only six days prior to the hearing and based his opinions on a review of the case file

and a site visit. He did not perform any independent surveys of the stream channel or conduct any independent hydrologic modeling of the river. When asked on direct examination if he was certain that irreparable harm would occur from the work, he paused for a significant period of time before giving his answer. After the pause he stated "I can't imagine how it could be otherwise." The Court finds Dr. Andrews to be highly qualified; however, due to his late involvement in the case, his lack of significant independent study of the stream conditions, and his somewhat equivocal response to the question regarding irreparable harm, the Court does not accord his testimony the same weight as the ROA's experts.

Mr. Mikkelson testified for the ROA as an expert in aquatic habitat improvement. He explained the extensive and lengthy studies that were performed by Inter-Fluve in designing the stream improvements. These included numerous stream surveys (Exhibit 14), and HEC-RAS modeling (Exhibit 15). These were precisely the types of studies Dr. Andrews indicated were desirable for a project of this scope. The work done in the Inter-Fluve study exceeded that required for the issuance of the government permits. Mr. Mikkelson testified he had worked on approximately 2,000 river improvement projects, including four in the White River basin. In all of these projects he testified that there had never been any damage to a downstream landowner. While Mr. Mikkelson was not a particularly convincing witness when he was testifying about the contract negotiations for this job, the Court

found his testimony convincing regarding his experiences in other stream improvement projects and potential impacts on adjacent land owners. Mr. Mikkelson opined that if any damage did occur to the Sleepy Cat headgate or ditch, such damage could be readily repaired. Based on his background and experience, the Court found his testimony credible.

Finally, Mr. Claffey testified for the ROA as an expert in federal permitting, hydrology and wetlands. Mr. Claffey explained that sediment movement from the work is expected and permitted. He said the sediment would not harm the aquatic environment and would be controlled with suitable best management practices. It was his opinion that the channel surveys and HEC-RAS models were "extraordinary" and more than what is typically required for permitting purposes. He supported the integrity of the analysis performed by Inter-Fluve. He testified that the design of the point bar/pool improvements is very stable and that river health is significantly improved by such structures. In his experience he testified that he has never seen a failure of any point bar/pool improvements and that such structures readily integrate into the stream habitat over time. The Court found Mr. Claffey to be highly qualified and credible.

IV. ANALYSIS

1. Reasonable Probability of Success on the Merits. The Court finds Regulski has not met his burden on this factor. Based on the expert testimony, the Court finds that it is unlikely that Regulski could demonstrate that the proposed stream project would cause damage to Regulski's property or the ditch. The sediment discharge that he observed is permitted and will not pose long-term problems when the spring run-off clears it out. The facts show that the project will improve the aquatic habitat, not degrade it. That is the purpose for which the permits are issued. The expert testimony indicated that any actual damage to Regulski's property was unlikely. In roughly 2,000 projects Mr. Mikkelson had never seen damage to a downstream owner. Mr. Claffey testified the point/bar structures were stable. Since it is unlikely that damage to Regulski's property will occur, there is no reasonable probability of success on the merits.

2. Danger of Real, Immediate, and Irreparable Injury. The Court finds Regulski has not met his burden on this factor. As previously stated. "[T]he concept of irreparable harm does not readily lend itself to definition, nor is it an easy burden to fulfill. In defining the contours of irreparable harm, case law indicates that the injury 'must be both certain and great, and that it must not be merely serious or substantial.'" *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262-63 (10th Cir. 2004)(citing, *Prairie Band of Potawatomi Indians*, 253 F.3d 1234 (10th Cir. 2001)(internal citation and quotations omitted)).

The alleged injury to the headgate on the Ditch is speculative at best. The experts disagreed on this point, but the stronger expert testimony was that the point/bar structures were stable and unlikely to significantly alter the river flow or cause erosion or damage to the ditch or headgate. Dr. Andrews did not perform the same extensive analysis as Inter-Fluve when he opined that damage was likely. Moreover, even if injury were to occur it is not irreparable. Headgates can be rebuilt or repaired and diversion structures can similarly be restored or repaired. The repairs may be costly if any damage actually occurs, but that does not make the potential harm, if any, irreparable. Regulski has failed to meet his burden on this factor.

3. Plain, Speedy, and Adequate Remedy at Law. As stated above, any claimed injury to the Ditch or headgate can be repaired or restored. To the extent any violation of the Federal or County permits may occur, Regulski has administrative remedies to prohibit any improper disturbance of the waterways and wetland areas. Regulski has adequate remedies at law and administratively. Regulski fails to meet his burden on this factor.

4. Public Interest and Preservation of the Status Quo. The Court finds that Regulski does not meet his burden with regard to these two factors. The testimony showed that some limited discharge of sediment is to be expected and is allowed under the permits. Overall however, the aquatic habitat in the White River and Elk Creek will be improved. The public interest is served by improving aquatic

habitat in these waterways. As the Court previously noted the County and the Corps of Engineers have continuing regulatory and enforcement powers under the permits. Presumably, those agencies would not have authorized the work if it was not in the public interest. Maintenance of the status quo does not advance the beneficial goal of improving of the river ecosystem.

5. Balance of Equities. The equities do not weigh in favor of Regulski. The ROA obtained all the required permits and proceeding lawfully under those permits. There is a limited timeframe within which this work can be done. The daily cost of delay is significant for the ROA. A large investment in time and money has gone into obtaining the permits and performing the extensive studies and planning for the work. Without convincing evidence of actual, irreparable harm, the equities do not favor issuing an injunction.

V. ORDER

Based on the forgoing analysis, the Motion for Preliminary Injunction is DENIED.

Dated October 27, 2014.

BY THE COURT:

John F. Neiley
District Court Judge

5.3 Temporary Restraining Order - Example

District Court, Rio Blanco County, Colorado 555 Main Street; P.O. Box 1150 Meeker, CO 81641	
Plaintiff: **ROBERT M. REGULSKI, an individual domiciled in Rio Blanco County** v Defendant(s): **ELK CREEK RANCH DEVELOPMENT, INC., a Colorado corporation; SOC EXCAVATING, INC., a Colorado corporation; and INTER-FLUVE, INC., a Montana corporation**	**▲COURT USE ONLY▲** Case No.: 14CV30031 Div.: 1
ORDER ON MOTION FOR TEMPORARY RESTRAINING ORDER	

This matter is before the Court on the Motion for Temporary Restraining Order and Preliminary Injunction ("Motion") filed by Plaintiff Robert Regulski ("Regulski"). The Defendants, Elk Creek Ranch Development, Inc. ("ECRD"), SOC Excavating, Inc. ("SOC"), and Inter-Fluve, Inc. ("Interfluve") have not filed a formal response to the Motion. Elk Creek Ranch Owner's Association, Inc. ("HOA") is not a named party to the action, but has filed a Response to the Motion claiming to be a real party in interest pursuant to C.R.C.P. 17(a) as the successor in interest to ECRD and the representative entity for the individual parcel owners within Elk Creek Ranch.

The facts of the HOA's succession have not been demonstrated; however, it is well established that a home owner's association typically has authority to represent owners in a common interest community with respect to matters affecting the community property or other matters of common interest. § 38-33.3-302(1)(d), C.R.S.; *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Estates Owners Ass'n*, 214 P.3d 451, 456 (Colo. App. 2008). Since this is a Motion requesting expedited relief, the Court will accept the HOA's representation that it has standing to represent the interests of the named parties as well as the owners within the ranch. The Complaint will subsequently need to be amended to join the HOA as a party pursuant to C.R.C.P. 19(a) and any other owners whose interests may not be aligned with the HOA's. Solely, for the limited purpose of this Motion for Temprary Restraining Order and the scheduled hearing on preliminary injunction, the Court will permit the HOA and its attorneys to enter an appearance in a representative capacity for these individuals and the named Defendants. Hereinafter, the Defendants will be referred to as the HOA unless the context requires otherwise.

Regulski seeks to temporarily enjoin and restrain certain construction activities occurring on the Elk Creek Ranch Property. The HOA has engaged SOC and Interfluve to perform stream improvement and restoration work in the White River and Elk Creek to develop and enhance the fish habitat in those waterways. Regulski has an interest in the LaCamp Ditch that takes its water from the White

River. Regulski owns the Sleepy Cat Ranch downstream from the Elk Creek Ranch and uses the ditch water for irrigation purposes. Regulski seeks injunctive relief on the theory that the proposed and ongoing stream improvement work will potentially impair the function of the Ditch and its headgate, damage the in-stream and stream bank habitat, and otherwise cause damage to the Sleepy Cat Ranch property and the portion of the White River flowing through the Sleepy Cat Ranch.

In support of this argument, Regulski attached a nine page report prepared by Jason Carey, a Colorado Licensed Engineer with extensive background knowledge and experience in stream restoration and improvement projects. In summary, Mr. Carey criticizes the validity and propriety of the US Army Corps of Engineers permit and the Rio Blanco County Floodplain permit that were issued for the proposed work. Mr. Carrey also mentions his on-site observations of sedimentation and stream bank and wetland disturbances related to the project. Regulski essentially seeks a stop work order from this Court until those claimed deficiencies can be addressed to his satisfaction.

The HOA counters that it obtained all the required permits from the US Army Corps of Engineers and the County that it needs to perform the work. The HOA further states that it shared the proposed plans for the stream project with its neighbors, including Regulski, before starting the work. The HOA asserts that the proposed work will not have any adverse impact on Regulski's Ditch or water rights

or otherwise cause any damage to the Sleepy Cat Ranch property or operations. The HOA also characterizes Regulski's Motion as an impermissible collateral attack on the Army Corps permit and the County permit. The HOA argues that this Court lacks jurisdiction to determine the validity or appropriateness of the Federal permit. In support of its position, the HOA submitted copies of all the permits and the relevant regulations governing their issuance. The HOA also submitted the affidavit of Lon Michelson who is the principal of Interfluve. The affidavit summarizes the permitting process undertaken prior to the work starting as well as the claimed loss that the Defendants would incur of $18,000 per day if the project were delayed. The Court has reviewed all of the pleadings and attachments filed by both parties in the case. With this background, the Court is being asked to grant the requested temporary injunctive relief.

STANDARD OF REVIEW

The legal standard for injunctive relief is well established. The six elements a court must consider in issuing a preliminary injunction are: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits.

Rathke v. MacFarlane, 648 P.2d 648, 653–54 (Colo.1982); *Dallman v. Ritter*, 225 P.3d 610, 620 (Colo. 2010). The Plaintiff bears the burden of proving each of the elements by a preponderance of the evidence.

ANALYSIS

1. Reasonable Probability of Success on the Merits. The Court finds Regulski has not met his burden on this factor. Regulski essentially attacks the validity of the Federal and County permits and the underlying supporting documentation upon which those permits were granted. With regard to the Federal permit, the Court finds that Federal preemption doctrine would preclude a state court review of the Federal agency's determination to issue the permit.

The Federal Administrative Procedure Act's judicial review provisions make clear that Congress intended to hold federal administrative agencies answerable for their conduct only in federal courts. 5 U.S.C. § 702. Section 702 defines the scope of review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review and may bring suit against the agency. 5 U.S.C. § 702.

However, the suit must be brought "in a court of the United States." *Id.* Thus, the waiver of sovereign immunity is expressly limited to federal court. *Aminoil USA v. Calif. State Water Res. Control Bd.*, 674 F.2d 1227, 1233 (9th Cir.1982). The United States and its agencies are immune from suit in state courts except in very narrowly defined circumstances. *Nat'l State Bank of Elizabeth v. Gonzalez*, 266 N.J.Super. 614, 630 A.2d 376, 381 (A.D.1993); *In re Application for Water Rights of U.S.*, 101 P.3d 1072, 1080 (Colo. 2004). This Court therefore lacks jurisdiction to evaluate the propriety of the US Army Corps of Engineers' decision.

With regard to the County permit, the Court has jurisdiction to evaluate the issuance of the permit, but the scope of review is limited and highly deferential to the agency's decision and interpretation of its own regulations. "The courts may not overturn agency actions unless such actions are arbitrary, capricious, legally impermissible, or an abuse of discretion." *Colorado Real Estate Comm'n v. Hanegan*, 947 P.2d 933, 935 (Colo. 1997). Under this heightened standard, the Court does not find that Regulski has met his burden of showing a probability of success on the merits. The Court cannot even consider the appropriateness of the Federal permit and will defer to the County with regard to its permit unless an abuse of discretion or lack of evidence can be shown.

2. Danger of Real, Immediate, and Irreparable Injury. The Court finds Regulski has not met his burden on this factor. "[T]he concept of irreparable harm

does not readily lend itself to definition, nor is it an easy burden to fulfill. In defining the contours of irreparable harm, case law indicates that the injury 'must be both certain and great, and that it must not be merely serious or substantial.'" *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262-63 (10th Cir. 2004)(citing, *Prairie Band of Potawatomi Indians,* 253 F.3d 1234 (10th Cir. 2001)(internal citation and quotations omitted)).

The alleged injury to the headgate on the Ditch is speculative. The Defendant's Response indicates that no construction relating to the Ditch or headgate is contemplated. Moreover, even if injury did occur it is not irreparable. Headgates can be rebuilt or repaired and diversion structures to ensure water flowing into the Ditch can similarly be restored or repaired. Economic loss damages can also be calculated for lost irrigation water. The Court also notes that Mr. Carey's report is hardly a firm opinion that irreparable harm will occur. He states that "it is not possible to opine that there is not a significant risk of irreparable damage to Mr. Regulski's property rights." Reading through the linguistic contortions of the double-negative, Mr. Carey is simply saying that harm *might* be possible but he cannot say for certain without more information. An opinion of this sort does not meet the standards set out above. Counsel for Mr. Regulski argues that more tangible injury will occur, but the arguments of counsel are not evidence. *Wilson v.*

People, 743 P.2d 415, 421 (Colo. 1987). Regulski has failed to meet his burden on this factor.

3. Plain, Speedy, and Adequate Remedy at Law. As stated above, any claimed injury to the Ditch or headgate can be repaired or restored. If Regulski believes the Federal permit was improperly granted, he presumably has administrative avenues to challenge the issuance of the permit. With regard to the County permit, similar avenues also exist to challenge the County's decision to issue the permit. To the extent any violation of those permits is occurring, the respective agencies have enforcement powers to prohibit any improper disturbance of the waterways and wetland areas. Regulski has not explained why or whether he has pursued or exhausted those administrative remedies. Regulski fails to meet his burden on this factor.

4. Public Interest and Preservation of the Status Quo. The Court finds that Regulski likely meets his burden with regard to these two factors. There is a strong public interest in ensuring that public waterways remain unpolluted. There is some evidence that sediment has entered the White River and that some disturbance of wetland areas may have occurred. The public interest weighs towards granting an injunction to prevent further harm, if any, and maintaining the status quo. However, the Court notes, as stated above, that the County and the Corps of Engineers have continuing regulatory and enforcement powers under the permits.

Since Regulski has already failed to meet the other factors, these factors are irrelevant.

5. Balance of Equities. The equities do not weigh in favor of Regulski. It appears from the record that the HOA obtained all the required permits and proceeding lawfully under those permits. The Court understands that there is a limited timeframe within which this work can be done to avoid high water at run off, prime fishing time for ranch owners, and winter conditions. The daily cost is estimated at $18,000 for any delay. Significant expense has gone into obtaining the permits and performing the required studies and planning. Without more convincing evidence of actual, irreparable harm, the equities do not favor issuing an injunction.

ORDER

Based on the forgoing analysis, the Motion for Temporary Restraining Order is DENIED. The matter remains set for a 3 hour hearing on the request for a preliminary injunction on October 23, 2014, at 1:00 p.m. in Glenwood Springs.

Dated October 16, 2014.

BY THE COURT:

John F. Neiley
District Court Judge

5.4 Protection Orders

A. Index and Chart Guide

B. Emergency Protection Orders.

- Chart: ER Orders in Civil v. Juvenile cases.

C. Temporary Protection Order – People.

- Preliminary Considerations.
- Chart: TPO v. DR Temporary Orders re People.

D. Temporary Protection Orders – Property.

- Preliminary Considerations.
- Chart: TPO v. DR Temporary Orders re Property.

E. Temporary Orders - Custody & Support.

- Preliminary Considerations.
- Chart: TPO v. DR Temporary Orders re Custody.

F. Civil Permanent Protection Orders.

- Preliminary Considerations.

- Chart: Civil PPOs v Criminal MROs.

G. Criminal Mandatory Protection Orders.

B. Emergency Protection Orders

- Civil PO cases - C.R.S. 13-14-103
- Juvenile Cases - C.R.S. 19-1-113

Chart: ER Orders in Civil v. Juvenile cases.

Topic	Civil Case	Juvenile Case
Jurisdiction	County or District Court has authority to enter Emergency Protection Orders under 13-14-103(1), C.R.S.	Juvenile Court has jurisdiction, among other things, concerning a child who has committed a delinquent act or is neglected or dependent and over proceedings concerning any adult who abuses, ill-treats, neglects, or abandons a child. 19-1-104(1)(a),(b), C.R.S.
Venue	Venue is appropriate in any county where the acts occur, where one of the parties resides, or where one of the parties is employed. 13-14-103(5), C.R.S.	
Procedure	13-14-103(1)(d), C.R.S. Can be issued by phone by a district court judge, county court judge, special associate, associate, assistant county judge, or magistrate during times when the county and district courts are otherwise closed for judicial business. 13-14-103(1)(e), C.R.S. When the courts are closed and a peace officer asserts	19-1-113(1), C.R.S. Can be issued by phone when courts are closed 19-1-113(2), C.R.S. May be sought by a person who has the responsibility of supervising a child placed out of the home by court order through a P.O.S.T. – certified peace officer - Must assert reasonable grounds to believe that the

Topic	Civil Case	Juvenile Case
	reasonable grounds to believe that an adult is in immediate and present danger of domestic abuse, assault, stalking, sexual assault or abuse, or that a minor child is in immediate and present danger of an unlawful sexual offense or domestic abuse, a judge/magistrate may issue a **written or verbal** ex parte emergency protection order. ▪ If **written** it must be on the standardized form and a copy must be provided to the protected person. 13-14-103(1)(e), C.R.S. ▪ A **verbal** emergency protection Order may be issued only if the judge finds that an **imminent danger in close proximity exists to the life or health of one or more persons** or that a **danger exists to the life or health of the minor child in the reasonably foreseeable future**. 13-14-103(2)(a), C.R.S. It shall be reduced to writing on a standardized form and signed by the officer or other person asserting the grounds for the order and shall include a statement of the grounds for the order asserted, and shall be served upon the respondent with a copy to the protected party and filed with the county or district court as soon as practicable. 13-14-103(2)(b), C.R.S.	child is in immediate and present danger based on an allegation that the child is absent without permission from the court-ordered placement. 19-1-113(5)(a), C.R.S. A **verbal** order shall be reduced to writing and signed by the peace officer through whom the emergency order was sought and shall include a statement of the grounds for the order asserted through the P.O.S.T.-certified officer. A **written** order shall meet the same requirement as an order issued verbally. 19-1-113(5)(b), C.R.S. The order shall be served upon the respondent with a copy given to the person who sought the order and filed with the juvenile court as soon as practicable after issuance. 19-1-104(3)(b), C.R.S. May issue ex parte emergency orders for medical treatment If not in session, the judge or magistrate may give oral or telephone authorization, to be followed by a written order entered on the first regular court day thereafter, making specific findings of fact that the emergency existed Reasonable effort has to be made to notify the parents, guardian, or other legal custodian to gain consent

Topic	Civil Case	Juvenile Case
Scope	13-14-103(1)(b), C.R.S. May include provisions – o Restraining a party from contacting, harassing, injuring, intimidating, threatening, molesting, touching, stalking, sexually assaulting, or abusing any other party, a minor child of either of the parties, or a minor child who is in danger in the reasonably foreseeable future of being a victim of an unlawful sexual offense or domestic abuse; o Excluding a party from the family home or from the home of another party upon a showing that physical or emotional harm would otherwise result; o Awarding temporary care and control of any minor child of a party involved; o Enjoining an individual from contacting a minor child at school, at work, or wherever he or she may be found; o Restraining a party from molesting, injuring, killing, taking, transferring, encumbering, concealing, disposing of or threatening harm to an animal owned, possessed, leased, kept, or held by any other party, a minor child of either of the parties, or an elderly or at-risk adult; OR	19-1-113(3), C.R.S. May include, but need not be limited to: - Restraining a person from threatening, molesting, or injuring the child - Restraining a person from interfering with the supervision of the child - Restraining a person from having contact with the child or the child's court-ordered residence. - Restraining a person from harboring a child who is absent without permission from a court-ordered placement

Topic	Civil Case	Juvenile Case
	○ Specifying arrangements for possession and care of an animal owned, possessed, leased, kept, or held by any other party, a minor child of either of the parties, or an elderly or at-risk adult. 13-14-103(1)(c), C.R.S. In cases involving a minor child, the juvenile court and the district court shall have the authority to issue emergency protection orders to prevent an unlawful sexual offense, as defined in 18-3-411(1), C.R.S., or to prevent domestic abuse, as defined in 13-14-101(2), C.R.S., when requested by the local law enforcement agency, the county department of social services, or a responsible person who asserts, in a verified petition supported by affidavit, that there are reasonable grounds to believe that a minor child is in danger in the reasonably foreseeable future of being the victim of an unlawful sexual offense or domestic abuse, based upon an allegation of a recent actual unlawful sexual offense or domestic abuse or threat of the same.	
Form	13-14-103(3), C.R.S. Any protection order issued pursuant to 13-14-103(1) shall be on a standardized form prescribed by the judicial department and a copy shall be provided to the protected person or their parent/individual acting in the parents' place who is not	

Topic	Civil Case	Juvenile Case
	the respondent. 13-14-103(1)(c) & (3) C.R.S. The court shall also electronically transfer it into the central registry of protection orders.	
Special Provisions	13-14-103(8), C.R.S. Availability of an Emergency Protection Order is not affected by the person seeking protection leaving his/her home to avoid harm. 13-14-103(9), C.R.S. Issuance of the Emergency Protection Order shall not be considered evidence of any wrongdoing. 13-14-103(10), C.R.S. If three are issued within 1 year involving the same parties, the court shall summon them to appear to review the circumstances giving rise to such Emergency Protection Orders.	19-1-113(6), C.R.S. The issuance of an emergency protection order shall not be considered evidence of any wrongdoing.
Modification and Termination	13-14-103(1)(f), C.R.S. Expires not later than the close of judicial business on the next day of judicial business following the day of issue, unless otherwise continued by the court. 13-14-104.5, C.R.S. The court may continue an emergency protection order filed to prevent abuse only if the judge is unable to set a hearing on plaintiff's request for a temporary protection order on the day the complaint was filed pursuant to section	19-1-113(4), C.R.S. Shall expire not later than the close of judicial business on the next day of judicial business following the day of issue, unless otherwise continued by the court. 19-1-113(4), C.R.S. With respect to any continuing order, on two days' notice to the person who obtained the emergency protection order or on such shorter notice to that person as the court may prescribe, the responding person

Topic	Civil Case	Juvenile Case
	Except this limitation on the court's power to continue an emergency protection order shall not apply to an emergency protection order filed to protect a minor child from an unlawful sexual offense or domestic abuse. For any Emergency Protection Order continued, following two days' notice to the party who obtained the order (or on such shorter notice as the court may prescribe), the adverse party may appear and move its dissolution or modification. A motion to dissolve or modify the Emergency Protection Order **shall be set for a hearing at the earliest possible time** and **shall take precedence** over all matters except older matters of the same character, and the court **shall determine such motions as expeditiously as the ends of justice require**.	may appear and move for its dissolution or modification. A motion to dissolve or modify the Emergency Protection Order **shall be set for a hearing at the earliest possible time** and **shall take precedence** over all matters except older matters of the same character, and the court **shall determine such motions as expeditiously as the ends of justice require**. 19-1-104(3)(b), C.R.S. Emergency medical orders expire after 24 hours and the parent can apply for a hearing to set aside the order during the 24 hour period.

C. Temporary Protection Orders – People

Preliminary Considerations

Timeline

- Duty to hear the matter "as expeditiously as possible":
- Motion for Temporary Civil Protection Orders **shall** be set for a hearing at the earliest possible time, and shall take precedence over all matters except other older motions for protection orders, 13-14-104.5(4), C.R.S.
    - Once the TCPO issues, the show cause hearing must be set within 14 days (unless petitioner is unable to serve the respondent in that period), 13-14-104.5(10), C.R.S.
- When a Temporary Civil Protection Order is filed in a DR Case, it creates the same expedited timeline for the temporary orders, if there is a basis for the protective relief
- Typical temporary orders in DR cases under 14-10-108, C.R.S., with no imminent harm issues, can be set on the usual docket.

Duty to Inquire about other POs:

- When issuing a protection order, the Ct is required to inquire about other prior and existing protection orders, and the parties have a duty to disclose other protection orders, 13-14-104.5(6), C.R.S. and 14-10-108(7), C.R.S.
- In the event of conflicting orders –
    - Ct shall consider, as its first priority, issues of public safety. Orders that prevent assaults, threats, etc. are given precedence over orders that deal with disposition of property, 13-14-104.5(6), C.R.S.

Mediation

- When issuing a Temporary Civil Protection Order, the Court may wish to clarify whether mediation is allowed, and consider including a provision allowing the parties to mediate the issues arising in a concurrent/subsequent DR Case if it would be safe and the protected party wishes to mediate.
- **However**, the court "**shall not** refer the case to mediation services or dispute resolution programs

where one of the parties claims that it has been the victim of physical or psychological abuse by the other party and states that it is thereby unwilling to enter into mediation services or dispute resolution programs." §13-22-311(1), C.R.S.

Temporary Orders in Juvenile Cases

The juvenile court may also issue temporary orders that overlap with these provisions. For example:

- The juvenile court may issue temporary orders providing for legal custody, protection, and support if it is in assistance of or as a condition of any decree authorized by the Children's Code. §19-1-104(3)(a), C.R.S. & 19-1-114(1), C.R.S.
- The juvenile court may issue a protection order requiring a person to stay away from a child or his residence, permit a parent to visit a child at stated periods, and perform any "legal obligation" of support. 19-1-114(2), C.R.S.
- If the juvenile court has jurisdiction over a child who is dependent or neglected and there is no pending APR case concerning the same child, it can enter an APR order. 19-1-104(6), C.R.S. The

person who has the child the majority of the time pursuant to the juvenile court's order shall file a certified copy of the order in the district court in the county where the child permanently resides.

- Such orders shall be treated by the DR court the same as any other APR orders. §19-1-104(6), C.R.S.

§19-1-104(4), C.R.S. – Nothing in the children's code "shall deprive the district court of jurisdiction to appoint a guardian for a child nor of jurisdiction to determine the legal custody of a child upon writ of habeas corpus or when the question of legal custody is incidental to the determination of a cause in the district court, except that:"

- "If a petition involving the same child is pending in juvenile court or if continuing jurisdiction has been previously acquired by the juvenile court, the district court **shall** certify the question of legal custody to the juvenile court." §19-1-104(4)(a), C.R.S.
- The district court can request at any time that the juvenile court make recommendations pertaining to guardianship or legal custody. §19-1-104(4)(b), C.R.S.

When a DR court has made an APR order in a DR proceeding and has continuing jurisdiction, the juvenile court can take jurisdiction in a case involving the same child if he/she is dependent or neglected or otherwise comes within the jurisdiction of the juvenile court. §19-1-104(5), C.R.S.

Chart: TPO v. DR Temporary Orders re People.

Topic	Civil TPO	DR Temp Orders
Purposes	§13-14-104.5(1), C.R.S. Prevent assaults and threats, prevent DV, prevent emotional abuse of elderly/at-risk adults, prevent sexual assault/abuse, and prevent stalking **Same for DR cases** – 13-14-104.5(5), C.R.S. Any district court in a DR action "shall have authority to issue temporary and permanent protection orders pursuant to the provisions of" 13-14-104.5(1), C.R.S. See also 14-10-108(3), C.R.S. A party to a DR action may seek, and court may issue, a temporary … protection order pursuant to the provisions of 14-13-101 et seq.	§14-10-102(2) General purposes: (a) To promote the amicable settlement of disputes that have arisen between parties to a marriage; (b) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; And maintaining the status quo pending final disposition to mitigate potential harm to families. In re the Marriage of Nussbeck, 899 P.2d 347, 349 (Colo. App. 1995). 14-10-108(2)(b), C.R.S. Enjoins the restrained party from molesting or disturbing the peace of the other party or of any child 14-10-108(2)(c), C.R.S. Excludes the restrained party from the family home or from the home of the other party
Venue	§13-14-104.5(3), C.R.S. Venue is proper in any county where the alleged acts took place, where one of the parties resides, or where one of the parties is employed. Venue may also be moved to any other county, if appropriate. §13-14-105(2), C.R.S. For civil protection orders that provide for temporary care and control of a child, they are	Venue must be appropriate under the rules of the applicable DR case. Temporary orders can be requested in a proceeding for dissolution of marriage, legal separation, allocation of parental responsibilities, declaration of invalidity of marriage or a proceeding for property, maintenance or support following dissolution of marriage

	governed by the Uniform Child-custody Jurisdiction and Enforcement Act – See 14-13-201(1), C.R.S. **Same for PO's in DR cases** Venue must also be appropriate under the rules of the applicable DR case.	
Procedure	In a civil PO case – §13-14-104.5(8), C.R.S File a complaint, duly verified, alleging that the respondent has committed acts that would constitute grounds for a civil protection order (may be filed by the person seeking the order or on behalf of someone else) In a DR case – 13-14-104.5(5), C.R.S. and 14-10-108(3), C.R.S. Requested by independent motion accompanied by an affidavit in the DR case. In both types of cases – 13-14-104.5(4), C.R.S. A **motion** for a TCPO **shall** be set for hearing at the **earliest possible time**, may be ex parte, and **shall take precedence**. [Implies you must have a "hearing", *i.e.* take testimony from the applicant *ex parte*, but in practice a TCPO may issue on the motion and affidavit submitted.] 13-14-104.5(8), C.R.S. If sufficient cause exists, judge may issue temporary protection order and a citation to respondent to appear and show cause why it should not be made permanent	14-10-108(1),(2), C.R.S. Filed as part of a motion for temporary orders regarding payment of debts, use of property, maintenance, parental responsibilities, child support, or payment of attorney fees OR Requested by an independent motion accompanied by an affidavit. Court issues a temporary order. C.R.C.P. 16.2(c)(3)(C) provides that hearings on temporary orders shall be held **as soon as possible.** C.R.C.P. 16(c)(3)(C) – The parties have to certify on the record that they have attempted in good faith to resolve temporary orders issues. The court may vacate the hearing if the parties don't comply with this requirement.

	13-14-104.5(10), C.R.S. Show Cause Hearing must be set **within 14 days** (Shall be continued and an alias citation issued if petitioner is unable to serve the respondent in that period; may be continued thereafter if service still cannot be obtained.) 13-14-104.5(9), C.R.S. Copy of complaint, protection order, and citation must be served on the respondent and the person to be protected (if complaint was filed by someone else) in accordance with the rules of service of process provided in CRCP 4. It must inform the respondent that, if he/she fails to appear in court, a bench warrant may issue and the temporary protection order will be made permanent without further notice or service.	
Standard	13-14-104.5(7)(a), C.R.S. Imminent danger to the person or persons seeking protection. Court shall consider all relevant evidence concerning the safety and protection of the persons seeking the PO Court shall not deny a petitioner the relief requested because of the length of time between an act of abuse or threat of harm and the filing of the petition for PO 13-14-104.5(1)(b), C.R.S. – To be eligible for a protection order, the petitioner does not	For temporary orders enjoining a party from molesting or disturbing the peace of another – upon request (no standard listed in statute) For temporary orders excluding a party from the family home or from the home of the other party – 14-10-108(2), C.R.S. Upon a showing that physical or emotional harm would otherwise result

	need to show that he/she reported the act or is participating in prosecution of the perpetrator 13-14-104.5(7)(b), C.R.S. – If imminent danger exists to the employees of a business entity, judge may issue a protection order in the name of the business from the protection of the employees 13-14-105(1)(c)/(d) – For orders excluding a party from a home: "Upon a showing that physical or emotional harm would otherwise result." §13-14-105(1), C.R.S. Provisions of the order must be necessary for the protection of persons **Same for DR cases**	
Scope of Relief	13-14-104.5, C.R.S. Court may issue a temporary protection order to prevent the actions complained of 13-14-105(1), C.R.S. May include any provisions the court deems necessary for the protection of persons, including but not limited to: (a) restraining a party from threatening, molesting, or injuring the other party or the children of the parties, (b) restraining a party from contacting any party or the minor child of either party, (c)/(d) excluding a party form the family home or another home upon a showing that physical or emotional harm would otherwise result,	14-10-108(2)(b) Enjoins the restrained party from molesting or disturbing the peace of the protected party or of any child 14-10-108(2)(c) Excludes the restrained party from the family home or from the home of the other party Note: 14-10-107(4)(b)(I)(B), C.R.S. In a dissolution of marriage/legal separation case, an automatic temporary injunction enters that enjoins both parties from molesting or disturbing the peace of the other party.

	(e) awarding temporary care and control of any minor children of either party involved for a period of not more than one year,* (*See section III below) (f) restraining a party from interfering with a protected person at their place of employment/education or from engaging in conduct that impairs the protected person's employment/educational relationships/environment, (g) restraining a party from molesting, injuring, killing, taking, transferring, encumbering, concealing, disposing of or threatening to harm an animal or minor child of any other party, (h) specifying arrangements for possession and care of an animal or minor child of any other party, (i) granting such other relief as the court deems appropriate, and (j) Temporarily restraining the respondent from ceasing to make payments or from transferring, encumbering, concealing or disposing of property under certain circumstances.** (**See Section II below) 13-14-104.5(8), C.R.S. Court may order any other relief the court deems appropriate **Same for DR cases**	
Form	13-14-104.5(2), C.R.S. Protection order shall be issued using the standardized set of forms developed by the state	DR Temporary Order

	court administrator pursuant to section 13-1-136, C.R.S. **Same for DR cases**	
Special Provisions	§13-14-105.5, C.R.S. If a court subjects a person to a civil protection order and it qualifies as an order described in 18 U.S.C. §922(d)(8) or (g)(8) (if DV and Brady Handgun applies), the court, as part of such order shall order the person to refrain from possessing or purchasing firearms or ammunition for the duration of the order, and to relinquish any firearm or ammunition in the respondent's immediate possession or control §13-14-104.5(6), C.R.S., §14-10-108(7), C.R.S. When issuing a protection order, the Ct is required to inquire about other prior and existing protection orders, and the parties have a duty to disclose other protection orders §13-14-104.5(6), C.R.S. In the event of conflicting orders – Ct shall consider, as its first priority, issues of public safety. Orders that prevent assaults, threats, etc. are given precedence over orders that deal with disposition of property. **Same for DR cases plus –** §14-10-108(5)(a), C.R.S. A temporary order or injunction does not prejudice the rights of the parties of the child which are to be adjudicated at subsequent hearings in the proceeding.	§14-10-108(5)(a), C.R.S. A temporary order or injunction does not prejudice the rights of the parties of the child which are to be adjudicated at subsequent hearings in the proceeding.

Subsequent modification or termination	§13-14-108(1), C.R.S. A protection order excluding a party from the family home or awarding temporary care and control of minor children "must terminate whenever a subsequent order regarding the same subject matter is granted" in a DR matter or a case under the Children's Code. §13-14-105(1)(j)(II), C.R.S. & §13-14-105(1)(e)(I), C.R.S. A protection order regarding payments and property under 13-14-105(1)(j) or care and control under 13-14-105(1)(e) lasts for a period of time determined appropriate by the court, not to exceed one year after issuance of a Permanent Civil Protection Order §13-14-105(1)(j)(IV), C.R.S. Any subsequent order in a DR case supersedes an injunction made pursuant to 13-14-105(1)(j), C.R.S. 13-14-108(2)(a), C.R.S. Protected party can apply for modification or dismissal at any time*** 13-14-108(2)(b), C.R.S. Restrained party can apply for modification or dismissal of the temporary protection order 13-14-108(4), C.R.S. Court retains jurisdiction to enforce, modify, or dismiss a temporary protection order. (See 13-14-108(6) for factors) 13-14-106(1), C.R.S. A temporary protection order terminates if a permanent	§14-10-108(5)(b), C.R.S. "A temporary order … may be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S." 14-10-108(5)(c), C.R.S. A temporary order terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

	protection order is issued on the return date of the citation, or on the day to which the show cause hearing has been continued. Judge can continue the temporary PO up to one year after the hearing date for good cause shown, if the continuance would be in the best interests of the parties and both parties are present and agree to the continuance. If the court finds, at the show cause hearing, that the grounds for issuance of a permanent protection order have not been met, it may vacate the temporary order. Martin v. Arapahoe County Court, 2016WL612813, ¶20. **Same for DR cases plus –** 13-14-106(1)(c), C.R.S. A temporary protection order filed in a DR proceeding can be continued until the time of the final decree or final disposition (and not converted to a permanent protection order) if both parties agree §14-10-108(5)(b), C.R.S. "A temporary order … may be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S." 14-10-108(5)(c), C.R.S. A temporary order terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution	

	or legal separation is voluntarily dismissed.	

D. Temporary Protection Order – Property

Preliminary Considerations

Purpose and Timeline

- Temporary orders regarding property can be made in a Temporary Civil Protection Order **if necessary for the protection of persons**.
- See Section I above; §13-14-105(1)(j), C.R.S.; §13-14-104.5(1), C.R.S. (purpose of civil protection orders is to prevent assaults and threats, DV, emotional abuse of elderly/at-risk adults, sexual assault/abuse, or stalking)
    - *See also* §13-14-100.2(2), C.R.S. ("The general assembly further finds and declares that domestic abuse is not limited to physical threats of violence and harm but also includes mental and emotional abuse, financial control, document control, property control, and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs. Many victims

of domestic abuse are unable to access the resources necessary to seek lasting safety options. Victims need additional provisions in protection orders so that they can meet their immediate needs of food, shelter, transportation, medical care, and childcare for their appearance at protection order hearings.").

- This can be done in a civil protection order case (under §13-14-105(1)(j), C.R.S.) or in the DR case under §14-10-108(3), C.R.S. (allowing DR court to issue temporary or permanent protection orders pursuant to the provisions of 14-13-101 et seq.).
- Either way, it results in an **expedited timeline**. See Section I above.

- If the temporary order regarding property is **not necessary for the protection of persons**, it falls under §14-10-108(1) & (2), C.R.S. in the DR case.
  - This would be handled on the **usual docket schedule**

Subsequent Orders

Any subsequent DR order supersedes a Temporary Civil Protection Order regarding property.

- 13-14-105(1)(j)(IV), C.R.S.

Chart: TPO v. DR Temporary Orders re Property

Topic	Civil TPO	DR Temp Orders
Purpose	§13-14-104.5(1), C.R.S. Prevent assaults, threats, DV, emotional abuse of elderly/at-risk adults, sexual assault/abuse, or stalking (§13-14-100.2(2), C.R.S. – Victims of DV are often controlled by the control of necessary provisions)	§14-10-102(2) General purposes: (a) To promote the amicable settlement of disputes that have arisen between parties to a marriage; (b) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; And maintaining the status quo pending final disposition to mitigate potential harm to families. In re the Marriage of Nussbeck, 899 P.2d 347, 349 (Colo. App. 1995).
Procedure	In a civil protection order case: §13-14-104.5(8), C.R.S File a complaint, duly verified, alleging that the respondent has committed acts that would constitute grounds for a civil protection order (may be filed by the person seeking the order or on behalf of someone else) In a DR case: §13-14-104.5(5), C.R.S. and 14-10-108(3), C.R.S. Requested by independent motion accompanied by an affidavit in the DR case In both types of cases: §13-14-104.5(4), C.R.S. – A **motion** for a TCPO **shall** be set for hearing at the **earliest possible time**, may be ex parte, and **shall take precedence**. [Implies you must have a "hearing", *i.e.* take testimony from the applicant *ex parte*, but in practice	§14-10-108(1),(2), C.R.S. Filed as part of a motion for temporary orders regarding payment of debts, use of property, maintenance, or payment of attorney fees OR Requested by an independent motion accompanied by an affidavit. Court issues a temporary order. C.R.C.P. 16.2(c)(3)(C) provides that hearings on temporary orders shall be held **as soon as possible.** C.R.C.P. 16(c)(3)(C) – The parties have to certify on the record that they have attempted in good faith to resolve temporary orders issues. The court may vacate the hearing if the parties don't comply with this requirement.

Topic	Civil TPO	DR Temp Orders
	a TCPO may issue on the motion and affidavit submitted.] 13-14-104.5(8), C.R.S. – If sufficient cause exists, judge may issue temporary protection order and a citation to respondent to appear and show cause why it should not be made permanent 13-14-104.5(10), C.R.S. – Show Cause Hearing must be set **within 14 days** (Shall be continued and an alias citation issued if petitioner is unable to serve the respondent in that period; may be continued thereafter if service still cannot be obtained.) 13-14-104.5(9), C.R.S. – copy of complaint, protection order, and citation must be served on the respondent and the person to be protected (if complaint was filed by someone else) in accordance with the rules of service of process provided in CRCP 4. It must inform the respondent that, if he/she fails to appear in court, a bench warrant may issue and the temporary protection order will be made permanent without further notice or service.	
Standard	§13-14-105(1), C.R.S. Provisions regarding property must be necessary for the protection of persons §13-14-104.5(7)(a), C.R.S. Must find Imminent danger to the person or persons seeking protection. (See Section I above)	§14-10-108(1), C.R.S. For temporary DR orders regarding property – upon motion supported by an affidavit setting forth the factual basis for the motion and the amounts requested
Scope	§13-14-105(1)(j)(I), C.R.S. Temporary injunction	§14-10-108(1), C.R.S.

Topic	Civil TPO	DR Temp Orders
	Can restrain the party from ceasing to make payments for mortgage or rent, insurance, utilities, or related services, transportation, medical care, or child care**** (****Restrained party has to have had a prior existing duty or legal obligation to make the payments) Can restrain the party from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities of life Can require the restrained party to account to the court for all extraordinary expenditures made after the injunction is in effect.	Court may order temporary payment of debts, use of property, maintenance, child support, or payment of attorney's fees 14-10-108(2)(a), C.R.S. Can restrain any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life If a party is so restrained, court may require him/her to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued. Note: 14-10-107(4)(b)(I)(A), C.R.S. In a dissolution of marriage/legal separation case, an automatic temporary injunction enters when the petition is filed and served that restrains both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the injunction is in effect. 14-10-107(4)(b)(I)(D), C.R.S. The automatic temporary injunction in dissolution/legal separation cases also restrains both parties (without at least 14 days' advance notice and the written consent of the other party or a court order) from canceling, modifying,

Topic	Civil TPO	DR Temp Orders
		terminating, or allowing to lapse for nonpayment of premiums any policy of health insurance, homeowner's insurance, renter's insurance, or automobile insurance that provides coverage to either of the parties of the minor children, or any life insurance policy that names either party or the minor children as a beneficiary.
Special Provisions	§13-14-105(1)(j)(II), C.R.S. Effective upon personal service or upon waiver and acceptance of service by the restrained party §13-14-105(1)(j)(III), C.R.S. The provisions of this type of injunction must be printed on the summons and becomes an order of the court upon fulfillment of the requirements of (j)(I) §13-14-105(1)(j)(IV), C.R.S. Does not preclude the party from applying for further temporary orders, an expanded temporary injunction, or modification or revocation. §13-14-104.5(6), C.R.S., §14-10-108(7), C.R.S. When issuing a protection order, the Ct is required to inquire about other prior and existing protection orders, and the parties have a duty to disclose other protection orders §13-14-104.5(6), C.R.S. In the event of conflicting orders – Ct shall consider, as its first priority, issues of public safety. Orders that prevent assaults, threats, etc. are given precedence over orders that deal with disposition of property. <u>In the DR case only</u>: §14-10-108(5)(a), C.R.S.	§14-10-108(5)(a), C.R.S. A temporary order or injunction does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.

Topic	Civil TPO	DR Temp Orders
	A temporary order or injunction does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.	
Modification and Termination	§13-14-105(1)(j)(II), C.R.S. Lasts for a period of time determined appropriate by the court, not to exceed one year after issuance of a Permanent Civil Protection Order §13-14-105(1)(j)(IV), C.R.S. Any subsequent order in a DR case supersedes an injunction made pursuant to 13-14-105(1)(j), C.R.S. 13-14-108(2)(a), C.R.S. Protected party can apply for modification or dismissal at any time*** 13-14-108(2)(b), C.R.S. Restrained party can apply for modification or dismissal of the temporary protection order but no motion to modify or dismiss may be filed by the restrained party within 2 years after issuance of the permanent order or after disposition of a prior motion to modify/dismiss.*** (***See 13-14-108(5) for procedure and standard for modification or termination under this subsection) 13-14-108(4), C.R.S. Court retains jurisdiction to enforce, modify, or dismiss a temporary protection order. (See 13-14-108(6) for factors) <u>If issued in a DR case under §14-10-108(3), C.R.S.</u> – 13-14-106(1)(c), C.R.S. A temporary protection order filed in a DR proceeding can be continued until	§14-10-108(5)(b), C.R.S. A temporary order or injunction may be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S. 14-10-108(5)(c), C.R.S. A temporary order or injunction terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

Topic	Civil TPO	DR Temp Orders
	the time of the final decree or final disposition (and not converted to a permanent protection order) if both parties agree §14-10-108(5)(b), C.R.S. "A temporary order … may be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S." 14-10-108(5)(c), C.R.S. A temporary order terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.	

E. Temporary Orders – Custody & Support

Preliminary Considerations

Purpose and Timeline

- Temporary orders regarding custody and child support can issue as part of a Temporary Civil Protection Order **if necessary for the protection of persons**.
    - See section above; §13-14-105(1)(b) & (e), C.R.S.; §13-14-104.5(1), C.R.S. (purpose of civil protection orders is to prevent assaults and threats, DV, emotional abuse of elderly/at-risk adults, sexual assault/abuse, or stalking).
    - This can be done in a civil protection order case (under §13-14-105(1)(b) & (e), C.R.S.) or in the DR case under §14-10-108(3), C.R.S. (DR court may issue temporary or permanent protection orders pursuant to the provisions of 14-13-101 et seq.).
    - Either way, it results in an **expedited timeline**. See section above.

- If the temporary order regarding parenting time/decision making is **not necessary for the protection of persons**, it falls under 14-10-108, C.R.S. in the DR case.
    - This would be handled on the **normal docket schedule**.

Chart: TPO v. DR Temporary Orders re Custody.

Topic	Civil TPO	DR Temp Orders
Purpose	§13-14-104.5(1), C.R.S. Prevent assaults, threats, DV, emotional abuse of elderly/at-risk adults, sexual assault/abuse, or stalking	§14-10-102(2) General purposes: (a) To promote the amicable settlement of disputes that have arisen between parties to a marriage; (b) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; And maintaining the status quo pending final disposition to mitigate potential harm to families. In re the Marriage of Nussbeck, 899 P.2d 347, 349 (Colo. App. 1995).
Procedure	In a civil protection order case: §13-14-104.5(8), C.R.S File a complaint, duly verified, alleging that the respondent has committed acts that would constitute grounds for a civil protection order (may be filed by the person seeking the order or on behalf of someone else) In a DR case: §13-14-104.5(5), C.R.S. and 14-10-108(3), C.R.S. Requested by independent motion accompanied by an affidavit in the DR case In both types of cases: 13-14-104.5(4), C.R.S. – A **motion** for a TCPO **shall** be set for hearing at the **earliest possible time**, may be ex parte, and **shall take precedence**. [Implies you must have a "hearing", *i.e.* take testimony from the applicant *ex parte*, but in practice a TCPO may issue on the motion and affidavit submitted.]	§14-10-108(1),(2), C.R.S. Filed as part of a motion for temporary orders regarding parental responsibilities or child support OR Requested by an independent motion accompanied by an affidavit. Court issues a temporary order. C.R.C.P. 16.2(c)(3)(C) provides that hearings on temporary orders shall be held **as soon as possible.** C.R.C.P. 16(c)(3)(C) – The parties have to certify on the record that they have attempted in good faith to resolve temporary orders issues. The court may vacate the hearing if the parties don't comply with this requirement.

Topic	Civil TPO	DR Temp Orders
	13-14-104.5(8), C.R.S. – If sufficient cause exists, judge may issue temporary protection order and a citation to respondent to appear and show cause why it should not be made permanent 13-14-104.5(10), C.R.S. – Show Cause Hearing must be set **within 14 days** (Shall be continued and an alias citation issued if petitioner is unable to serve the respondent in that period; may be continued thereafter if service still cannot be obtained.) 13-14-104.5(9), C.R.S. – copy of complaint, protection order, and citation must be served on the respondent and the person to be protected (if complaint was filed by someone else) in accordance with the rules of service of process provided in CRCP 4. It must inform the respondent that, if he/she fails to appear in court, a bench warrant may issue and the temporary protection order will be made permanent without further notice or service.	
Standard	§13-14-105(1), C.R.S. Provisions regarding property must be necessary for the protection of persons §13-14-104.5(7)(a), C.R.S. Must find Imminent danger to the person or persons seeking protection. (See Section I above) §13-14-105(1)(e)(II), C.R.S. In order to deny parenting time, the court must find that the safety of any child or the protected party cannot be	§14-10-108(1), C.R.S. For temporary DR orders regarding parental responsibilities and child support – upon motion supported by an affidavit setting forth the factual basis for the motion and the amounts requested §14-10-108(1.5), C.R.S. The court may consider the allocation of parental responsibilities in accordance with the best interests of the child, with particular reference to

Topic	Civil TPO	DR Temp Orders
	ensured with any form of parenting time reasonably available. §13-14-105(1)(e)(III), C.R.S. In order to grant a temporary award of decision-making over a child, court must find that such award is reasonably related to preventing domestic abuse as defined in section 13-14-101(2), C.R.S. or preventing the child from witnessing domestic abuse §13-14-105(1)(e)(IV), C.R.S. Temporary care and control or interim decision-making responsibility must also be determined in accordance with the standard contained in 14-10-124, C.R.S. (Best Interests of the Child): - Court shall determine parenting time and decision-making responsibilities in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs of the child (14-10-124(1.5), C.R.S.) - **Parenting time** – best interests unless the parenting time by a party would endanger the child's physical health or significantly impair the child's emotional development. (14-10-124(1.5)(a), C.R.S.) In addition, in any order imposing/continuing a parenting time restriction, the court shall enumerate the specific factual findings supporting the restriction and may enumerate the conditions that the restricted party could fulfill in order to seek modification. (14-10-124(1.5)(a), C.R.S.) - For claims of DV/abuse/sexual assault resulting in conception	the factors specified in 14-10-124(1.5), C.R.S.: - Court shall determine parenting time and decision-making responsibilities in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs of the child (14-10-124(1.5), C.R.S.) - **Parenting time** – best interests unless the parenting time by a party would endanger the child's physical health or significantly impair the child's emotional development. (14-10-124(1.5)(a), C.R.S.) In addition, in any order imposing/continuing a parenting time restriction, the court shall enumerate the specific factual findings supporting the restriction and may enumerate the conditions that the restricted party could fulfill in order to seek modification. (14-10-124(1.5)(a), C.R.S.) - For claims of DV/abuse/sexual assault resulting in conception of the child, see 14-10-124(4), C.R.S. - To determine best interests for parenting time, consider all relevant factors, including: - the wishes of the child's parents, - the wishes of the child if sufficiently mature, - the interaction and interrelationship of the child with his/her parents, siblings, and any other person who may

Topic	Civil TPO	DR Temp Orders

	of the child, see 14-10-124(4), C.R.S.
	- To determine best interests for parenting time, consider all relevant factors, including:
	  - the wishes of the child's parents,
	  - the wishes of the child if sufficiently mature,
	  - the interaction and interrelationship of the child with his/her parents, siblings, and any other person who may significantly affect the child's best interest,
	  - the child's adjustment to his or her home, school, and community,
	  - the mental and physical health of all individuals involved (except a disability alone shall not be a basis to deny or restrict parenting time)
	  - the ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party (except when a party is acting to protect the child from witnessing DV or being a victim)
	  - whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support,
	  - the physical proximity of the parties to each other
	  - the ability of each party to place the needs of the child ahead of his or her own needs
		significantly affect the child's best interest,
		  - the child's adjustment to his or her home, school, and community,
		  - the mental and physical health of all individuals involved (except a disability alone shall not be a basis to deny or restrict parenting time)
		  - the ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party (except when a party is acting to protect the child from witnessing DV or being a victim)
		  - whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support,
		  - the physical proximity of the parties to each other
		  - the ability of each party to place the needs of the child ahead of his or her own needs
		- **Decision-Making Responsibility** – best interests. (14-10-124(1.5)(b), C.R.S.)
		  - For claims of child abuse/neglect/DV or suspected abuse/neglect/DV and claim that child was conceived as a result of sexual assault, see 14-10-124(4), C.R.S.
		  - To determine <u>best interests</u> for decision-making responsibility, consider the factors listed above and all relevant <u>factors</u>, including:

Topic	Civil TPO	DR Temp Orders

	- **Decision-Making Responsibility** – best interests. (14-10-124(1.5)(b), C.R.S.)
	  - For claims of child abuse/neglect/DV or suspected abuse/neglect/DV and claim that child was conceived as a result of sexual assault, see 14-10-124(4), C.R.S.
	  - To determine best interests for decision-making responsibility, consider the factors listed above and all relevant factors, including:
	  - credible evidence of the ability of the parties to cooperate and to make decisions jointly
	  - whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child
	  - whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties
	- The court shall not consider conduct of a party that does not affect that party's relationship to the child. 14-10-124(2), C.R.S.
	- The court shall not presume that any person is better able to serve the best interests of the child because of their sex. 14-10-124(3), C.R.S.
		- credible evidence of the ability of the parties to cooperate and to make decisions jointly
		  - whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child
		  - whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties
		- The court shall not consider conduct of a party that does not affect that party's relationship to the child. 14-10-124(2), C.R.S.
		- The court shall not presume that any person is better able to serve the best interests of the child because of their sex. 14-10-124(3), C.R.S.
		- A request for genetic testing shall prejudice the requesting party in the allocation of parental responsibilities. 14-10-124(3.5), C.R.S.
		- §14-10-124(4), C.R.S. – For claims of abuse/neglect/DV and a claim that the child was conceived as a result of sexual assault – prior to allocating parenting time and decision-making responsibilities or considering the factors above, the

Topic	Civil TPO	DR Temp Orders
	- A request for genetic testing shall prejudice the requesting party in the allocation of parental responsibilities. 14-10-124(3.5), C.R.S. - §14-10-124(4), C.R.S. – For claims of abuse/neglect/DV and a claim that the child was conceived as a result of sexual assault – prior to allocating parenting time and decision-making responsibilities or considering the factors above, the court shall consider the factors outlined in the statute.	court shall consider the factors outlined in the statute.
Scope	§13-14-105(1)(b), C.R.S. Can restrain a party from contacting the minor child of either of the parties §13-14-105(1)(e)(I), C.R.S. Can award temporary care and control of any minor children of either party involved for a period of not more than one year. §13-14-105(1)(e)(II), C.R.S. The order may include parenting time rights for the other party involved and any conditions of such parenting time, including supervision by a third party who agrees to the terms of the supervised parenting time and any costs associated with supervised parenting time, if necessary. (If the restrained party is unable to pay the court ordered costs, the court shall not place such responsibility with publicly funded agencies.) The court may deny parenting time if it finds that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available. §13-14-105(1)(e)(III), C.R.S.	§14-10-108(1), C.R.S. Upon motion of either party in a DR proceeding, the court may enter temporary orders regarding parental responsibilities (parenting time and decision-making) or child support Note: 14-10-107(4)(b)(I)(C), C.R.S. In a dissolution of marriage/legal separation case, an automatic temporary injunction enters that restrains both parties from removing the minor child or children from the state without the consent of the other party or an order of the court

Topic	Civil TPO	DR Temp Orders
	Court may award interim decision-making responsibility of a child to a person entitled to bring a DR action for APR, when such award is reasonably related to preventing domestic abuse as defined in section 13-14-101(2), C.R.S. or preventing the child from witnessing domestic abuse	
Special Provisions	§13-14-105(2), C.R.S. Any order for temporary care and control in a civil protection order is governed by the Uniform Child-custody Jurisdiction and Enforcement Act – 14-13-101 et seq. (This comes into play if the parties have lived in Colorado less than 6 months or have an out-of-state custody order.) §13-14-104.5(6), C.R.S., §14-10-108(7), C.R.S. When issuing a protection order, the Ct is required to inquire about other prior and existing protection orders, and the parties have a duty to disclose other protection orders §13-14-104.5(6), C.R.S. In the event of conflicting orders – Ct shall consider, as its first priority, issues of public safety. Orders that prevent assaults, threats, etc. are given precedence over orders that deal with disposition of property. <u>In the DR case only</u>: §14-10-108(5)(a), C.R.S. A temporary order or injunction does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.	§14-10-108(5)(a), C.R.S. A temporary order or injunction does not prejudice the rights of the parties of the child which are to be adjudicated at subsequent hearings in the proceeding.
Modification and Termination	§13-14-105(1)(e)(I), C.R.S. Award of temporary care and control of children lasts for a period of not more than one year.	§14-10-108(5)(b), C.R.S. A temporary order or injunction may be revoked or modified prior to final decree on a showing by affidavit of the

Topic	Civil TPO	DR Temp Orders
	§13-14-108(1), C.R.S. A protection order awarding temporary care and control of minor children under 13-14-105(1)(e) "must terminate whenever a subsequent order regarding the same subject matter is granted" in a DR matter or a case under the children's code. 13-14-108(2)(a), C.R.S. Protected party can apply for modification or dismissal at any time*** 13-14-108(2)(b), C.R.S. Restrained party can apply for modification or dismissal of the temporary protection order but no motion to modify or dismiss may be filed by the restrained party within 2 years after issuance of the permanent order or after disposition of a prior motion to modify/dismiss.*** (***See 13-14-108(5) for procedure and standard for modification or termination under this subsection) 13-14-108(4), C.R.S. Court retains jurisdiction to enforce, modify, or dismiss a temporary protection order. (See 13-14-108(6) for factors) If issued in a DR Case under §14-10-108(3), C.R.S. – 13-14-106(1)(c), C.R.S. A temporary protection order filed in a DR proceeding can be continued until the time of the final decree or final disposition (and not converted to a permanent protection order) if both parties agree §14-10-108(5)(b), C.R.S. "A temporary order … may be revoked or modified prior to final decree on a	facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S. 14-10-108(5)(c), C.R.S. A temporary order or injunction terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

Topic	Civil TPO	DR Temp Orders
	showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, C.R.S." 14-10-108(5)(c), C.R.S. A temporary order terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.	

F. Civil Permanent Protection Orders

Can be issued in a civil PO case or a dissolution case – §13-14-106, C.R.S. and 14-10-108(3), C.R.S. – or in a criminal case – §18-1-1001, C.R.S.*

- Although Mandatory Criminal Protection orders are technically temporary in nature, they generally last longer than a Temporary Civil Protection Order.
    - They last until final disposition of the case, which may be up to the defendant's life.

Preliminary Considerations

Parent's Liberty

- Interest of parents in the care, custody and control of their children is a fundamental liberty interest. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); U.S. Const. Amend. XIV.
    - This interest does not "evaporate because" a person has "not been [a] model parent[ ] or [has] lost temporary custody of their child to

the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

- In the probation context, Federal Courts have held that a restriction on contact with one's children is valid only if the probationer presents a danger to the child and the court makes particularized findings. *United States v. Burns*, 775 F.3d 1221 (10th Cir. 2014).
  - However, in *Troxel* the majority passed on the question of whether the Due Process Clause requires non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation over the parents' objection. *Troxel*, 530 U.S. at 73,77.

- In an article titled "Parental Rights and Permanent Civil Protection Orders: Constitutional Implications," Judge Butler and Attorney Intolubbe-Chmil argued that permanent protection orders could result in the severe curtailment of a parent's fundamental liberty interest in the care, custody and control of their children IF:

- (1) the order prohibits contact with the child of the restrained party, or that child is listed as a protected party and
- (2) the child has not been a direct victim of the alleged abuse.

- Reasons for concern with Permanent Civil Protection Orders and Mandatory Criminal Protection Orders where the child is not a victim:
  - Burden of Proof
    - Permanent Civil Protection Orders
      - Require only a Preponderance of the Evidence Standard that (1) the restrained party has committed acts constituting grounds for issuance of a civil protection order, and (2) unless restrained will continue to commit such acts or acts designed to intimidate or retaliate against the protected person.
      - No finding of imminent danger is necessary
      - Permanent Civil Restraining order may also issue

automatically if the restrained party fails to appear at the show cause hearing after being properly served

- Acts that constitute grounds for issuance of a Permanent Civil Protection Order are broad:
    - Grounds are those acts set forth in 13-14-104.5, C.R.S., which a protection order is meant to prevent – assaults and threatened bodily harm, "domestic abuse," emotional abuse of the elderly or an at-risk adult, sexual assault, sexual abuse, and stalking. *Martin v. Arapahoe County Court*, 2016WL6122813, ¶20; §13-14-104.5(1), C.R.S.
    - "Domestic abuse" means "any act, attempted act, or threatened act of violence, stalking, harassment, or coercion that is committed

by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship." §13-14-101(2), C.R.S.

- Coercion includes compelling a person (by force, threat, or intimidation) to engage in conduct from which the person has a right to abstain, or to abstain from conduct the person has a right to engage in.
- Domestic abuse includes acts, attempted acts, and threatened acts of violence against an animal if the act is intended to coerce, control, punish, intimidate,

or exact revenge upon either of the parties or a minor child of the parties.

- Mandatory Criminal Protection Orders
  - Orders to stay away from the home or prevent contact or communication with a witness can be entered at the court's discretion when requested by the DA in DV cases and in victim's rights notification cases.
  - The court can also enter "any other order it deems appropriate to protect the safety of the alleged victim or witness."

- Permanent nature
  - In *Santosky v. Kramer*, 455 U.S. 745, 748 (1982), the Supreme Court held that a clear and convincing evidence standard is required prior to permanently terminating a parent's rights. *See also* §19-3-604, C.R.S.
  - "[W]hether the loss threatened by a particular type of proceeding is

sufficiently grave to warrant" a higher burden of proof "turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky*, 455 U.S. at 758.

- Nature of the interest – The interest in companionship, care, custody and management of one's children is "far more precious than any property right." *Id.* at 758-59.
- Permanency of the loss – The termination of parental rights is a more permanent and total loss than a protection order, but this loss is still grave and may end up being permanent.
    - Permanent Civil Protection Orders last a minimum of two years and may be permanent.
    - Mandatory Criminal Protection Orders last until final disposition of the case,

which means dismissal, acquittal, or completion of the sentence, and therefore could last up to the defendant's lifetime.

- Situations where a Parent's Fundamental Liberty Interest is not violated:
    - Temporary Civil Protection Orders. *See Santosky*, 455 U.S. at 758 (noting that permanency of threatened loss is a factor in determining constitutional implications).
    - Permanent Civil Protection Orders and Mandatory Criminal Protection Orders where the child was the direct victim of some type of alleged abuse
        - The Constitution permits a State to interfere with the rights of parents to rear their children in order to prevent harm or potential harm to a child. *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting).
    - Permanent Civil Protection Orders under §13-14-105(1)(e), allocating temporary care and control of a child to the protected party

- Allows the court to award temporary care and control of a minor child of either party only for a period of up to 1 year.
- Allows the court to enter temporary orders regarding parenting time and decision making only in accordance with the best interests standards of §14-10-124, C.R.S.
- Allows a court to deny parenting time only if it finds that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available, and
- Allows a temporary grant of decision-making to the protected party only if the court finds that such award is reasonably related to preventing domestic abuse or preventing the child from witnessing domestic abuse.
- Temporary care and control provisions automatically terminate when a subsequent Order is entered in a DR matter or a Case under the Children's Code.

- Situations where the fundamental liberty interest *may* be violated:
    - A Permanent Civil Protection Order with a §13-14-105(1)(b) restriction
        - Restrains a party from "contacting … the minor child of either of the parties."
        - Entry of this order would effectively deny the restrained party any parenting time.
        - This section (1)(b) is not governed by the same standards as section 13-14-105(1)(e)
            - Unlike 13-14-105(1)(e), subsection (1)(b) does not require the court to enter its order in accordance with the best interests standards of §14-10-124, C.R.S., does not require a finding that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available prior to denying parenting time, and does not

allow a temporary grant of decision-making to the protected party only if the court finds that such award is reasonably related to preventing domestic abuse or preventing the child from witnessing domestic abuse.

- Unlike 13-14-105(1)(e), subsection (1)(b) does not have a 1 year maximum term.
- Unlike 13-14-105(1)(e), subsection (1)(b) does not automatically terminate when a subsequent Order enters in a DR or Children's Code Case.

- A Permanent Civil Protection Order listing the restrained party's non-victim child as a protected party
  - All provisions of the restraining order would apply to the child.
  - The restrained party generally cannot have any parenting time unless the court makes a specific exception in the PPO allowing for some sort of parenting time.

- A Mandatory Criminal Protection Order containing provisions that prevent and/or restrict contact with a non-victim child of the restrained party.

- Suggestions for Protection Orders listed above that may raise a constitutional concern:
  - Consider whether the restriction is warranted or whether some other, less restrictive means can be used to accomplish the same goal
    - Consider inquiring as any harm done to minor children, and questioning the parties as to the age of the minor children and their current living arrangements.
  - Consider making detailed factual findings on the record related to the threat of harm to the child (separate from the protected adult) and the availability/efficacy of other, less restrictive measures
  - Consider asking the protected party whether they want to apply for temporary care and control under 13-14-105(1)(e) (only valid for up to one year), and advising the

protected party that they may seek a more permanent APR order in a DR case.

- Consider placing a time limit on any parenting restrictions in the protection order or stating that any subsequent order in a DR or D&N case will control.
- Consider applying the standards from 13-14-105(1)(e) to other parenting time restrictions
    - Make findings regarding the best interests standards of §14-10-124, C.R.S.
    - Make a finding that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available prior to entering an order that effectively denies the restricted party any parenting time
    - Make a finding that the restrictions are reasonably related to preventing domestic abuse or preventing the child from witnessing domestic abuse, if the Order will effectively award temporary decision-making responsibility to the protected party

- Consider including appropriate exceptions that will allow safe/appropriate contact with the child and/or allow modification of the Protection Order by any subsequent order in a DR case.
    - ***Note:*** Even if the child is not listed as a protected party and the restrained party has some parenting time, if the protected party is the child's other parent the court must consider how things like parenting exchanges and attendance at school functions will occur without having the restrained party violate the PPO.
    - ***Note also*** that the section of the form allowing the court to enter exceptions has a 136 character limit, so they must be concise.

Cases with Multiple Protection Orders

- The most restrictive conditions control.
- In order to seek modification, the parties must request it in each case (and in a criminal case, the DA is the other party, not the alleged victim).

- Courts in criminal cases and civil protection order cases should consider deferring to the DR court on provisions regarding care and control of the children, because the DR court often has more information to make the best interest determination.

Chart: Civil PPOs v Criminal MROs.

Topic	Civil PPO	Criminal MRO
Procedure	13-14-104.5(8), (10) C.R.S. – Show Cause Hearing not more than 14 days after issuance of temporary protection order (Unless continued because petitioner was unable to serve respondent) 13-14-106(1)(a), C.R.S. On return date, Judge examines record and evidence, and if standard is met, shall order either that the temporary protection order is made permanent or a modified permanent protection order is entered. Judge shall inform that a violation of the protection order is a criminal offense pursuant to section 18-6-803.5 or constitutes contempt of court. If the restrained party fails to appear after proper service of the temporary protection order and citation, court can still make the protection order permanent. It is not necessary to re-serve the restrained party unless the protection order is modified. 13-14-106(1)(b), C.R.S. Judge may continue temporary protection order and show cause hearing for up to one year if: - Court examines record and evidence - Good cause is shown - Court finds a continuance would be in the best interests of the parties AND - Both parties are present and agree to the continuance. Each party may also request one continuance for up to 14 days for good cause shown 13-14-106(2), C.R.S.	18-1-1001(1), C.R.S. Issues automatically in criminal cases under title 18 Court shall provide copies to protected parties. Court shall inform defendant of protection order at the first appearance, and inform defendant that a violation is punishable by contempt. §18-1-1001(1),(2), C.R.S. In cases involving DV, stalking, or unlawful sexual behavior, prior to releasing defendant on bail the court shall state the terms of the protection order on the record, and shall require the defendant to acknowledge the protection order in court and in writing prior to release as a condition of any bond. The prosecutor shall notify the alleged victim and the protected person in such cases. §18-1-1001(5), C.R.S. §18-1-1001(6), C.R.S. Court shall set a hearing upon a request for modification.

	Court shall electronically transfer permanent protection orders to the central registry and deliver a copy to the protected party. **Same in DR Case Except –** §13-14-106(1)(c), C.R.S. Court may, on the motion of either party, continue the temporary protection order until the issuance of the final decree or disposition in the DR case IF both parties agree to the continuance. If no agreement, judge must enter a new permanent protection order, which technically is not a "permanent order" as to any property orders under 13-14-105(1)(j), child custody issues under 13-14-105(1)(e), and orders excluding a party from the family home under 13-14-105(1)(c), because such orders terminate once the DR case resolves those issues and concludes. §13-14-105(1)(j)(IV), C.R.S.; §13-14-108(1), C.R.S.	
Purposes	Same as temporary protection orders §13-14-104.5(1), C.R.S. Prevent assaults and threats, prevent DV, prevent emotional abuse of elderly/at-risk adults, prevent sexual assault/abuse, and prevent stalking See also 13-14-100.2(1), C.R.S. "The general assembly hereby finds that the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence and other types of abuse, and prevent serious harm and death." **Same in DR Cases**	Protection of the alleged victim
Standard	§13-14-106(1)(a), C.R.S. Judge finds by a <u>preponderance of the evidence</u> that: (1) the restrained party has	Issues automatically in criminal cases

	committed acts constituting grounds* for issuance of a civil protection order, **and** (2) unless restrained will continue to commit such acts or acts designed to intimidate or retaliate against the protected person. *Grounds are those acts set forth in 13-14-104.5, C.R.S., which a protection order is meant to prevent – assaults and threatened bodily harm, "domestic abuse," emotional abuse of the elderly or an at-risk adult, sexual assault, sexual abuse, and stalking *Martin v. Arapahoe County Court*, 2016WL6122813, ¶20; §13-14-104.5(1), C.R.S. See §13-14-101, C.R.S. for definitions of these terms. A finding of imminent danger to the protected person is **not a necessary prerequisite**. *See In re Marriage of Fiffe*, 140 P.3d 160, 162 (Colo. App. 2005) (explaining why this is not required). 13-14-105(1)(c)/(d) – For orders excluding a party from a home: "Upon a showing that physical or emotional harm would otherwise result." 13-14-106(3), C.R.S. Court shall not grant mutual protection orders to prevent DV unless each party has met his/her burden of proof as described in 13-14-104.5(7), C.R.S. (imminent danger to the person, considering all relevant evidence about safety and protection of the person) and the court makes separate and sufficient findings of fact to support the issuance of the mutual protection order **Same in DR Cases**	For certain provisions, the case must be a DV case or a case involving victims' rights notification.
Scope of Relief	Same as Temporary Protection Orders Except:	§18-1-1001(1), C.R.S. "[S]hall restrain the person charged from harassing, molesting, intimidating,

	- As to restraining the respondent from ceasing to make payments under certain circumstances, which restraint can only be temporary under 13-14-105(1)(j)(II), C.R.S. – not to exceed 1 year after issuance of the permanent PO, and terminates upon entry of a subsequent order in a DR case. - As to awards of temporary care and control of a child, which can only be temporary under §13-14-105(1)(e)(I), C.R.S. – lasts for a period of not more than 1 year and terminates upon entry of a subsequent order in a DR or case under the Children's Code. See 13-14-106(1), C.R.S. Judge may order the temporary protection order to be made permanent or modify it 13-14-105(1), C.R.S. A court authorized to issue a protection order has jurisdiction to include any provisions the court deems necessary for the protection of persons, including but not limited to: (a) restraining a party from threatening, molesting, or injuring the other party or the children of the parties, (b) restraining a party from contacting any party or the minor child of either party, (c)/(d) excluding a party form the family home or another home upon a showing that physical or emotional harm would otherwise result, (e) awarding temporary care and control of any minor children of either party involved for a period of not more than one year,* (*See section above) (f) restraining a party from interfering with a protected person at their place of employment/education or from engaging in conduct that impairs the protected person's employment/educational relationships/environment, (g) restraining a party from molesting, injuring, killing, taking, transferring,	retaliating against, or tampering with any witness to or victim of the acts charged." §18-1-1001(1),(3), C.R.S. Upon motion of the DA or on the court's own motion in DV cases and cases involving crimes listed in 24-4.1-302, C.R.S. (except (cc.5) and (cc.6)) [cases involving victims' rights notification], the court can include the following provisions: - An order to vacate or stay away from the home of the alleged victim or witness and to stay away from any other location where the victim or witness is likely to be found* - An order to refrain from contact or direct or indirect communication with the alleged victim or witness - An order prohibiting possession or control of firearms or other weapons - An order prohibiting possession or consumption of alcohol or controlled substances; and - Any other order the court deems appropriate to protect the safety of the alleged victim or witness.

	encumbering, concealing, disposing of or threatening to harm an animal or minor child, (h) specifying arrangements for possession and care of an animal or minor child, And (i) granting such other relief as the court deems appropriate, **Same in DR Cases**	
Subsequent Modification or Termination	§13-14-105(1)(j)(IV), C.R.S. Any subsequent order in a DR case supersedes an injunction made pursuant to 13-14-105(1)(j), C.R.S. (regarding property/payments) §13-14-108(1), C.R.S. A protection order excluding a party from the family home or awarding temporary care and control of minor children "must terminate whenever a subsequent order regarding the same subject matter is granted" in a DR matter or a Case under the Children's Code. 13-14-108(2)(a), C.R.S. Protected party can apply for modification or dismissal at any time*** 13-14-108(2)(b), C.R.S. Restrained party can apply for modification or dismissal of the permanent protection order 2 years after issuance of the permanent order or after disposition of a prior motion to modify or dismiss.*** (***See 13-14-108(5) for procedure and standard for modification or termination under this subsection) 13-14-108(4), C.R.S. Court retains jurisdiction to enforce, modify, or dismiss a permanent protection order. (See 13-14-108(6) for factors) **Exception** – 13-14-108(3), C.R.S.	§18-1-1001(3),(6), C.R.S. Defendant can apply for modification or dismissal at any time and can request a hearing on the issue. §18-1-1001(3), C.R.S. DA can apply for further orders, additional provisions under the protection order, or modification or dismissal at any time. §18-1-1001(6), C.R.S. DA can request a hearing on modification in cases involving DV, stalking, or unlawful sexual behavior. §18-1-1001(3), C.R.S. Court retains jurisdiction to enforce, modify, or dismiss the protection order until final disposition of the case. §18-1-1001(1), C.R.S. Upon final disposition of the action, the mandatory protection order automatically terminates. "Final disposition" means the case is dismissed, D is acquitted, or D completes his sentence.

	If the restrained party is convicted of another offense against the protected party after issuance of the permanent PO, the PO must remain permanent and may not be modified or dismissed by the court, except upon motion of the protected person.**** (****See conditions listed in the statute.) **Same in DR Cases Except –** Note: §13-14-105(1)(j)(IV), C.R.S. Any subsequent order in a DR case supersedes an injunction made pursuant to 13-14-105(1)(j), C.R.S. (regarding property/payments) §13-14-108(1), C.R.S. A protection order excluding a party from the family home or awarding temporary care and control of minor children under 13-14-105(1)(e) "must terminate whenever a subsequent order regarding the same subject matter is granted" in a DR matter or a Case under the Children's Code. 13-14-106(1)(c), C.R.S. A temporary protection order continued on the agreement of both parties and not made permanent terminates upon final disposition of the DR case.	

G. Criminal Mandatory Protection Orders

1. Duration

Remains in effect from advisement to final disposition of the action (when the case is dismissed, D is acquitted, or D's sentence is complete). §18-1-1001(1), C.R.S.

2. Scope

"[S]hall restrain the person charged from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged." §18-1-1001(1), C.R.S.

Upon motion of the DA or on the court's own motion in DV cases and cases involving crimes listed in 24-4.1-302, C.R.S. (except (cc.5) and (cc.6)) [– these are cases involving victims' rights notification], the court can include the following provisions:

- An order to vacate or stay away from the home of the alleged victim or witness and to stay away

from any other location where the victim or witness is likely to be found*

- An order to refrain from contact or direct or indirect communication with the alleged victim or witness
- An order prohibiting possession or control of firearms or other weapons
- An order prohibiting possession or consumption of alcohol or controlled substances; and
- Any other order the court deems appropriate to protect the safety of the alleged victim or witness.

§18-1-1001(1),(3), C.R.S.

*In a civil protection order or DR case, this requires a showing that physical or emotional harm would otherwise result.

If the order qualifies as an order under 18 U.S.C. §922(g)(8) – the Brady Handgun Act – the court shall order Defendant to refrain from possessing or purchasing any firearm or ammunition and relinquish any firearm or ammunition for the duration of the order. §18-1-1001(9), C.R.S.

3. Form

Issued on a standardized form. §18-1-1001(1), C.R.S.

4. Procedure

Enters automatically in criminal cases.

Court shall provide copies to protected parties. Court shall inform defendant of protection order at the first appearance, and inform defendant that a violation is punishable by contempt. §18-1-1001(1),(2), C.R.S.

In cases involving DV, stalking, or unlawful sexual behavior, prior to releasing defendant on bail the court shall state the terms of the protection order on the record, and shall require the defendant to acknowledge the protection order in court and in writing prior to release as a condition of any bond.

The prosecutor shall notify the alleged victim and the protected person in such cases. §18-1-1001(5), C.R.S.

5. Note

In those instances when there is both a criminal protection order and a civil protection order in place it

is important that the parties in the civil PPO case understand:

- The parties are subject to the most restrictive conditions of both the civil PPO and criminal protection order. If one permits certain conduct or contact and the other one prohibits it, *the prohibition controls*.
- The parties cannot self-modify or terminate either the civil PPO or criminal protection order.
- In order to seek modification of the civil PPO and criminal protection order they will have to file a motion in each case. Technically, there are different parties to each case. In the criminal case the prosecutor and defendant are the parties to the case. In the civil case the Protected Party and the Restrained Party are the parties to the case. As such, it is possible that it will be opposed in one case and unopposed in the other.
- The judge ruling on any motion to modify or terminate in the civil case may not be the same judge ruling on any motion to modify or terminate in the criminal case.

6. Modification & Termination

Defendant can apply for modification or dismissal at any time and can request a hearing on the issue.

- §18-1-1001(3),(6), C.R.S.

DA can apply for further orders, additional provisions under the protection order, or modification or dismissal at any time.

- §18-1-1001(3), C.R.S.

DA can request a hearing on modification in cases involving DV, stalking, or unlawful sexual behavior.

- §18-1-1001(6), C.R.S.

Court retains jurisdiction to enforce, modify, or dismiss the protection order until final disposition of the case.

- §18-1-1001(3), C.R.S.

Court shall set a hearing on request.

- §18-1-1001(6), C.R.S.

Upon final disposition of the action, the mandatory protection order automatically terminates.

- §18-1-1001(1), C.R.S. ("Final disposition" means the case is dismissed, D is acquitted, or D completes his sentence.)

5.5 Contempt

5.6 Mechanics Liens

5.7 Replevin

5.8 Appeals from County Court

There are two basic ways a County Court case can be appealed to the District Court depending on whether the appeal is from a civil case or a criminal case.

A. Procedure

1. Civil Appeals

County Court civil matters can be appealed pursuant to § 13-6-310 or under the simplified procedure of § 13-6-311. Rule 411 of the County Court Rules of Civil Procedure also governs the timeline along with the statutory provisions. An appeal to the District Court must be made within 14 days after entry of the judgment in County Court. Timeliness is jurisdictional. The appellant must also file an appeal bond within 14 days except in indigency cases. The filing of the appeal, determination of bond, and the payment of the fee for

the record are all handled in County Court. Any execution on the judgment is stayed by the County Court. Once these matters have been addressed, the case gets docketed in the District Court and the appropriate filing fee is paid. The time for docketing is 35 days after the notice of appeal is filed. The record is due 42 days after the notice of appeal is filed. Parties have 14 days to object to the record. Once the record is certified, the appellant has 21 days to file the opening brief, then the appellee has 21 days to file an answer brief. The court can extend these deadlines and can order oral argument.

When exercising appellate review, the court may affirm, reverse, remand, or modify the county court judgment, or order a trial *de novo* before the district court. *See* § 13–6–310(2). Rule 411(d) limits the trial *de novo* to cases where the county court record has been lost or destroyed or cannot be produced or where there is new material evidence that for some reason could not have been previously discovered. Unless the district court orders a trial *de novo*, it is prohibited from making independent factual findings and is bound to accept the facts as found by the county court and presented in the record. *Water, Waste & Land, Inc. v.*

Lanham, 955 P.2d 997, 1002 (Colo. 1998). The district court review is thus limited to the sufficiency of the evidence.

A district court decision reviewing a county court decision can only be appealed by writ of certiorari to the Supreme Court, and the Court of Appeals lacks jurisdiction over such appeals.

2. Criminal Appeals

Criminal appeals from county court arise under Crim.P. 37 and § 16-2-115, C.R.S. Under Crim.P. 37, the defendant may appeal a judgment and the district attorney may appeal a question of law. Under § 16-2-115, C.R.S. only the defendant has a right to appeal; however, in all other respects the language of Rule and the statute are identical.

The notice of appeal must be filed in the county court within 35 days from the entry of judgment or if post-trial motions are filed, from the denial of post-trial motions. When a party appeals, he must also pay the "advance costs" as required for preparation of the

record, and serve the notice of appeal on the appellee. Within the same 35 day period, the appellant must docket the appeal in the district court and pay the docket fee. No motion for a new trial is required before appealing. If a motion for a new trial is filed, however, it does not restrict the issues that may be raised on appeal. If the court directs a party to file a motion for a new trial on a specific issue, the party may not appeal on that issue if he fails to file the motion. The notice of appeal must state "with particularity" the alleged errors of the county court; and include either a stipulation or designation of the evidence and other proceedings to be included in the record. The appellee has 14 days to designate any other parts of the record deemed necessary. The record must be completed within 42 days of the filing of the notice of appeal. Once filed, the parties have an additional 14 days to object to the record. Once the record is certified as final, the appellant has 21 days to file the opening brief. The appellee then has 21 days to file an answer brief. A reply brief may be filed within 14 days after service of the answer brief.

The district court's appellate function is to review the judgment of the county court, based upon the county

court record. *People v. Luna,* 648 P.2d 624, 625 (Colo. 1982); *Bovard v. People*, 99 P.3d 585, 588-89 (Colo. 2004). The district court electing to act in its appellate authority cannot alter or depart from the county court's findings of fact in any way. *People v. Williams,* 473 P.2d 982, 983, 984 (Colo. 1970); *People v. Gallegos,* 533 P.2d 1140, 1142 (Colo. 1975). Questions of law (e.g. interpretation of statutes) involve a *de novo* review.

B. Standards of Review - Civil Cases

County court civils appeal will commonly implicate only the three traditional standards of review:

- Questions of law which are reviewable *de novo*;
- Questions of fact which are reviewable for clear error; and
- Matters of discretion which are reviewable for abuse of discretion.

Reviewing a county court decision will likely involve the application of two or more of these standards where an appeal involves a mixed question of fact and law.

De Novo

The *de novo* standard of review applies to the lower court's legal findings, typically with regard to statutory interpretation, jurisdictional issues, and standing questions. Statutory interpretation is a question of law. The court's primary task when interpreting a statute is to determine and give effect to the intent of the legislature. Court's look first to the language employed and, if unambiguous, apply the statute as written unless doing so would lead to an absurd result. A statute should be read as a whole, giving consistent, harmonious, and sensible effect to all parts. *Tulips Investments, LLC v. State ex rel. Suthers*, 2015 CO 1, ¶ 11.

Clear Error

The clear error or clearly erroneous standard of review grants great deference to the lower court's factual findings. Under this standard of review, the appellate court can only reverse the lower court's factual findings when there is no support for them in the record. "A finding is also clearly erroneous when the court, on reviewing the entire evidence, is left with the definite

and firm conviction that a mistake has been committed." *In re Estate of Schlagel*, 89 P.3d 419, 422 (Colo. App. 2003).

Abuse of Discretion

The abuse of discretion standard of review applies in cases where the lower court has discretion to apply facts to the law or make discretionary decisions on matters relating to good cause, fairness, the award of attorney's fees, or the application of equitable principles. The standard will typically apply where the court exercises judgment based on a fact-specific inquiry. The abuse of discretion standard is also applicable to most evidentiary rulings in civil cases. *Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000). We will find an abuse of discretion only if the trial court's ruling was manifestly arbitrary, unfair, or unreasonable. *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269, 274 (Colo. App. 2005).

Note

There may be other case-specific standards of review in matters involving constitutional rights, such as

heightened standards of review under the First Amendment free speech cases (strict scrutiny, intermediate scrutiny, or rational basis).

There are also other standards of review applicable to a court's deference to other branches of government or administrative agencies.

- Typically, a court will defer to the interpretation of a statute or a regulation by the agency charged with its administration, provided the interpretation has a reasonable basis in the law and is supported by the record. *Marshall v. Civil Serv. Comm'n*, 2016 COA 156, ¶ 9, 401 P.3d 96.

These more specific standards of review are outside the scope of this outline, but may need to be applied depending on the facts of the appeal and the parties involved.

C. Standards of Review - Criminal Cases

Appellate courts in Colorado employ one of six different standards to determine whether an error in criminal proceedings necessitates reversal of the judgment of conviction. These six standards differ by the degree to which they require that the error impair the reliability of the judgment of conviction. They are:

- Structural error;
- Constitutional harmless error;
- Harmless error;
- Claims where the effect on the conviction is constitutionally material to the claim itself; and
- Plain error
- Abuse of discretion

Matters relating to a trial court's discretionary functions (continuances, evidentiary rulings, procedural motions, changes of venue, etc.) are mostly reviewed for abuse of discretion unless a constitutional issue is implicated.

Some cases also involve a mixed standard of review (e.g. where a lower court is found to have abused its discretion, you then have to ask whether the error was harmless or not – applying the applicable standard of constitutional harmless error or ordinary harmless error – see below).

Two types of constitutional error exist, structural error and trial error. *People v. Vigil*, 127 P.3d 916, 929 (Colo. 2006). Structural error is unique and rare and involves the fundamental process of the trial as a whole. Errors occurring within the context of the trial proceeding are trial errors with varying levels of review depending on the specific issue presented.

D. Structural Errors

Certain errors are structural errors, which require automatic reversal without an individualized analysis of how the error impairs the reliability of the judgment of conviction.

- *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Blecha v. People,* 962 P.2d 931, 942 (Colo.1998).

Examples of these errors include:

- Complete deprivation of counsel,
- Trial before a biased judge,
- Unlawful exclusion of members of the defendant's race from a grand jury,
- Denial of the right to self-representation, and
- Denial of the right to a public trial.

- *Neder,* 527 U.S. at 8, 119 S.Ct. 1827 (collecting cases). *Hagos v. People*, 2012 CO 63, ¶¶ 9-14.

Structural errors are "defects affecting the framework within which the trial proceeds," and they require automatic reversal.

- *People v. Vigil*, 127 P.3d 916, 929 (Colo. 2006).

Structural errors currently are found in the following limited classes of cases:

- A total deprivation of the right to counsel;
- Lack of impartial trial judge;
- Unlawful exclusion of grand jurors of the defendant's race;
- Denial of the right to self-representation at trial;
- Denial of the right to a public trial; and
- The jury receives an erroneous reasonable doubt instruction.
- 18 Colo. Prac., Appellate Law & Practice § 18.11 (2d ed.)

This limited class of error now comprehends only those defects affecting the framework within which the trial proceeds—errors that infect the entire trial process and

necessarily render a trial fundamentally unfair—rather than simply errors in the trial process itself.

- *People v. Novotny*, 2014 CO 18, ¶ 21, *reh'g denied* (Apr. 7, 2014).

E. Trial Errors

1. Constitutional Harmless Error

We review trial errors of constitutional dimension **that were preserved by objection** for constitutional harmless error. *Krutsinger v. People*, 219 P.3d 1054, 1058 (Colo.2009). These errors require reversal unless the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In other words, we reverse if "there is a reasonable *possibility* that the [error] might have contributed to the conviction." *Id.* (emphasis added); *Krutsinger*, 219 P.3d at 1058.

For this kind of error, **the State bears the burden** of proving the error was harmless beyond a reasonable doubt. See *Chapman*, 386 U.S. at 24, 87 S.Ct. 824 ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for

that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."); *id.* at 26, 87 S.Ct. 824 ("Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions."); *see also Kimmelman v. Morrison,* 477 U.S. 365, 382 n. 7, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (noting that the constitutional harmless error standard of *Chapman* requires the State to prove that the defendant was not prejudiced by the error).

A constitutional error is harmless when the reviewing court is confident beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Neder,* 527 U.S. at 15, 119 S.Ct. 1827; *Blecha,* 962 P.2d at 942. The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Blecha,* 962 P.2d at 942. Thus, we do not inquire into the sufficiency of the evidence but instead focus on whether, beyond a reasonable doubt, the error in the jury instructions did not contribute to the verdict.

Griego v. People, 19 P.3d 1, 8–9 (Colo. 2001), *as modified on denial of reh'g* (Mar. 12, 2001). "For this kind of error, the State bears the burden of proving the error was harmless beyond a

reasonable doubt." *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119.

Examples

- sentence enhancement under *Apprendi* and *Blakely*.
- Confrontation of witnesses.

2. Ordinary Harmless Error

We review non-constitutional trial errors that were preserved by objection for harmless error. Crim. P. 52(a); *Tevlin v. People,* 715 P.2d 338, 341–42 (Colo.1986). Under this standard, reversal is required only if the error affects the substantial rights of the parties. Crim. P. 52(a); *Tevlin,* 715 P.2d at 342. That is, we reverse if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Tevlin,* 715 P.2d at 342. Reversal is more difficult to obtain under this standard than under the constitutional harmless error standard because this standard requires that the error impair the reliability of the judgment of conviction to a greater degree than the constitutional harmless error standard requires. *See Krutsinger,* 219 P.3d at 1058 (stating that

nonconstitutional harmless error more readily produces a finding of harmlessness than constitutional harmless error).

The "ordinary" harmless error standard involves a violation of a substantive right that is not of constitutional dimensions. **The appellant bears the burden** to "establish a reasonable probability that the error contributed to the verdict." *People v. Wise*, 2014 COA 83, ¶ 27, 348 P.3d 482, 489 *cert. denied,* No. 14SC678, 2015 WL 1610548 (Colo. Apr. 6, 2015). "As used in this context, 'a reasonable probability' does not mean that it is 'more likely than not' that the error caused the defendant's conviction. Instead, it means only a probability sufficient to undermine confidence in the outcome of the case." *People v. Casias*, 2012 COA 117, ¶ 63, 312 P.3d 208, 220 (internal citations omitted.)

Examples

- Evidentiary rulings.
- Admission of 404(b) bad acts; *People v. Casias*, 2012 COA 117, ¶ 62.

3. Constitutionally Impaired Error

For certain types of claims, including ineffective assistance of counsel, the effect of the error upon the proceedings is constitutionally material to the claim itself.

- *Delaware v. Van Arsdall,* 475 U.S. 673, 679–80, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (citing *Strickland,* 466 U.S. at 671–701, 104 S.Ct. 2052).

That is, these claims "by their nature require a showing of prejudice with respect to the trial as a whole." *Id.*

A defendant can therefore succeed on a claim for ineffective assistance of counsel only by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

- *Ardolino v. People,* 69 P.3d 73, 76 (Colo.2003) (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

Satisfaction of this standard is more difficult than reversal under the harmless error standard because this standard requires that the error impair the

reliability of the judgment of conviction to a greater degree than the harmless error standard requires.

- *Krutsinger,* 219 P.3d at 1060 (citing *Kyles v. Whitley,* 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)) (It appears the appellant bears the burden on this type of claim as well.)

4. Plain Error

Errors that were **not properly preserved at trial**. We review all other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error.

- *People v. Miller,* 113 P.3d 743, 748–50 (Colo.2005).

Plain error is obvious and substantial. *Id.* at 750.

We reverse under plain error review only if the error "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction."

- *Id.* (quoting *People v. Sepulveda,* 65 P.3d 1002, 1006 (Colo.2003)).

Because this standard was formulated to permit an appellate court to correct "particularly egregious

errors," *Wilson v. People,* 743 P.2d 415, 420 (Colo.1987), the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error to warrant reversal.

5. Abuse of Discretion

The court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair.

- *Dunlap v. People,* 173 P.3d 1054, 1094 (Colo.2007).

Additionally, a court abuses its discretion when it misconstrues or misapplies the law.

- *People v. Sieck,* 2014 COA 23, ¶ 5, 351 P.3d 502.

If we determine that the court abused its discretion, we must then determine whether the error warrants reversal under a constitutional or harmless error standard.

- *People v. Jacobson,* 2014 COA 149, ¶ 11, —— P.3d —— (*cert. granted* Nov. 2, 2015).

Chapter Z | Benchbook Template

1.1 Your Topic Title - Use Heading 2

Intro text, if any. Use "Normal" in the style box above.

A. Sections - Use Heading 3

Section titles appear in the table of contents.

Keep section titles to about five words or less. Don't use punctuation at the end of a title.

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Put citations at the end of the text or as a bullet point after. Do not include a citation in a title or before the text.

- *Case*, Cite (2019).

- Bullet Points.

- Sub-Point.

1. Sub-Sections - Use Heading 4

Sub-sections won't appear in the table of contents.

1.1 | Sub-Section Topics - Use Heading 5

Align the body text to the left.

Only use Justify for long quotes. Use direct quotes sparingly. Cite to sources or use paratheatrical case citations over long quotes to authority.

2. Next Sub-Section - Heading 4

Only use a single space between sentences. Try to keep sentences to 20 syllables or less.

B. Next Section - Heading 3