CIVIL PROCEDURE

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This article reviews the new rules and the case law that affected the Colorado Rules of Civil Procedure in 2004. It begins by examining the significant changes to the Colorado Rules of Civil Procedure (C.R.C.P.) and the Colorado Appellate Rules (C.A.R.). The chief change is C.R.C.P. 16.1, which mandates a simplified litigation process for all civil cases that meet its criteria, unless the parties affirmatively opt out of the rule. The article then examines significant developments in Colorado's 2004 case law regarding Colorado civil procedure. This article is designed to provide an overview of the updates and significant changes to Colorado civil procedure law.

RULES

The following is an outline of the significant rule changes that have occurred over the past year. This article focuses only on civil procedure; it does not address amendments the Colorado Supreme Court adopted to other rules.[1]

The Colorado Supreme Court has enacted several significant changes to the Colorado rules. The most significant change, which the authors commented on in the *2003 Annual Survey of Colorado Law*, is the court's adoption of C.R.C.P. 16.1, which provides simplified case management and procedure in many cases. Consistent with the simplified procedure rules, the supreme court amended C.R.C.P. Rules 8 and 10. The court approved forms to be used in conjunction with the simplified procedure, or, if appropriate, forms to use when opting out of the simplified procedure rule. The court also adopted amendments to the Colorado Appellate Rules. Each of the changes is addressed in turn.

Simplified Civil Procedure

The simplified civil procedure became effective for all cases filed after July 1, 2004.[2] As the authors discussed previously, the simplified civil procedure rule applies to *all* civil district court actions with less than $100,000 at issue, except class action, domestic relations, mental health, probate, FED, water law, and Rule 120 cases.[3] Interests and costs are not included within the limitations of the rule.[4]

The simplified procedure rule applies unless expressly excluded by the rule itself, or unless a party timely and properly elects to be excluded from the rule. The Colorado Supreme Court's recent amendment to Rule 16.1 requires that "[e]ach pleading containing an initial claim for relief in a civil action . . . shall be accompanied by a completed Civil Cover Sheet in the form and content of . . .

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form 1.2 (JDF 601), at the time of filing."[5] The Colorado Supreme Court approved a form civil cover sheet, which is available as an appendix to the Colorado Rules of Civil Procedure as well as online.[6] The civil cover sheet requires litigants to certify that the case is governed by the simplified civil procedure rule or that the case is not governed by the rule because the case is one of those excepted by C.R.C.P. 16.1(b)(2).

The Colorado Supreme Court also amended C.R.C.P. 16.1(d) by requiring the use of a "Notice to Elect Exclusion from C.R.C.P. 16.1 Simplified Procedure" when opting out of the simplified procedure rule. If the notice is filed, then the ordinary civil procedure and case management rules apply. The "Notice to Elect Exclusion from C.R.C.P. 16.1 Simplified Procedure" form also is available as an appendix to the Colorado Rules of Civil Procedure, as well as online.[7] It must be filed by a party to the case "no later than 35 days after the case is at issue."[8] If any party timely and properly opts out of the simplified procedure rule, the normal C.R.C.P. 16 rules apply to the action.

Under the simplified procedure rule, the maximum allowable monetary judgment is limited to $100,000 against any one party. The simplified procedure rule requires early, full disclosure of persons, documents, damages, insurance, and experts. It also requires early and detailed disclosure of witnesses' testimony. The rule further provides that witnesses' direct trial testimony is generally limited to that which has been disclosed, and nothing more. The rule has particular disclosure requirements for particular types of cases.[9]

Practitioners in civil litigation should carefully consult the new simplified procedure rule and ensure that the necessary deadlines are diaried. Practitioners also should familiarize themselves with the court's civil cover sheet and forms for opting out, and educate their office staff and others accordingly.

Changes to the Appellate Rules

The Colorado Supreme Court amended the Colorado Appellate Rules in 2004 in several important ways. To begin with, the court added C.A.R. 3.3, which provides that "[a]n appeal from an order granting or denying class certification under C.R.C.P. 23(f) may be allowed pursuant to the procedures set forth in that rule and C.R.S. § 13-20-910."[10] C.A.R. 3.3 became effective September 9, 2004.[11]

Additionally, the Colorado Supreme Court amended C.A.R. 28, the rule concerning appellate briefs.[12] The amendments are two-fold. First, amended Rule 28 addresses attorney fee requests on appeal. The amended rule now requires the appellant to include any request for attorney fees in his or her opening brief.[13] The amended rule also requires that the appellee include any request for attorney fees, or opposition to a request for attorney fees, in his or her answer brief.[14] Finally, the appellant must state any opposition to attorney fees requested by the appellee in his or her reply brief.[15]

Second, amended Rule 28 allows a party in an appeal to "promptly advise" the court of "pertinent and significant new authority" that came to the party's attention after the briefing closed.[16] Previously, supplemental authority was allowed only if the court permitted it in its order setting oral argument. The amended rule now allows a party on appeal to file citations to supplemental authority in every case.[17] A party's citation to supplemental authority must take the form of a notice and must "state without argument the issue to which the supplemental citation pertains."[18]

The Colorado Supreme Court also enacted, effective January 1, 2004, C.A.R. 39.5.[19] Rule 39.5 mandates that any party on appeal who claims attorney fees must specifically state the bases therefor "in the party's principal brief in the appellate court."[20] Rule 39.5 continues: "Any opposition to a request for attorney fees shall be set forth, as pertinent, in either the answer or reply brief."[21] The rule enables the appellate court to determine both a party's entitlement to fees and the amount of attorney fees.[22] The appellate court may remand the case for resolution of a party's entitlement to attorney fees or the amount of fees to which the party is entitled.[23]

Finally, effective September 9, 2004, the Colorado Supreme Court amended C.A.R. 34, concerning oral argument in the court of appeals.[24] The amendments to Rule 34 allow the court of appeals, in its discretion, to dispense with oral argument even when a request for oral argument properly is made.[25] The amended Rule 34 also removes the option of seeking additional time for oral argument in the court of appeals.[26]

Replevin

The Colorado Supreme Court also amended C.R.C.P. 104, concerning replevin.[27] The amendment is sensible. Under the former Rule 104(d), at the same time the court used to issue an order to show cause directing the defendant to show cause why the property should not be taken from the

defendant and delivered to the plaintiff, the court was required to set the matter for a hearing date "not more than ten days from the issuance of the order."[28] The amendment allows the plaintiff to request a hearing outside of the 10-day window.[29] However, if the plaintiff does so, his or her request to have a later hearing "shall constitute a waiver of the right to a hearing not more than ten days from the date of issuance of the order."[30] Otherwise, the replevin procedure remains intact.

CASE LAW

In addition to the rule changes identified above, several changes to Colorado civil procedure law have occurred by virtue of appellate decisions interpreting or affecting the Colorado Rules of Civil Procedure. This case law is discussed in turn.

Personal Jurisdiction

The Colorado Court of Appeals decided three cases involving questions of personal jurisdiction. First, in *New Frontier Media, Inc. v. Freeman*,[31] the plaintiff filed a declaratory judgment action against shareholders in New Jersey companies. The plaintiff was a Colorado corporation and the defendants were non-resident shareholders of New Jersey corporations.[32] The non-resident defendants moved to dismiss the action for lack of personal jurisdiction.[33] The trial court granted the non-resident defendants' motion and dismissed the action.[34] The plaintiff appealed.

The court of appeals affirmed.[35] The court of appeals concluded that the non-resident defendants' contacts with Colorado, which were limited to two letters the defendants' agent sent to the plaintiff in Colorado and a letter of intent with the plaintiff Colorado company, were insufficient to establish personal jurisdiction.[36] The court of appeals reasoned that the letter of intent, a purported contract, did not require any activity to take place in Colorado by any of the defendants, was not negotiated in Colorado, and was not executed by the defendants in Colorado. Further, the defendants had never entered Colorado for any purpose; the plaintiff was the party that initiated the transaction, out of the state; and the plaintiff did not require any performance by any of the defendants in Colorado.[37] Hence, under the facts, insufficient minimum contacts existed to establish personal jurisdiction over the defendants.[38]

Second, in *Archangel Diamond Corp. v. Arkhangelskgeoldobycha*,[39] a Canadian public company that moved its principal office to Colorado between 1998 and 2002 brought an action against two Russian public companies, asserting tort claims based on the defendants' alleged failure to transfer licensing rights to the parties' joint venture. The district court granted the defendants' motion to dismiss on the basis that it lacked personal jurisdiction over either defendant. The plaintiff appealed.[40]

The court of appeals held that when the trial court is presented with factual disputes concerning whether the exercise of personal jurisdiction is appropriate, the trial court is required to weigh conflicting evidence and to resolve legal issues regarding personal jurisdiction.[41] The court concluded that the analysis and hearings applied in *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, which requires that the trial court resolve disputed factual issues involving subject matter jurisdiction under C.R.C.P. 12(b)(1), also applies to motions to dismiss for lack of personal jurisdiction under C.R.C.P. 12(b)(2).[42]

Under the facts of *Archangel Diamond Corp.*, the court of appeals affirmed when it concluded that the defendant company did not purposefully avail itself of privilege of conducting business activities in Colorado for purposes of establishing personal jurisdiction over it. The court of appeals also concluded that alleged tortious conduct of the defendant company was insufficient to support a finding of personal jurisdiction.[43]

Third, in *Wenz v. National Westminster Bank, PLC*,[44] an investor sued the defendant bank for conversion.[45] The plaintiff claimed that the defendant regularly conducted business in Colorado and therefore jurisdiction was appropriate.[46] The defendant disputed the plaintiff's jurisdictional allegations and moved to dismiss the suit for lack of personal jurisdiction, making a factual attack.[47] The plaintiff responded to the defendant's motion to dismiss for lack of personal jurisdiction and requested limited discovery on the issue of personal jurisdiction.[48] The trial court denied the plaintiff's request for limited discovery on the issue of personal jurisdiction and dismissed the action for lack of personal jurisdiction.[49] The plaintiff appealed.

On appeal, the plaintiff argued that the trial court erred by not allowing him limited discovery on the issue of personal jurisdiction.[50] The court of appeals disagreed. It held that the plaintiff did not have a right as a matter of law to conduct limited discovery on the issue of personal jurisdiction.[51] Rather, the trial court has discretion to allow limited discovery if appropriate.[52] In this case, limited

discovery on the issue of personal jurisdiction was not appropriate, and therefore the trial court did not abuse its discretion in denying the plaintiff's request for limited discovery.[53]

Pleading Standards Under Rule 11 and Rule 11 Sanctions

In re Trupp[54] made its second appearance before the Colorado Supreme Court in 2004. In the first *Trupp* case, the supreme court held that only the assistant regulation counsel who signed the complaint and amended disciplinary complaint against an attorney could be subject to a motion for sanctions under Rule 11.[55] The case then was remanded for a determination of whether the assistant attorney regulation counsel violated C.R.C.P. 11 when she advanced a claim that the attorney had violated Colo. RPC 8.4(c).[56] The Presiding Disciplinary Judge concluded that the assistant attorney regulation counsel violated Rule 11 when she alleged "that Trupp disobeyed Colorado R.P.C. 8.4(c) by 'engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.'"[57] The Presiding Disciplinary Judge concluded that the assistant regulation counsel had no evidence that Trupp made either a reckless or knowing misrepresentation.[58] However, the Presiding Disciplinary Judge did not impose a monetary sanction under Rule 11(a) because he concluded that his finding that the assistant attorney regulation counsel violated Rule 11 has far-reaching consequences.[59]

The supreme court reversed. The court described the requirements of C.R.C.P. 11.[60] The court noted that C.R.C.P. 11 requires that an attorney only advance charges that are well grounded in fact and warranted by existing law or a good faith argument for the extension of the law.[61] The court examined the assistant attorney regulation counsel's prefiling investigation into the law and facts and concluded that it was sufficient to comply with the standards imposed by C.R.C.P. 11.[62] *Trupp* is a good discussion of the type of initial investigation that is necessary before making allegations governed by Rule 11.

Amendments of Pleadings

In *Civil Service Commission v. Carney*,[63] several police officers sued the Civil Service Commission to challenge the examination the commission was using to determine whether a promotion was appropriate. The Denver District Court ruled that components of the promotional exam were arbitrary and capricious.[64] The trial court also denied the police officers' request for costs.[65] The city appealed and the police officers cross-appealed. "Deciding the case solely under Rule 106(a)(4), the court of appeals held that the scoring of the PRE component of the exam was invalid, but that the trial court's remedy exceeded its jurisdiction under C.R.C.P. 106."[66] The court of appeals also ruled that the trial court erred in denying the three officers their request for costs as the prevailing parties under C.R.S. § 13-16-111.[67] The court of appeals remanded the case for a determination of costs.[68]

On remand, the police officers moved to amend their complaint to add a new breach of contract claim and a federal claim under 42 U.S.C. § 1983.[69] The new amendments sought both damages and attorney fees.[70] The statute of limitations had run on the police officers' claims, so the only way they could bring the claims was by amending their complaint and seeking to relate the claims back to the original filing date.[71]

The trial court initially granted the police officers' motion to amend.[72] The city moved the trial court to reconsider the ruling.[73] With a new judge presiding in the trial court, the trial court granted the city's motion for reconsideration and vacated the previous order allowing amendment.[74] "In its order, the trial court determined that amending the complaint was inappropriate because the court of appeals had remanded the case for the narrow purpose of awarding costs to the plaintiffs. The court reasoned that amending the complaint to include 'an entirely new cause of action thus requiring another trial' ran contrary to the appellate court's mandate."[75]

The police officers appealed again.[76] In an unpublished opinion, the court of appeals held that the remand order and appellate mandate in its earlier decision did not expressly or impliedly preclude amendment to assert new claims.[77] The court of appeals concluded that the police officers could amend their complaint to add new federal substantive due process claims because it raised issues not addressed by the court's earlier decision and was not necessarily futile.[78]

The city sought and obtained review by the Colorado Supreme Court. The court noted that amendments to pleadings should be freely allowed under C.R.C.P. 15(a).[79] Further, the trial court has discretion to determine whether to allow amendment of pleadings.[80] The trial court must consider the totality of the circumstances in determining whether to grant a motion to amend, "balancing the policy favoring amendment against the burden the amendment imposes on the other party."[81] The court further wrote that a "party may make a

motion to amend its complaint at any stage in the litigation. . . ."[82]

On its *de novo* review, the Colorado Supreme Court held that "when all claims for relief have been decided on appeal and the case is remanded for the sole purpose of awarding costs to the prevailing party, that party cannot amend its complaint to add a new claim for relief."[83] The Court found that when the only remaining issue is costs, the case effectively is over because "the award of costs is always ancillary to the award of judgment on the merits."[84]

C.R.C.P. 26(a)(1)(C) Initial Disclosure of Damages, Offers of Settlement, and Entries of Judgment in Favor of Plaintiff for Those Damages

Morgan v. The Genesee Company, LLC[85] involved a very unique situation. In *Morgan*, the plaintiff was a property owner. She sued the defendant investment company and developers, alleging several causes of action arising from flooding on her property.[86] In her initial disclosures, the plaintiff listed as her damages $24,041.75.[87] The plaintiff further noted in her disclosures that the amount of damages she disclosed was subject to further discovery.[88]

Prior to when the plaintiff filed her initial disclosures, the defendants had offered her nearly $25,000 to settle her claims, more than the plaintiff had listed in her initial disclosures.[89] After receiving the plaintiff's initial disclosures, the defendants moved the trial court to enter judgment against them for the amount the plaintiff disclosed in her initial disclosures, reserving their right to contest any award of costs or attorney fees.[90] The plaintiff objected, arguing that the amounts she listed in her initial disclosures were based on estimates only, and were made without complete information.[91]

The trial court granted the defendants' motion and entered judgment in favor of the plaintiff in the amount listed in the plaintiff's disclosures, $24,041.75.[92] The plaintiff moved the court to reconsider its order entering judgment in favor of the plaintiff for the amount she listed in her initial disclosures.[93] The court denied the plaintiff's motion to reconsider.[94] The plaintiff then petitioned the Colorado Supreme Court to exercise its original jurisdiction and reverse the trial court's decision.[95]

The supreme court agreed to exercise its original jurisdiction. The court reversed the trial court and concluded that it should not have entered judgment in favor of the plaintiff solely for the amount listed in the plaintiff's initial disclosures.[96] The court reviewed the offer of settlement rule under the former Rule 68 and under the current C.R.S. § 13-17-202 (2003).[97] The court concluded that, under the former rule, a defendant properly could petition the court to enter judgment against him or her for a certain amount.[98] Such a judgment would not be binding unless the plaintiff consented to it or ratified it.[99] In *Morgan*, the plaintiff did not consent to the entry of judgment in her favor. Hence, even under the former Rule 68, the trial court's actions were inappropriate.[100]

Under C.R.S. § 13-17-202, however, the court's inquiry was simpler. Applying the framework of the offer of settlement statute to the *Morgan* case, the court concluded that the trial court's actions were improper because the plaintiff had rejected the defendants' offer of settlement.[101] The defendants' attempt to bind the plaintiff to the damages she listed in her initial disclosures was improper and took the case out of the purview of the offer of settlement statute.[102]

Further, the court discussed the nature and purpose of the initial disclosure and discovery rules.[103] The court noted that the purpose of the initial disclosures, particularly the requirements concerning disclosure of damages in C.R.C.P. 26(a)(1)(C), is to move the case toward trial or settlement.[104] The court reasoned, however, that a party's duty to disclose its claimed damages is continuing under C.R.C.P. 26(e).[105] Since the disclosure duty is continuing, it is neither fair nor consistent for a court to lock a party in to the damages listed in the party's initial disclosures. Hence, the Colorado Supreme Court concluded that the trial court abused its discretion by entering judgment in the plaintiff's favor, over the plaintiff's objection, for the amount plaintiff listed in her initial disclosure.[106]

The unique facts and procedural history in the case probably mean that it will have little application to cases in the future. The case presents very interesting issues, however.

Expert Disclosures and Failure to Comply with C.R.C.P. 26(a)(2)(B)(1)'s Requirement Concerning Disclosure of Previous Testimonial History

Svendsen v. Robinson[107] was a medical malpractice case. The plaintiff sued an orthopedic physician and his medical center.[108] The defendants moved to strike the plaintiff's disclosed standard of care expert for failure to comply with C.R.C.P. 26(a)(2).[109] The trial court granted the de-

fendants' motion before time had expired for the plaintiff to file her response.[110] After the trial court struck the plaintiff's standard of care expert, the defendants moved for summary judgment.[111]

Once the plaintiff received the trial court's order striking her standard of care expert, the plaintiff moved the trial court to reconsider its order striking her expert and filed a response to the defendants' motion to strike.[112] The trial court responded by setting the matter for a hearing.[113] Before the trial court held its hearing, the plaintiff supplemented her motion for reconsideration, filed a supplemental endorsement of her standard of care expert, and filed a response to the defendants' motion for summary judgment.[114] The trial court denied the plaintiff's motion for reconsideration and entered summary judgment in the defendants' favor.[115] The plaintiff appealed.

The court of appeals concluded that the trial court entered its order to strike prematurely. The court nevertheless concluded that the trial court's order striking the plaintiff's standard of care expert did not prejudice the plaintiff because the plaintiff later was given a full opportunity to explain and demonstrate why her standard of care expert should not be stricken.[116] The court of appeals further held that the trial court did not err in striking the plaintiff's standard of care expert under C.R.C.P. 37(c).[117] The trial court specifically concluded that the plaintiff was aware of the disclosure requirements, did not demonstrate difficulty in obtaining the information required under C.R.C.P. 26(a)(2)(B)(1), and did not establish that her failure to comply with C.R.C.P. 26(a)(2)(B)(1) was harmless.[118] Further, the trial court found that, given the noncompliance of the plaintiff's expert disclosure, there was no way to locate the expert's prior testimony because it was out of state.[119] Finally, the trial court found that the plaintiff's failure to comply with C.R.C.P. 26(a)(2)(B)(1) precluded the defendants from effectively preparing for the expert's deposition. Given these findings, the court of appeals held that the trial court did not abuse its discretion in striking plaintiff's expert.[120]

In doing so, the court of appeals noted that the plaintiff's expert provided "a 'sales by customer' list that included the attorney's name and firm, the date of the testimony, the amount charged, and in some instances, the case name. The list also contained a numerical code, which, as the expert later explained during his deposition, identified whether it was arbitration or trial testimony."[121] The information the plaintiff provided concerning her expert, however, did not identify the "case numbers, the name of the court or agency, or the venue or state where the attorneys were located."[122] Additionally, the information did not identify the expert's prior deposition testimony.[123]

The court of appeals agreed that the information given by the plaintiff concerning her standard of care expert was insufficient. The court of appeals also noted that, since the expert "had a list of the attorneys' names, as well as sufficient other information," the expert could have complied with C.R.C.P. 26(a)(2)(B)(1) had he expended "diligent effort."[124]

The court of appeals also affirmed the trial court's entry of summary judgment in the defendants' favor.[125] The court of appeals noted that in a medical malpractice case, the plaintiff has the burden of establishing a *prima facie* case of negligence.[126] To do so, the plaintiff must show that the defendant failed to conform to the standard of care through expert testimony.[127] Since the plaintiff's only standard of care expert had been stricken, the plaintiff's standard of care opinions could not be considered by the trial court at the summary judgment stage.[128] Since the plaintiff had no admissible standard of care opinions, summary judgment was required because the plaintiff could not demonstrate that a genuine issue of material fact existed to support her medical malpractice claim.[129]

Voluntary Dismissal and Attorney Fees as a Condition Imposed on Voluntary Dismissal of Claims or Parties

The Colorado Court of Appeals decided two cases involving questions of voluntary dismissal and the conditions that can be imposed on voluntary dismissal.

First, in *FSDW, LLC v. First National Bank*,[130] the court of appeals considered whether a trial court's dismissal of a party under C.R.C.P. 41(a)(2) without prejudice is a final, appealable order.[131] The court of appeals also considered whether the trial court's failure to impose terms and conditions upon the plaintiff's voluntary dismissal of the defendants was improper.[132]

On the first question, the court of appeals concluded that an order dismissing a party without prejudice, under C.R.C.P. 41(a)(2), is a final, appealable order.[133] The court noted that since the dismissal was without prejudice, it was not "final" in the sense that the party could later bring the claim again, assuming the statute of limitations had not run.[134] The court further noted that under C.R.S. § 13-4-102(1) (2003), a "final" order is neces-

sary to confer jurisdiction on the court of appeals.[135]

The court also observed that its former precedent suggested that a plaintiff ordinarily may not appeal from an order granting voluntary dismissal.[136] The court further noted that the Colorado Supreme Court has elaborated that a plaintiff may appeal a voluntary dismissal under C.R.C.P. 41(a)(2) "when dismissal is conditioned on terms to which the plaintiff does not agree."[137] The court found no logical reason why a defendant similarly could not appeal a voluntary dismissal of a plaintiff when the trial court declined to impose terms and conditions on the voluntary dismissal, as the defendant requested.[138] The court therefore concluded that an order dismissing a plaintiff voluntarily under C.R.C.P. 41(a)(2) is final for purposes of an appeal if the defendant is appealing the trial court's failure to impose limitations or conditions upon the voluntary dismissal.[139]

With respect to the issue of whether the trial court erred by dismissing the case without imposing terms and conditions upon the dismissal, the court of appeals concluded that the trial court erred. The court of appeals noted that before granting a voluntary dismissal, "the trial court must 'determine that any harm to the defendant may be avoided by imposing terms and conditions of dismissal.'"[140] The court of appeals noted that a trial court may require the plaintiff to pay the defendant's attorney fees as a condition of dismissal, but only when doing so is necessary to protect the defendant from prejudice.[141]

Review of a trial court's decision to impose or not impose conditions upon a voluntary dismissal is based on an abuse of discretion standard.[142] However, in this case, the trial court made no findings regarding why it declined to impose conditions upon the plaintiff's voluntary dismissal.[143] The court of appeals therefore remanded the case for factual findings necessary to determine whether imposing conditions upon the plaintiff's voluntary dismissal is appropriate, and if so, which conditions are appropriate.[144]

In *Brock v. Weidner*,[145] the defendants appealed a judgment voluntarily dismissing an action against them filed by the plaintiffs. The defendants appealed the portion of the trial court's judgment that declined to award them costs and attorney fees under a contractual fee-shifting provision.[146] In the lawsuit, the plaintiffs sought injunctive and declaratory relief and damages from defendants' plans to build an addition to their home. The plaintiffs named as additional defendants the homeowners' association and its architectural control committee.[147] The plaintiffs also sought to recover their costs and attorney fees under a fee-shifting provision in the covenants.[148]

The trial court denied the plaintiffs' request for a preliminary injunction, finding that the defendants proceeded properly and the architectural control committee acted in a reasonable and good faith manner in allowing the defendants to continue with the project.[149] The plaintiffs and the committee later moved for voluntary dismissal of the plaintiffs' claims under C.R.C.P. 41(a)(2), based on a settlement agreement they had reached.[150] "The settlement agreement provided that it became effective only if the trial court dismissed the action and it required all parties, including defendants, to pay their own attorney fees. The motion indicated that defendants would object to the requested relief."[151] The trial court dismissed the action with prejudice.

The defendants moved the court to modify its order of dismissal.[152] The trial court declined, concluding that an award of attorney fees to the defendants was not warranted.[153] The defendants appealed.[154]

On appeal, the defendants argued that the trial court abused its discretion in not awarding attorney fees either as a condition of the plaintiffs' voluntary dismissal, under C.R.C.P. 41(a)(2), or because of the fee-shifting provision in the governing covenants.[155] The court of appeals held that the trial court did not abuse its discretion by failing to award attorney fees to the defendants as a condition of the plaintiffs' voluntary dismissal under C.R.C.P. 41(a)(2).[156] However, the court of appeals concluded that the defendants were entitled to an award of their attorney fees under the governing covenants.[157] The court of appeals therefore reversed the trial court's judgment pertaining to award of costs and attorney fees and remanded the case.[158]

The Burden of Proof in Setting Aside a Default Judgment

In *Borer v. Lewis*,[159] the Colorado Supreme Court considered what the burden of proof is for setting aside a default judgment. The plaintiff in *Borer* was a passenger in a vehicle who was injured when the car crashed into another vehicle.[160] The plaintiff and her husband sued the driver of the vehicle.[161] The plaintiffs later asserted a negligent entrustment claim against another defendant, Lewis, claiming that Lewis negligently allowed the driver to drive her car.[162] Lewis never answered

and the trial court entered a default judgment against her.[163]

Lewis later discovered that a default judgment had been entered against her.[164] She moved to set aside the default judgment, arguing that she was never served with the summons and a copy of the first amended complaint.[165] The trial judge ruled that Lewis was properly served and had failed to establish the existence of a meritorious defense.[166] The trial court further concluded that "the balance of equities weighed in the Plaintiffs' favor. The trial judge therefore denied [Lewis'] motion to set aside the default judgment."[167]

The parties subsequently tried the damages case to a jury.[168] After trial, Lewis again moved to set aside the default judgment, "this time citing evidence that she had been heavily sedated in October 1986 and therefore would have been unable to recognize the summons and complaint if they were in fact served upon her."[169] The trial court denied that motion, and Lewis appealed.

The court of appeals ruled that the trial court erred in failing to conduct an evidentiary hearing prior to ruling on the matter. The court of appeals remanded the case for an evidentiary hearing concerning whether Lewis actually was served and, if so, whether the default judgment might nevertheless be set aside based on grounds of excusable neglect.[170]

On remand, Lewis testified "that she had never been served and also testified regarding the nature of various medical problems she had been experiencing during October 1986 which required her to take medications that interfered with her memory as well as her ability to appreciate the full implication of legal documents."[171] Lewis also offered additional testimony to support her contention that she was not served. At the close of the hearings, the trial court set aside its default judgment and ruled in Lewis' favor, concluding that Lewis had established by a preponderance of the evidence that she had not been served.[172]

The plaintiffs appealed. The court of appeals reversed on another matter, but affirmed the trial court's order setting aside the default judgment against Lewis.[173] The plaintiff appealed to the Colorado Supreme Court. The question before the Supreme Court was what burden of proof should be applied to a party seeking to overturn a default judgment entered against her.[174] The court examined C.R.C.P. 55(c), C.R.C.P. 60(b), and the common law, and concluded that the party seeking relief from a default judgment "has the burden of establishing the grounds 'by clear, strong and satisfactory proof.'"[175] The rub, however, is that C.R.S. § 13-25-127(1) provides that "the burden of proof in any civil action shall be by a preponderance of the evidence."[176] The issue was whether the preponderance of evidence burden, or the more difficult "clear, strong and satisfactory proof" burden, governed motions to set aside default verdicts.

The court held that C.R.S. § 13-25-127(1) does not apply to procedural motions, but instead, only substantive claims. Hence, the supreme court overruled the court of appeals' decision in *White Front Auto Sales, Inc. v. Mygatt*.[177] The court affirmed the trial court, however, finding that Lewis had met her burden even under the more stringent standard.[178]

Res Judicata *and Permissive Cross-claims*

In *Continental Divide Insurance Co. v. Western Skies Management, Inc.*,[179] an insurer sued its insured for indemnity and contribution. The case arose out of an underlying lawsuit brought by a tenant of the insured against the insured and its management company for negligence and wrongful eviction.[180] The jury in the underlying lawsuit found for the tenant, and the court entered judgment against the insured and the management company for $637,500 plus costs and interests.[181]

The insured paid the plaintiff $40,000 to cover interest and costs. The insured then sued its management company for indemnity and breach of contract.[182] The insured sought to recover the $40,000 that it paid to the plaintiff, plus the fees and costs it incurred while defending the underlying action. The trial court replaced the insured with its insurer, Continental, as the real plaintiff in interest, since Continental had paid the money.[183]

The parties filed cross-motions for summary judgment. The trial court granted summary judgment for the management company.[184] The court ruled that Continental's suit was barred by the doctrine of *res judicata* because its claims could have been raised during the underlying action.[185]

On appeal, Continental claimed that the trial court erred by applying the doctrine of *res judicata* to bar its claims.[186] Continental argued that its indemnity and contract claims could have been raised in the underlying action only as cross-claims, and *res judicata* cannot bar cross-claims because they are permissive, not compulsory.[187] The court of appeals agreed.

The court of appeals reviewed the doctrine of *res judicata* or claim preclusion.[188] The court noted that the doctrine only bars claims that were or

could have been litigated in an earlier action that resulted in a final judgment on the merits.[189] The court refused to apply the doctrine of *res judicata* to Continental's claims because cross-claims are permissive, not compulsory. Hence, cross-claims can raise *res judicata* if, but only if, they actually were raised in the earlier litigation.[190] In this case, they were not raised in the earlier litigation. Accordingly, they were not barred by the doctrine of *res judicata.*[191]

Recoverable Costs for the Prevailing Party

There were several cases involving awards of costs to the prevailing party this year. Each is examined in turn.

First, in *Fort Morgan Reservoir and Irrigation Co. v. Groundwater Appropriators of South Platte River Basin, Inc.*,[192] the Colorado Supreme Court considered whether C.R.C.P. 54(d) allows a party who prevailed on certain issues in a water court case to obtain an award of costs.[193] The court noted that Rule 54(d) allows the trial court to award costs to the prevailing party.[194] The court noted that in a water case, the "filing of an additional protest to a proposed ruling triggers the involvement of the applicant and the opposer in a contested proceeding before the water judge where, at the least, the opposer will hold the applicant to a strict burden of proof and may present affirmative evidence adverse to the applicant."[195] Since a water court case that progresses to that level is in many ways similar to civil litigation, the purpose behind allowing an award of costs also applies to water cases in a similar fashion.[196]

The court noted that, in certain circumstances, it may be difficult to identify which party is the prevailing party to whom an award of costs is appropriate.[197] The court reasoned that "to 'prevail' for purposes of Rule 54(d), a party must prevail on a significant issue in the litigation and achieve some of the benefits sought by the litigation."[198] The court further reasoned that "where 'each of the parties can arguably be viewed as having prevailed in part, the award of costs in such a situation is committed to the sole discretion of the trial court.'"[199] The court concluded that, at the point in which a water rights case turns into a formally litigated case, the water court has the sound discretion to award costs to the prevailing party.[200] The court held that the water court in that case did not abuse its discretion in awarding costs to the groundwater appropriators who had obtained orders awarding them a conditional water storage right.[201]

Second, in *Archer v. Farmer Bros. Co.*,[202] an employee who was fired by his employer as he was resting in bed recuperating from a possible heart attack sued his employer and supervisors, alleging claims under the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Colorado Anti-Discrimination Act (CADA), and outrageous conduct claims.[203] The case was tried and the jury entered verdicts awarding damages to the plaintiff-employee for intentional infliction of severe emotional distress.[204]

The issue addressed by the Colorado Supreme Court was whether two defendants could be prevailing parties in the case under C.R.C.P. 54(d)'s costs provision, even when the plaintiff wins a jury verdict against the other defendant.[205] The supreme court held that the trial court did not abuse its discretion in awarding costs to two of the three defendants because they were "prevailing parties" under C.R.C.P 54(d).[206] The Colorado Supreme Court reasoned that, in cases involving multiple claims, some of which are successful and some of which are not, a trial court has the *sole* discretion under Rule 54(d) to determine which party, if any, is a "prevailing party" for purposes of awarding costs.[207]

The court noted that under Rule 54(d), a prevailing party is one who succeeds on a significant issue in the case and who achieves some of the benefits sought by the litigation.[208] The number of claims on which a party prevails or the amount a party recovers are not determinative. The supreme court concluded that no reason existed in the circumstances of this case to limit the trial court's discretion in determining who the prevailing party is. Accordingly, the Colorado Supreme Court affirmed.[209]

Finally, in *Mullins v. Kessler*,[210] the trial court awarded costs in favor of the defendant after the defendant prevailed in a jury trial. The plaintiff appealed. The plaintiff argued that the defendant was not entitled to recover costs because he was not the real party in interest, since his liability insurer covered his litigation costs and expenses.[211] The plaintiff also argued that the Health Care Availability Act (HCAA), C.R.S. §§ 13-64-102, *et seq.*, precluded an award of costs because the HCAA contains a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff.[212]

The court of appeals affirmed the trial court award to the defendant.[213] It held that a defendant may seek and obtain an award of costs under

C.R.C.P. 54(b) even if the defendant's liability insurer, rather than the defendant, paid the costs of defense. The arrangement between a defendant and his or her insurer for the disbursement and repayment of those costs is of no consequence to whether the defendant has the right to recover his or her costs in the first place.[214] Further, the court of appeals held that the HCAA does not preclude a prevailing defendant from recovering costs in a medical negligence action.[215]

Offers of Settlement

In *Dillen v. HealthOne, LLC*,[216] the plaintiff, a physician who participated in an internship and residency program operated by the defendant sued the defendant for multiple claims. The defendant sent plaintiff's counsel a letter offering to settle the plaintiff's claims for $95,000, pursuant to the offer of judgment statute, C.R.S. § 13-17-202.[217] The case was tried and the jury found in favor of the plaintiff.[218] The jury awarded her $80,000, less than the defendant's previous offer of judgment.[219] Based on the offer of judgment statute, the trial court denied the plaintiff's request for costs and instead awarded the defendant the costs it incurred subsequent to its offer of settlement.[220] The trial court also denied the plaintiff's request for prejudgment interest.[221] The plaintiff appealed.

The court of appeals held that the trial court properly denied the plaintiff's request for prejudgment interest.[222] The court of appeals reasoned that, although an award of prejudgment interest under C.R.S. § 5-12-102 is warranted when money or property has been wrongfully withheld, plaintiff failed to request specific findings by the jury regarding past and future damages. Hence, the court of appeals concluded that the trial court did not err in denying plaintiff's request for prejudgment interest.

Further, the court of appeals held that the trial court did not abuse its discretion by awarding costs to defendant and denying plaintiff's motion for costs. The court of appeals reasoned that under the offer of judgment statute, C.R.S. § 13-17-202 (1)(a), and under the former C.R.C.P. 68, service of the defendant's settlement offer via facsimile was proper. Further, the defendant's letter qualified as an offer pursuant to C.R.S. § 13-17-202(1)(a). The court of appeals reasoned that the defendant's settlement offer was included within the offer of judgment statute even though the defendant did not entitle its letter as a "settlement offer" and did not refer to C.R.S. § 13-17-202. The court of appeals therefore affirmed.

Post-Judgment Substitution of Parties

Liberty Mutual Fire Insurance Co. v. Human Resources Companies, Inc.[223] involved the question of whether a plaintiff can substitute a party to the action after judgment enters. In this case, the plaintiffs were insurers. The plaintiffs sued the defendant company, claiming that the company failed to reimburse them for payments made on its behalf under various insurance policies.[224] The trial court entered summary judgment against the defendant company for more than $560,000.[225]

The plaintiffs' post-judgment discovery revealed the fact that, while the plaintiffs' summary judgment motion was pending, the defendant company sold all of its assets to a new, derivative company.[226] After discovering this information, the plaintiffs moved the trial court to substitute the new company for the former company under C.R.C.P. 25(c).[227] The trial court denied the motion without explanation.[228] The plaintiffs appealed.

The court of appeals noted that C.R.C.P. 25(c) does not specify a procedure for resolving a motion in cases in which the parties dispute whether the corporation should be substituted for, or joined with, another corporation.[229] The court of appeals therefore examined federal authorities concerning post-judgment substitution of parties for guidance.[230] The court of appeals noted that substitution generally occurs during litigation, but it has been allowed even after litigation if the transfer of interest occurs during the pendency of the case.[231]

The court further noted that the issue of whether to allow substitution is left to the discretion of the trial court.[232] The court of appeals remanded the case, however, because the record was insufficient. Substitution of parties, particularly after judgment, implicates due process considerations and cannot be determined on affidavits alone.[233] Accordingly, on remand, the court of appeals instructed the trial court to conduct an evidentiary hearing and determine whether the new company is a successor corporation.

Claim Preclusion and Class Actions

In *Jahn v. ORCR, Inc.*,[234] the petitioners were unnamed members of a class seeking injunctive relief against the respondents.[235] The district court dismissed the petitioners' claims under the doctrine of claim preclusion, reasoning that claim preclusion barred the petitioners' claims for damages because the petitioners were unnamed members of a class seeking injunctive relief pursuant to C.R.C.P. 23(b)(2) in a prior action against the re-

spondents.[236]

The Colorado Supreme Court held that the doctrine of claim preclusion does not bar unnamed members of a class seeking injunctive relief and certified pursuant to C.R.C.P. 23(b)(2) from bringing claims for damages in subsequent litigation.[237] The Colorado Supreme Court explained in detail the differences between class actions where the class seeks money damages and class actions where the class seeks only injunctive relief.[238] Class actions where the class seeks only injunctive relief — classes that are pursued pursuant to C.R.C.P. 23(b)(2) — lack many of the procedural requirements of class actions seeking money judgments under C.R.C.P. 23(b)(3).

The Colorado Supreme Court further noted that because C.R.C.P. 23(b)(2) "lacks procedural requirements, courts have held that class actions for injunctive relief under the rule generally do not bar individual suits for damages."[239] The court was persuaded by the reasoning of those decisions and concluded that, when the former action was a class action seeking only injunctive relief under C.R.C.P. 23(b)(2), the former action does not preclude claims by individual members of the class for money damages.[240]

Interlocutory Appeals of Orders Denying Class Certification

Clark v. Farmers Insurance Exchange[241] was a case brought by an insured of the defendant automobile insurer seeking to recover on claims for bad faith breach of insurance contract based on the fact that the defendant insurer required proof of actual payment of deductible applicable to personal injury protection (PIP) coverage prior to paying for out-of-network healthcare.[242] The plaintiff sought class certification under C.R.C.P. 23.[243] The trial court denied class certification.[244]

The plaintiff sought an interlocutory appeal.[245] The court of appeals denied the plaintiff's attempt to appeal the district court's interlocutory order denying class certification.[246] In its ruling, the court of appeals interpreted the new Colorado statute, C.R.S. § 13-20-901(1).[247] The court of appeals concluded that the statute is substantially similar to Federal Rules of Civil Procedure (F.R.C.P.) 23(f). The court of appeals, guided by federal authorities interpreting federal Rule 23(f), concluded that the five-factor test outlined in *Prado-Steiman ex rel. Prado v. Bush* should be applied to the issue of whether an order denying class certification.[248]

The *Prado-Steiman* five-factor test requires an evaluation of: (1) whether the trial court's order is likely to dispose of the litigation or sound a "death knell" for either party; (2) whether the appellant has shown that the trial court's decision likely constitutes an abuse of discretion; (3) whether allowing the appeal will permit resolution of an unsettled legal issue; (4) the nature and status of the litigation before the trial court; and (5) the likelihood of future events.[249] The court of appeals evaluated the first three factors and concluded that they weigh against allowing the plaintiff to appeal the court's denial of class certification in an interlocutory appeal.[250] The court of appeals therefore dismissed the appeal.

Appeal from Order Granting a Motion to Compel Arbitration without a Rule 54(b) Certification

In *Ferla v. Infinity Development Associates, LLC*,[251] the court of appeals considered the issue of whether a trial court's order granting a motion to compel arbitration is appealable and whether the trial court's certification of its order compelling arbitration as appealable under C.R.C.P. 54(b) was proper.[252] The court of appeals held that the district court's order compelling arbitration is not an appealable interlocutory order under the Uniform Arbitration Act.[253]

Further, the court of appeals rejected a challenge to the constitutionality of the Uniform Arbitration Act on the argued grounds that the act violates equal protection because it permits an interlocutory appeal of a trial court's order *denying* a motion to compel arbitration, but does not permit the appeal of an order *granting* a motion to compel arbitration.[254] The court of appeals noted that a statutory classification such as the one made in the act must be upheld if it bears a rational relationship to a legitimate governmental objective and is not unreasonable, arbitrary, or capricious.[255] The distinction between orders denying a motion to compel arbitration and orders granting a motion to compel arbitration "serves a legitimate purpose because it is rationally based on the public policy favoring arbitration."[256] The court explained that if an arbitrable claim is adjudicated by the trial court, the benefits of a speedy resolution by arbitration are lost; hence the need to treat the orders differently.[257]

However, the court of appeals concluded that the trial court's C.R.C.P. 54(b) certification of its order compelling arbitration was improper because an ultimate decision on the claims had not been entered since the trial court stayed the claims it

found were subject to arbitration.[258] The court of appeals noted that an appeal of an order compelling arbitration is appropriate if the order also dismisses the arbitrable claims as final for purposes of appeal.[259] Without a dismissal of the arbitrable claims, however, an interlocutory order compelling arbitration cannot be certified as final, pursuant to C.R.C.P. 54(b). The court of appeals therefore dismissed the appeal.[260]

CONCLUSION

This article examined most, but not all, of the important changes to the Colorado Rules of Civil Procedure. The article does not examine the subtleties or context of the rules, the amendments, or of the rule changes. A practitioner who is confronted with a specific issue addressed in this article should be sure to research the issue himself or herself. This article is intended as an overview only.

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NOTES

1. The supreme court adopted several changes that are not reported in this article, including changes concerning the rules of probate procedure, Rule Change #2004(1), www.courts.state.co.us/supct/rules/2004/2004(1).doc; amendments to the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Colorado Attorneys' Fund for Client Protection and Mandatory Continuing Legal Education, Rule Change #2004(18), www.courts.state.co.us/supct/rules/2004/2004(18).doc; and amendments to Colorado Rule of Civil Procedure 16.2, concerning case management in domestic relations proceedings, Rule Change #2004(19), www.courts.state.co.us/supct/rules/2004/2004(19).doc. This article also does not address the newly adopted rules and standards concerning special advocates, Chief Justice Directive 04-08, www.courts.state.co.us/supct/directives/04-08.pdf. Finally, amendments to the rules concerning judicial bypass of the Parental Notification Act and the new rules adopted as they related to judicial bypass of the Parental Notification Act are not reported herein because of the very limited subset of procedures to which they are applicable, Rule Change #2004(14), www.courts.state.co.us/supct/rules/2004/2004(14).doc.

2. *See* C.R.C.P. 16.1 (2004).

3. C.R.C.P. 16.1(b)(1)-(2); *see also* Walter Houghtaling and Troy Rackham, "Civil Procedure," *2003 Annual Survey of Colorado Law* (CLE in Colo. Inc., 2004) (discussing Colorado Rule of Civil Procedure 16.1).

4. C.R.C.P. 16.1(b)(2).

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9. *See, e.g.*, C.R.C.P. 16.1(k)(1)(b)(i)-(ii).

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