Drawing Boundaries Between Tort and Contract

The Fluctuating Scope of Colorado's Economic Loss Rule

BY MIKE CROSS

This article traces the evolution of the economic loss rule in Colorado.

The economic loss rule is a judicial construct whose fundamental goal is to maintain the distinction between contract and tort law.[1] But currently, its seemingly amorphous scope confounds many practitioners. After the Colorado Supreme Court adopted the economic loss rule in 2000, the line between contract and tort law became blurred with appellate court expansions to the rule's applicability. In more recent decisions, the Supreme Court seems to have pulled back, but its guidance has been inconsistently applied. This article describes the evolution of Colorado's economic loss rule, including ongoing efforts to survey its margins and potential limits to its boundaries that may soon be drawn.

Colorado Adopts the Rule

Generally speaking, the economic loss rule provides that a party suffering only economic loss (damages other than physical harm to a person or property) from the breach of a contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law.[2] This rule emerged from the development of products liability jurisprudence and was first recognized by the California Supreme Court in *Seely v. White Motor Co.*[3] In *Seely*, a consumer brought tort claims against a manufacturer seeking economic losses, including lost profits, resulting from a defective product. The Court emphasized the need to maintain a distinction between the allocation of risk of physical harm versus economic injury, stating "[e]ven in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."[4] From this statement, "the economic loss rule was born."[5]

The Colorado Court of Appeals first expressly invoked the economic loss rule in 1988 in *Jardel Enterprises, Inc. v. Triconsultants, Inc.*[6] to bar a negligence claim seeking lost profits against a subcontractor, stating:

> As a general rule, no cause of action lies in tort when purely economic damage is caused by negligent breach of a contractual duty. This economic loss rule prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract.[7]

However, this case ran contrary to prior Colorado appellate decisions permitting overlapping tort and contract theories. The lack of consistency led Judge Phillips of the Denver District Court to pen a *Colorado Lawyer* article in 1992 where he examined a "series of cases stretching back to 1961 [that left] Colorado law with no well-developed dividing line that distinguishes between tort and contract."[8] He lamented the lack of "an adequate conceptual basis to draw the line of demarcation between overlapping contract and tort theories" and the resulting confusion and unnecessarily complicated lawsuits.[9]

The Colorado Supreme Court finally provided some clarity in 2000 with the simultaneous announcement of two decisions: *Town of Alma v. AZCO Construction, Inc.*[10] and *Grynberg v. Agri Tech, Inc.*[11] In the former, the Town of Alma brought claims against a contractor engaged to construct a water service line. The Town discovered several leaks

in the line due to faulty workmanship. The contractor repaired the leaks pursuant to a limited warranty but refused to perform repairs after the one-year warranty term expired. The Town asserted several claims against the contractor, including negligence. The Supreme Court held that the economic loss rule barred the negligence claim.

The Court expressly adopted a "workable" economic loss rule.[12] In doing so, it explored the rule's underlying rationale and the importance of maintaining a distinction between contract and tort law. The Court noted that the essential difference between these areas of law is "the source of the duties of the parties."[13] Tort law imposes duties without regard to any agreement or contract with the goal of protecting citizens from risk, while contract duties arise from promises between parties. The fundamental goal of contract law is to enforce the parties' expectations.

The Court noted that the availability of tort claims to seek redress for breach of contractual duties undermines the goal of contract law by potentially extending liability beyond the contract's negotiated terms and, therefore, the parties' expectations. By limiting tort liability where a contract exists, parties are held to the terms of their bargain. This is consistent with the assumption that rational economic actors can adequately address nonperformance by bargaining at arm's length to shape contract terms. The economic loss rule serves to ensure predictability in commercial transactions by allowing parties to "confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties' efforts to build these cost considerations into the contract."[14] The Court also expressed concern over the possibility that simultaneous tort and contract liability could generate confusion and unnecessary complexity in litigation.

Accordingly, the Court set forth a foundational framework that focused on the source of the duty. Though the phrase "economic loss rule" suggests the focus should be on the type of damages, the Court rejected this approach, noting that the relationship between the type of damages suffered and the availability of a tort claim is "inexact at best."[15] The Court noted that a more accurate name for the rule would be the "independent duty rule"[16] because "economic loss rule" is "merely an unfortunate carry-over from its origins in products liability jurisprudence," which the Court maintained only for the sake of consistency.[17] Consistent with this "duty analysis," the Court expressly adopted an economic loss rule that barred tort claims where a party suffered only economic loss from the breach of an express or implied contractual duty unless an independent duty of care existed under tort law.[18] It provided examples of such independent duties that were long recognized by Colorado courts, including duties arising out of attorney-client,[19] physician-patient,[20] and insurer-insured relationships.[21]

> "Consistent with this 'duty analysis,' the Court expressly adopted an economic loss rule that barred tort claims where a party suffered only economic loss from the breach of an express or implied contractual duty unless an independent duty of care existed under tort law."

Applying this new framework, the Court similarly barred a negligence claim in the companion case, *Grynberg*. There, the plaintiff alleged contract and tort claims arising out of a cattle investment program. The Court held that there was no duty independent of the contract, relying on the fact that the plaintiff sought the same damages through both contract and negligence claims, and concluding that the applicable duty of care was "created by, and completely contained in, the contractual provisions."[22]

The Rule Expands

Not long after *Town of Alma* and *Grynberg*, in 2004 the Colorado Supreme Court revisited the economic loss rule in *BRW, Inc. v. Dufficy & Sons, Inc.*[23] There, a subcontractor brought negligence and negligent misrepresentation claims against an engineering firm responsible for drafting plans and specifications on a construction project. Despite the absence of direct contractual privity, the engineering firm asserted that the economic loss rule barred the claim. The Court agreed, extending the economic loss rule to "interrelated contracts" in what it described as a "natural progression" from its holdings in *Town of Alma* and *Grynberg*.[24] The contractual relationships between the parties were attenuated enough that the Court had to dedicate significant real estate in the opinion to a graphic explaining the connection. It reasoned that parties on larger construction projects typically rely on a network of contracts to allocate their risks, duties, and remedies and, therefore, have an opportunity to bargain for or decline to enter into contractual relationships.

The Court thus expanded on the *Grynberg* rationale to set forth three factors to help determine whether the duty allegedly breached is independent 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, and (3) whether the tort duty differs in any way from the contractual duty.[25] The Court also seemingly created a bright line rule:

> If we conclude that the duty of care owed by [defendants] was memorialized in the contracts, it follows that the plaintiff has not shown any duty independent of the interrelated contracts and the economic loss rule bars the tort claim and holds the parties to the contracts' terms.[26]

The Court did not weigh in on this issue again until 2016.

In the meantime, appellate courts relied on *BRW* to offer expansive interpretations of the economic loss rule. For example, in *Parr v. Triple L & J Corp.*,[27] the Court of Appeals barred a claim for intentional interference with contract. Relying on *BRW*, it stated:

> [T]he existence of [a common law] duty is not determinative, because we are directed *first* to determine whether the contract requires conformance to a particular standard *before* turning to an independent duty analysis. If a duty is found in the contract, as here, it is improper further to analyze the existence of an independent tort duty in determining whether an economic loss may be recovered.[28]

Similarly, in *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*,[29] a division held that the economic loss rule barred a fraud claim. The Court first noted that *Town of Alma* "did not draw any bright lines among types of torts (e.g., fraud, negligence) that are always barred by the economic loss rule, those that may be barred, and those that are never barred."[30] The Court then engaged in an extensive analysis of the three *BRW* factors, concluding: "Simply put, whether a party negligently breaches a contractual duty or fraudulently does so, the duty allegedly breached is not independent of the contract."[31]

That same year, a separate division cited *Hamon Contractors* with approval in an opinion expanding the economic loss rule even further, barring a claim for statutory civil theft. In *Makoto USA, Inc. v. Russell*,[32] the Court rejected the plaintiff's argument that fraud and theft claims arise out of a common law duty independent of contracts. While the Court agreed that such a duty exists, it held that the duty alone was insufficient to show independence. Instead, the duty (1) must arise from a source other than the relevant contract and (2) must not be a duty also imposed by the contract.[33] The Court quoted *BRW*, stating "our supreme court has explained that if a duty is also 'memorialized in the contracts, it follows that the plaintiff has not shown any duty independent of the interrelated contracts and the economic loss rule bars the tort claim.'"[34] It was an understandable interpretation, essentially a blanket rule that if the duty exists in the contract, tort claims (including intentional tort claims) are barred even where a separate common law duty exists. Applying that rule, the Court held that the contract and statutory civil theft claims were "inextricably intertwined: the latter could not be proven without first proving the former."[35]

Following these decisions, a *Colorado Lawyer* article concluded that *Hamon Contractors*, *Makoto*, and subsequent appellate decisions "indicate an unwillingness to allow a claim for fraud where the party committing the fraud also is breaching a contract."[36] The authors recognized such holdings as "a departure from Colorado's historic view that there exists an independent duty, separate and apart from any contract, not to commit fraud."[37]

Not long after this article, a Court of Appeals division reaffirmed the expanded scope of the economic loss rule in *Engeman Enterprises, LLC v. Tolin Mechanical Systems Co*.[38] There, the operator of a cold-storage facility sued a cooling system company that caused an explosion resulting in significant consequential damages. The plaintiff sought to avoid a limitation of liability provision in the contract by asserting tort claims and including allegations of willful and wanton conduct. Applying the *BRW* framework, the Court held that there was no duty independent of the contract[39] and, moreover, "merely proving willful and wanton conduct is not sufficient to avoid the economic loss rule."[40] While the Court acknowledged that "[p]roof of willful and wanton conduct is sufficient to defeat a limitation-of-liability clause in both tort and contract actions," it is not sufficient to overcome the economic loss rule.[41] Citing *Parr*, *Hamon Contractors*, and other decisions applying the economic loss rule "to bar intentional tort claims when no independent duty of care existed," the Court saw "no reason to depart from this precedent, which is consistent with the principle that the economic loss rule turns not on the nature of the defendant's conduct, but on the nature of the duties owed by the defendant."[42]

The Rule Contracts

In 2016 the Colorado Supreme Court began to pull back in *Van Rees v. Unleaded Software, Inc.*[43] The defendant in that case made various representations regarding its expertise to induce the plaintiff to enter into a contract and then failed to perform. In addition to a claim for breach of contract, the plaintiff brought claims for negligence, fraud, constructive fraud, fraudulent concealment, and negligent misrepresentation, all arising out of pre-contract misrepresentations. The district court dismissed the tort claims, a decision affirmed on appeal. But the Supreme Court reversed, relying on the "important distinction between failure to perform the contract itself, and promises that induce a party to enter into a contract in the first place."[44] In doing so, the Court hinted that the expansive application of the economic loss rule may have gone too far. While the goal of the economic loss rule is to prevent tort law from swallowing contract law, the Court was also "cautious of the corollary potential for contract law to swallow tort law."[45] Notably, the Court's decision did not cite *BRW* or discuss its three factors.

The Supreme Court had another opportunity to address the economic loss rule in 2019 in *Bermel v. BlueRadios, Inc.*[46] There, the Court granted certiorari to resolve a Court of Appeals split regarding the applicability of the economic loss rule to a statutory claim for civil theft. Expressly rejecting *Makoto*, the Court recognized that "to limit or abrogate a clear legislative pronouncement by reason of judicial policy concerns would offend the separation of powers."[47] Though reaffirming the "laudable goal" of the economic loss rule, the Court concluded it could not substitute

its policy judgments for those of the General Assembly.[48]

The Court could have rested on this analysis, but it went further, again pushing back against expansive appellate decisions. It noted that "since adopting the economic loss rule, we have applied it only to bar common law tort claims of negligence or negligent misrepresentation."[49] The Court cited *BRW* as an example of where it applied the economic loss rule to bar a negligence claim, but it did not address or apply *BRW*'s three factor analysis, seemingly signaling an abandonment of this framework.

In a lengthy footnote, the Court restated its prior warning in *Van Rees* that courts must be cautious of overreach and the corollary potential for contract law to swallow tort law.[50] The Court declined to define the proper balance, sidestepping the issue as "not the task before us today."[51] But it noted that "deference to private ordering must sometimes yield to the law's interest in compensation and redress for wrongful, injurious conduct."[52] The Court suggested that the economic loss rule is similar to exculpatory agreements, which must be applied with circumspection and "generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation."[53] This final statement is a radical departure from the Court's primary holding in *BRW*—that a duty a memorialized in the contracts cannot be independent—which spawned a decade of case law expanding the economic loss rule.

Instead of addressing the issue directly, the Court dropped a bomb in a footnote, with predictable consequences.

Appellate Uncertainty Ensues

Not long thereafter, a Court of Appeals division interpreted the dicta in the *Bermel* footnote to "substantially alter the application of the economic loss rule in Colorado."[54] In *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, a party to a joint venture that fell victim to the real estate collapse brought claims against the other party for breach of contract and seven tort claims, including fraudulent concealment, intentional interference with contractual obligations, and intentional inducement of breach of contract. The district court dismissed the tort claims, and in 2014 the Court of Appeals affirmed the dismissal on interlocutory appeal. Against this background, and following the Supreme Court's 2016 decision in *Van Rees*, the plaintiff sought reconsideration from the district court of the dismissal of the intentional tort claims. The district court denied the motion. During the pendency of the appeal of that order, the Supreme Court issued *Bermel*.

"This final statement is a radical departure from the Court's primary holding in *BRW*—that a duty a memorialized in the contracts cannot be independent—which spawned a decade of case law expanding the economic loss rule."

A different Court of Appeals division received the second *McWhinney* appeal and came to a different conclusion. Acknowledging that *Bermel* was limited to a statutory tort claim based on a separation of powers analysis, the second division still found the opinion "instructive on the economic loss rule's applicability to common law intentional tort claims."[55] In a stark departure from prior decisions, the Court then held that "each of these claims stems from a duty based in tort law independent of [the contract]."[56] The Court quoted *Bermel* directly: "While the conduct underlying each of these claims may also support a breach of contract claim in this case, we are not persuaded that the economic loss rule should 'shield intentional tortfeasors from liability for misconduct that happens *also* to breach a contractual obligation.'"[57] The principle precluding negligence and negligent misrepresentation claims against parties to a contract "works in the opposite direction when it comes to common law intentional torts."[58] The Court went so far as to conclude that, following *Bermel*, "in most instances the economic loss rule will not bar intentional tort claims."[59]

The Court acknowledged a trilogy of cases, including *Hamon Contractors*, that concluded the economic loss rule barred common law intentional tort claims. However, because "those divisions did not have the benefit of *Bermel* to guide their analysis," the Court declined to follow them.[60] And while recognizing that its decision was "largely contrary to another division's conclusions on interlocutory appeal from this case,"[61] the Court declined to follow the law of the case "[b]ecause of the significant developments in the law pertaining to the economic loss rule's applicability to intentional torts."[62] Again, the Court did not rely on or even address the *BRW* three-factor framework.

Given this case law development, in March 2021 the *Bermel* defendant filed a petition for writ of certiorari, presenting the following questions:

1. "Did the appellate court err when it departed from precedent and, applying dicta from *Bermel v. BlueRadios Inc.*, concluded Colorado's economic loss rule no longer bars intentional torts, even where the duties breached were covered by a contract negotiated and agreed to by sophisticated parties?"

> Given that the *Bermel* Court declined the invitation to define the 'proper balance' between tort and contract law, practitioners are left to speculate where the Supreme Court will draw the line between 'the law's interest in compensation and redress for wrongful, injurious conduct' and the desire to 'enforce expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining.'

2. "Did the appellate court err when it concluded *Bermel* fundamentally changed the law and overturned a July 10, 2014 opinion by another division upholding the dismissal of intentional tort claims the trial court determined the economic loss rule barred because there was no independent duty?"

Before the Supreme Court had a chance to rule on the petition, the parties settled, stipulating to dismissal of the appeal in May 2021.

Meanwhile, another Court of Appeals division analyzing *Bermel* went in a completely different direction. In *Dream Finders Homes LLC v. Weyerhaeuser NR Co.*,[63] the Court distinguished *Bermel* and limited its applicability. In that case, Weyerhaeuser supplied a homebuilder with wooden joists coated with a fire protectant that emitted excessive levels of formaldehyde, a known carcinogen. Weyerhaeuser issued a bulletin instructing homeowners to vacate their homes and agreed to replace the joists in accordance with two separate warranties—a general warranty and a stand-alone warranty for the joists. However, the replacement of the joists caused severe delays for the plaintiffs, who built and sold homes.

The plaintiffs brought claims against Weyerhaeuser for negligence, negligent misrepresentation, and fraudulent concealment, seeking consequential damages including delay costs and lost profits. They alleged that Weyerhaeuser knew the joists emitted excessive levels of formaldehyde but withheld this information and made false statements to the contrary. The jury entered a verdict for the plaintiffs for approximately $15 million on the negligence-based and fraudulent concealment claims. On appeal, Weyerhaeuser asserted that the economic loss rule barred the claim.

The Court of Appeals agreed. Charting a different course than the *McWhinney* division, the Court returned to the *BRW* framework, describing the three factors as "*Hamon Contractors* factors."[64] Applying this framework, the Court held that the economic loss rule barred not only the negligence-based claims, but also the intentional tort of fraudulent concealment. The Court acknowledged the *Bermel* and *McWhinney* decisions, recognizing that their dicta "suggests that the economic loss rule has only limited applicability to intentional tort claims."[65] However, the Court pushed back, noting that "no Colorado case has held that the economic loss rule can never apply to claims for fraud or other intentional torts."[66] The Court noted that "[t]his is one of those cases in which the economic loss rule bars fraud claims," particularly because the plaintiffs received the full benefit of their bargain through the warranty claims and sought to recover in tort the very damages expressly excluded under the contract's warranty provision.[67]

On January 13, 2022, plaintiffs filed a petition for writ of certiorari, describing the following "issues presented": (1) "Whether Colorado's economic loss rule bars recovery for intentional fraud"; (2) "Whether, under Colorado's economic loss rule, an injured party can be precluded from receiving full compensation based on a 'network of contracts' the party had no ability to negotiate"; and (3) "Whether the implied covenant of good faith and fair dealing can insulate an intentional tortfeasor from liability under the economic loss rule." The petition asserts that "[t]he division's conflict with *Alma*, *Bermel*, and *McWhinney* alone justifies certiorari." At the time of this writing, the Supreme Court had not yet ruled.

Open Questions

Given that the *Bermel* Court declined the invitation to define the "proper balance" between tort and contract law, practitioners are left to speculate where the Supreme Court will draw the line between "the law's interest in compensation and redress for wrongful,

injurious conduct"[68] and the desire to "enforce expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining."[69] Will the economic loss rule in Colorado permit intentional torts arising out of post-contractual performance even where a corresponding duty exists in the contract? Is the *BRW/Hamon Contractors* framework still controlling? Will the Supreme Court grant certiorari in *Weyerhaeuser* and finally draw the "clear lines" absent from the *Town of Alma* decision and its lineage?

While these answers remain pending, one assumption may be warranted: these decisions and the resulting uncertainty will almost certainly expand litigation. As Justice Gabriel noted in his dissent in *Bermel*, payors in breach of contract claims can now "virtually always assert a civil theft claim (the payee allegedly stole the payor's money), allowing it to seek treble damages and attorney fees not otherwise available under the parties' contract."[70] Additionally, litigants will undoubtedly attempt to sidestep contractual provisions limiting remedies and damages by including fraud-based claims. The benefit of the additional meritorious avenues for relief will likely be offset by great cost to litigants and judicial economy.

Conclusion

The scope of the economic loss rule in Colorado appears to perpetually exist in a state of ambiguity and uncertainty. The boundary between tort and contract law continues to beg for demarcation. Practitioners should keep an eye on *Weyerhauser* to see if clarification of the economic loss rule may be forthcoming. CL

Mike Cross is of counsel with Burnham Law in Boulder. He handles litigation in business, construction, personal injury, and products liability cases—mike@burnhamlaw.com.

Coordinating Editor: Mark Cohen, mark@cohenslaw.com

NOTES

1. *Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000).
2. *Id.* at 1264.
3. *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).
4. *Id.* at 151.
5. *Town of Alma*, 10 P.3d at 1260.
6. *Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301 (Colo.App. 1988).
7. *Id.* at 1303 (internal citations omitted).
8. Phillips, "Tort or Contract: A History of Ambiguity and Uncertainty," 21 *Colo. Law.* 241, 242 (Feb. 1992).
9. *Id.* at 241–44.
10. *Town of Alma*, 10 P.3d 1256 (Colo. 2000).
11. *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267 (Colo. 2000).
12. *Town of Alma*, 10 p.3d at 1263–64.
13. *Id.* at 1262.
14. *Id.*
15. *Id.* at 1263.
16. *Id.* at 1262, n.8.
17. *Id.* at 1262, n.9.
18. *Id.* at 1264.
19. *Id.* at 1263 (citing *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999) (attorney-client relationship creates independent duty of care)).
20. *Id.* at 1263 (citing *Greenberg v. Perkins*, 845 P.2d 530, 534 (Colo. 1993) (physician-patient relationship creates independent duty of care, as does physician's independent medical examination of non-patient)).
21. *Id.* at 1263 (citing *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141–42 (Colo. 1984) (quasi-fiduciary nature of insurer-insured relationship creates independent duty of care)).
22. *Grynberg*, 10 P.3d at 1270.
23. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004).
24. *Id.* at 72–73.
25. *Id.* at 74. For a review of the state of the economic loss rule in Colorado following *BRW*, *see* Lawler, "Independent Duties and Colorado's Economic Loss Rule—Part I," 35 *Colo. Law.* 17 (Jan. 2006), and "Independent Duties and Colorado's Economic Loss Rule—Part II," 35 *Colo. Law.* 33 (Mar. 2006).
26. *BRW*, 99 P.3d at 74.
27. *Parr v. Triple L & J Corp.*, 107 P.3d 1104 (Colo. App. 2004).
28. *Id.* at 1108 (emphasis in original).
29. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo.App. 2009).
30. *Id.* at 291.
31. *Id.* at 295.
32. *Makoto USA, Inc. v. Russell*, 250 P.3d 625 (Colo.App. 2009).
33. *Id.* at 627 (citing *Haynes Trane Serv. Agency, Inc. v. Am. Standard Inc.*, 573 F.3d 947, 962 (10th Cir. 2009)).
34. *Id.* at 627–28.
35. *Id.* at 629.
36. Neureiter and Payne, "Colorado's Current Formulation of the Economic Loss Rule Bars Claims for Post-Contractual Fraud," 41 *Colo. Law.* 33, 34 (Dec. 2012).
37. *Id.* at 40.
38. *Engeman Enters., LLC v. Tolin Mech. Sys. Co.*, 320 P.3d 364 (Colo.App. 2013).
39. *Id.* at 368–71.
40. *Id.* at 372.
41. *Id.*
42. *Id.*
43. *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603 (Colo. 2016).
44. *Id.* at 607.
45. *Id.* at 608.
46. *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019).
47. *Id.* at 1157.
48. *Id.* at 1157–58.
49. *Id.* at 1155.
50. *Id.* at 1154, n.6.
51. *Id.*
52. *Id.*
53. *Id.*
54. *McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Ctrs.-Centerra LLC*, 486 P.3d 439, 453 (Colo.App. 2021).
55. *Id.* at 454.
56. *Id.* at 455.
57. *Id.* (quoting *Bermel*, 440 P.3d at 1154 n.6) (emphasis in *McWhinney*).
58. *Id.* at 454.
59. *Id.* at 453.
60. *Id.* at 455.
61. *Id.*
62. *Id.*
63. *Dream Finders Homes LLC v. Weyerhaeuser NR Co.*, 2021 COA 143, 2021 WL 5707117 (Dec. 2, 2021).
64. *Id.* at ¶ 39 (citing *Hamon Contractors*, 229 P.3d 282).
65. *Id.* at ¶ 63.
66. *Id.*
67. *Id.* at ¶ 64.
68. *Bermel*, 440 P.3d at 1154, n.6.
69. *Id.* at 1162.
70. *Id.* at 1163 (Gabriel, J., dissenting).