COLORADO COURT OF APPEALS **2013 COA 61**

Court of Appeals No. 12CA0457
Summit County District Court No. 09CV533
Honorable Mark D. Thompson, Judge
Honorable Edward J. Casias, Judge
Honorable W. Terry Ruckriegle, judge

Jason L. Rodgers and James R. Hazel,

Plaintiffs-Appellants,

v.

Board of County Commissioners of Summit County,

Defendants-Appellees.

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

Division IV
Opinion by JUDGE WEBB
Lichtenstein, J., concurs
Fox, J., concurs in part and dissents in part

Announced April 25, 2013

Holley, Albertson & Polk, P.C., Dennis B. Polk, Heather S. Hodgson, Golden, Colorado, for Plaintiffs-Appellants

Berg Hill Greenleaf & Ruscitti LLP, Josh A. Marks, Melanie B. Lewis, Boulder, Colorado, for Defendants-Appellees

¶ 1 This case arises from disputes over Summit County's building regulations. Plaintiffs, Jason L. Rodgers and James R. Hazel, a same-sex couple, primarily contend the County treated them differently from heterosexual couples when interpreting and enforcing these regulations.

¶ 2 On appeal, plaintiffs argue that the trial court erred by dismissing two of their claims; entering a directed verdict in favor of the County on their inverse condemnation claim and on three of the four challenged actions within their single 42 U.S.C. § 1983 equal protection claim; and improperly instructing the jury to consider only one challenged action within that claim.

¶ 3 Whether C.R.C.P. 50 allows a trial court to direct a verdict in part, as to some but not all actions or omissions within a single claim against a single defendant, is unresolved in Colorado. Because we conclude that the trial court erred in doing so, we reverse in part and remand plaintiffs' section 1983 claim for retrial. We affirm the orders of dismissal and the directed verdict on the inverse condemnation claim.

I. Background

¶ 4 Plaintiffs built a home in Summit County that included a septic system. Before issuing a certificate of occupancy, County employees inspected this system. They concluded that it did not comply with either the County's regulations or the approved building plan obtained by the previous owner. According to the County, the septic tank was too small and required a subsurface drain that had not been installed. In addition, they found that plaintiffs' subcontractor had damaged wetlands on the property during the septic system installation.

¶ 5 Because winter was approaching, plaintiffs would be unable to fix these problems until spring. The County offered them a temporary certificate of occupancy. It required them to fix the septic system, mitigate the wetlands damages, and post a bond for the estimated costs. When plaintiffs did not post the bond, the County refused to issue a certificate of occupancy. Ultimately, they lost the home in foreclosure.

¶ 6 The trial court dismissed three of the five claims under C.R.C.P. 8 and 12(b)(5). The parties agreed to bifurcate the inverse

condemnation from the section 1983 claims. During a bench trial on the inverse condemnation claim, the court entered a directed verdict in the County's favor. After plaintiffs had rested in the jury trial on the section 1983 claim, the court directed a verdict in favor of the County on three out of the four actions on the basis of which plaintiffs asked the jury be instructed that, "taken as a whole, collectively establish[] that the County treated them in a discriminatory manner." The jury returned a verdict for the County on what remained of the section 1983 claim.

II. Dismissal

¶ 7 Plaintiffs contend the trial court erred in dismissing their first and third claims for relief. We affirm dismissal of the first claim because plaintiffs failed to plead exhaustion of their administrative remedies under the Colorado Civil Rights Act (CRCA), § 24-34-306, C.R.S. 2012. We affirm dismissal of the third claim because they cannot bring a direct action for damages under the Colorado or U.S. Constitutions when other adequate remedies exist.

A. Standard of Review

¶ 8 Review of dismissal of a claim is de novo, accepting all factual allegations in the complaint as true. *Monez v. Reinertson,* 140 P.3d 242, 244 (Colo. App. 2006).

B. First Claim – Discrimination in Connection with Certificate of Occupancy

¶ 9 Plaintiffs' first claim asserts that County officials discriminated against them by requiring certain actions not required of heterosexual couples before the County would issue a certificate of occupancy. The second amended complaint does not identify the statute underlying this claim. However, because plaintiffs' appellate briefs state that the claim lies under the CCRA, *see, e.g.,* § 24-34-502, C.R.S. 2012, the dismissal will be analyzed based on that statute.

¶ 10 Under the CCRA, any person alleging discrimination must file a complaint with the Colorado Civil Rights Commission (CCRC). § 24-34-306(1)(a). "No person may file a civil action in a district court based on an alleged discriminatory or unfair practice . . . without first exhausting the proceedings and remedies available . . . under [this section]." § 24-34-306(14). The proceedings and

remedies include an investigation by the director of the commission, section 24-34-306(2)(a); mediation, section 24-34-306(2)(b)(II); and a hearing before the commission, a commissioner, or an administrative law judge, section 24-34-306(4).

¶ 11 Plaintiffs point out that they pled compliance with all notice requirements of the Colorado Government Immunity Act (CGIA), section 24-10-102, C.R.S. 2012, and "any further attempts to obtain administrative relief would be futile." But the second amended complaint does not allege that they sought any administrative relief from the CCRC before proceeding with a civil action under the CCRA. And at oral argument, their counsel conceded that the CCRC administrative process had never been invoked.

¶ 12 Accordingly, the trial court did not err in dismissing the first claim for failure to plead exhaustion of administrative remedies.

C. Third Claim – State and Federal Constitutional Violations

¶ 13 Plaintiffs' third claim asserts that the County deprived them of their constitutional rights of due process, equal protection, and freedom of association under the U.S. and Colorado Constitutions.

The trial court dismissed this claim because their allegations do not entitle them to recover damages through such a direct claim.

¶ 14 Section 1983 provides a remedy for any person who has been deprived of a constitutional right by state action. Before pursuing a direct claim under the U.S. Constitution, a plaintiff must utilize section 1983. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001); *see also Webb v. Johnson*, 2007 WL 2936647, *3 (D. Colo. 2007) (unpublished order). And here, the fifth claim alleges violations of section 1983, based on the same conduct alleged in the third claim. Hence, the direct claim under the U.S. Constitution fails. *See White v. Talboys*, 573 F. Supp. 49, 50 (D. Colo. 1983) ("It is well established that once a claim for relief has been asserted under 42 U.S.C. § 1983, all other direct claims for relief based upon various amendments to the U.S. Constitution are unnecessary.").[1]

¶ 15 Like the U.S. Constitution, a direct claim for damages will lie under the Colorado Constitution only where no other adequate

[1] The County does not dispute that section 1983 encompasses an equal protection claim based on sexual orientation. *See Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) (*cert. granted* Dec. 7, 2012).

remedy exists. *See Board of County Comm'rs v. Sundheim*, 926 P.2d 545, 549, 553 (Colo. 1996). Colorado statutes do not include a counterpart to section 1983 with which to enforce the Colorado Constitution. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 81 F. Supp. 2d 1090, 1098 (D. Colo. 2000). But here, plaintiffs could have sought relief for the discrimination alleged under C.R.C.P. 106(a)(4) (abuse of agency discretion) and section 24-10-118(2)(a), C.R.S. 2012 (tortious behavior not protected by the CGIA). Therefore, the trial court did not err in dismissing the third claim.

III. Directed Verdict

¶ 16 Plaintiffs next contend the trial court erred in directing a verdict for the County on their inverse condemnation claim and on three of the four actions that form the basis for the section 1983 claim. We affirm the directed verdict on the inverse condemnation claim but reverse the partial directed verdict on the section 1983 claim.

A. Directed Verdict Rule and Standard of Review

¶ 17 A directed verdict is reviewed de novo. *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 186 P.3d 80, 82 (Colo. App. 2008).

It should be entered only when no reasonable juror would conclude that the evidence presented or resulting inferences could support a verdict against the moving party. *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Recreation Dist.*, 271 P.3d 587, 590 (Colo. App. 2011). The evidence must be considered in the light most favorable to the nonmoving party. *Id.*

B. Inverse Condemnation

¶ 18 The government cannot take private property for public or private use without just compensation. Colo. Const. art. II, § 15.[2] Inverse condemnation is a claim for relief against a regulatory taking. *See Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs*, 38 P.3d 59, 63 (Colo. 2001). Such a taking occurs when a government deprives a private property owner of the use of land through application of its laws or regulations. *Id.* ("extensive regulatory interference warrants compensation"). An owner can prove inverse condemnation by showing either a per se taking or a

[2] While this provision of the Colorado Constitution is very similar to the takings clause of the Fifth Amendment to the U.S. Constitution, the Colorado takings clause is broader because it includes damages to land. *See Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs*, 38 P.3d 59, 63 (Colo. 2001). We analyze this issue under the Colorado Constitution.

taking under a fact-specific inquiry. *Id.* at 65 (adopting the test from *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001)).

¶ 19 A per se taking occurs when a regulation affecting private property "does not substantially advance legitimate state interests," or when a regulation "denies an owner economically viable use of his land." *Id.* at 64 (quoting *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992)). However, because reasonable zoning and land use limitations are a proper exercise of police power, such restrictions will constitute a taking only if they do not "substantially advance legitimate state interests or if [they] prevent[] economically viable use of the property." *Van Sickle v. Boyes,* 797 P.2d 1267, 1271-72 (Colo. 1990) (holding that application of a safety code to plaintiff's building was not a taking); *National Adver. Co. v. Board of Adjustment (Zoning) of City & County of Denver*, 800 P.2d 1349, 1351 (Colo. App. 1990) (holding that a reasonable regulation requiring a modification of plaintiff's property was not a taking when it did not foreclose all reasonable use of the property); *see also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138 (1978).

¶ 20 Absent a per se taking, a property owner may still prove a regulatory taking under a fact-specific inquiry. Such a taking occurs if the property "retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner." *Animas Valley Sand & Gravel,* 38 P.3d at 66. A court may consider the economic effect of the regulations and their impact on investment-backed expectations. *See id.* at 66-67 (remanding for a new trial to determine economic impact of county land use plan on plaintiff's mining operation separate from the impacts of state and federal regulations and to determine whether plan affected plaintiff's reasonable investment-backed expectations for expanding mining operations on its property).

¶ 21 Here, plaintiffs asserted that the County interpreted various building code provisions in a manner that effected a regulatory taking. Specifically, they argued that a taking occurred because the County was not justified in: (1) finding that their septic system failed to comply with the regulations, (2) requiring them to post a

bond covering the cost of modifying the system, and (3) requiring them to post a bond to cover the cost of wetlands remediation.

¶ 22 The trial court found that no regulatory taking had occurred because the County's regulations served a legitimate purpose, the regulations were reasonably applied to plaintiffs, and that application did not deny them an economically viable use of their property. The County's septic system regulations were reasonable and contributed to the legitimate public purpose of protecting groundwater and adjoining properties from contamination. Moreover, these regulations were clear and had been incorporated into plaintiffs' approved septic system plan, as obtained by the prior owner of their property.

¶ 23 The court further found that the septic system installed by plaintiffs did not conform to the regulations or the approved building plan. Specifically, the septic tank was too small and they never installed the required subsurface drain. When the County asked them to post a bond for the cost of septic system modifications as a condition of authorizing a temporary certificate of

occupancy, it was merely attempting to hold them to the requirements of the building code.

¶ 24 Likewise, the court found a legitimate policy reason for the County's insistence on a bond to cover federally protected wetlands mitigation because wetlands operate to filter water. Plaintiffs argued that the County did not have jurisdiction over the wetlands; rather, the U.S. Army Corps of Engineers (USACE) should have insisted on wetlands mitigation, if any was required. They asserted that the USACE would not have required such a bond. But because they offered no proof of the USACE's position, the court found that the bond requirement for wetlands mitigation was reasonable.

¶ 25 Finally, the court found that the bond requirement did not deprive plaintiffs of an economically viable use of their property. The property was valued at over $800,000, and the total bond requirement for the septic system and wetlands mitigation was only $16,000.

¶ 26 The record does not show that the County's actions resulted in a regulatory taking. No per se taking occurred because the County's regulations served a legitimate purpose and the

regulations did not deprive plaintiffs of all economically viable use of their property. *See Animas Valley Sand and Gravel*, 38 P.3d at 64.

¶ 27 The record also does not show a taking under a fact-specific inquiry because the economic impact of the regulations was minor compared to the value of the property. Further, plaintiffs failed to prove an adverse impact on their investment-backed expectations because before acquiring the property they had an approved septic system plan that conformed to County regulations, but did not follow it. *See id.* at 66-67.

¶ 28 Accordingly, the trial court did not err in entering a directed verdict in favor of the County on the inverse condemnation claim.

C. Section 1983 Claim

¶ 29 The second amended complaint alleged that the County "engaged in a series of pretextual limitations and requirements as purported conditions to the issuance of the certificate of occupancy" and "imposed artificial, improper and contrived reasons for denying . . . the issuance of the certificate of occupancy," which constituted discrimination based on sexual orientation in violation of section

1983. In the trial management order, plaintiffs stated that the County's requirements were unreasonable and differed from requirements imposed on similarly situated heterosexual homeowners in the following four ways: [3]

- Plaintiffs were required to post a cash bond for the septic system and wetlands mitigation work as a condition of obtaining even a temporary certificate of occupancy ("TCO"). . . .

- The County required Plaintiffs to submit a wetlands mitigation plan for an extremely minor wetlands disturbance as a condition of obtaining a TCO. . . .

- When Plaintiffs submitted a bid from their contractor as to the cost of the work to be completed for purposes of the bond amount, [Summit County's environmental health manager] disregarded the bid and undertook to obtain his own bids on which to base the bond amount. The bond initially required from Plaintiffs was more than double the amount of the bond from their contractor. The County was unable to identify a single other instance in which the County took it upon itself to solicit bids when one had been provided by the homeowner's own contractor. . . .

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[3] The trial court found that plaintiffs did not present sufficient evidence to bring a facial or as applied challenge to the County's policy of not providing building permits to multiple individuals unless they were married because they had received a permit after they advised the County that they were in a committed relationship. Plaintiffs do not appeal that decision.

- In every instance the County had discretion, the County exercised that discretion in a manner to hinder or delay Plaintiffs from obtaining their CO. . . .

¶ 30 In ruling on the County's directed verdict motion, the trial court held that the discriminatory actions plaintiffs alleged were discrete and analyzed each of them separately. Then the court entered a directed verdict in the County's favor on three of these four challenged actions, allowing only the bond requirement for the septic system to go to the jury. It explained that plaintiffs had not presented sufficient evidence of similar comparators, even when taken in the light most favorable to them, that could have established an equal protection claim.

¶ 31 C.R.C.P. 50 provides:

> A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

¶ 32 Plaintiffs argue that the court erred in analyzing the County's conduct as discrete actions, rather than as a pattern of discriminatory conduct. Neither party has cited any authority, nor have we found any in Colorado, authorizing a trial court to grant a partial directed verdict by parsing the evidence as the court did here.

¶ 33 The reference to "partial directed verdict" in *Gordon v. Boyles*, 9 P.3d 1106, 1113 n.7 (Colo. 2000), is dicta. Further, the defamation claim that was dismissed on directed verdict could not succeed "against Boyles on the element of Boyles's actual knowledge or reckless disregard for the truth of his statements about Gordon. *See* CJI-Civ. 4th 22:2 (1998)." *Id.* Thus, the trial court had no reason to address any other elements of a defamation claim in directing a verdict on that claim.[4]

¶ 34 Here, in contrast, the trial court allowed the jury to decide the section 1983 claim, but foreclosed the jury from considering three

[4] *Evans v. Webster*, 832 P.2d 951, 956 (Colo. App. 1991), also cited in the dissent, involved a single negligence claim against a single defendant, in which the court held that the plaintiff's "tort suit against the defendant was barred by the Workers' Compensation Act." Because the bar constituted a complete defense, *Evans* does not support granting a partial directed verdict.

disputed actions within that claim. Unlike in *Gordon*, none of the three actions was an essential element of the section 1983 claim.[5]

¶ 35 The County relies on *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008), and *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998). These cases are inapposite because they involve appellate review of section 1983 claims in different contexts than the case at bar.

- In *Price-Cornelison*, the district court had dismissed the case because the defendant was entitled to sovereign immunity. The court of appeals examined each of the defendant's actions to decide whether the requirements for immunity

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[5] Because a partial directed verdict on a category of damages or an affirmative defense does not parse the evidence within a single claim, we express no opinion on the propriety of such rulings. *See, e.g.*, *State Dep't of Transp. & Development v. Restructure Partners, L.L.C.*, 985 So. 2d 212, 224 (La. Ct. App. 2008) ("cost-to-cure" damages); *Brackett v. Cartwright*, 499 S.E.2d 905, 907 (Ga. Ct. App. 1998) (statute of limitations affirmative defense). *Hamilton v. Henderson*, 579 S.E.2d 58, 59 (Ga. Ct. App. 2003), cited by the dissent, is similar to cases directing a verdict on an affirmative defense, because the appellate court affirmed a directed verdict on comparative negligence, while allowing the jury to consider the negligence claim.

were met. It concluded that as to one act, immunity was appropriate, but as to another act, it was not.

- In *Barney*, the court of appeals upheld summary judgment against the plaintiffs on their section 1983 equal protection claim. The court looked separately at assertions that the female plaintiffs had been afforded less access to programs than male prisoners and given harsher sentences than male prisoners who engaged in similar misconduct.

¶ 36 Thus, to uphold the rulings below, the appellate courts had to examine *each* ground that could have required a different outcome. The defendant in *Price-Cornelison* would not have been entitled to dismissal based on immunity unless both of its challenged actions satisfied the requirements for immunity. Likewise, the summary judgment in *Barney* could not be upheld unless the plaintiffs had failed to raise a disputed issue of material fact as to discrimination in either programs or sentencing.

¶ 37 In contrast, at the directed verdict stage, the trial court's role is not separately weighing different aspects of the evidence offered to support a single claim against a single defendant. *See Criss v.*

Angelus Hosp. Ass'n of Los Angeles, 13 Cal. App. 2d 412, 415, 56 P.2d 1274, 1275 (1936) ("If the several acts of negligence had been separately pleaded in separate causes of action, a motion for nonsuit or a directed verdict on the first cause of action for the first alleged negligence act . . . [would have been] granted."). Rather, the court's function is deciding whether, as to that claim, the totality of the evidence would permit a reasonable jury to return a verdict against that defendant. *See Denver and Rio Grande Western R.R. Co. v. Forster*, 773 P.2d 612, 614 (Colo. App. 1989) ("Likewise, the totality of the evidence concerning negligence by the Forsters could not sustain the granting of the Railroad's motion for directed verdict.").

¶ 38 The language of C.R.C.P. 50 does not empower a trial court to parse evidence presented in support of a single claim against a single defendant by granting a partial directed verdict on that claim and then instructing the jury to consider only a portion of the evidence presented in support of that claim. Such actions are contrary to the claim-by-claim approach to litigation created by the Rules of Civil Procedure.

¶ 39 This approach derives from the "General Rules of Pleading" described in C.R.C.P. 8(a), "Claims for Relief. A pleading which sets forth a claim for a relief . . . ." *See also* C.R.C.P. 54(b) ("the court may direct the entry of a final judgment as to one or more but fewer than all of the claims"). Rules dealing with dismissal also reflect this approach. *See, e.g.*, C.R.C.P. 12(b) ("failure of the pleading to state a claim upon which relief can be granted"); C.R.C.P. 41(b)(1) ("a defendant may move for dismissal of an action or of any claim against him").

¶ 40 In contrast, when a procedure permits a single claim to be parsed, the rules so provide. *See* C.R.C.P. 56(a) (permitting party "seeking to recover upon a claim" to seek summary judgment "upon all or any part thereof"); C.R.C.P. 59(c)(1) (empowering trial court, on its own initiative, to "Order a new trial of all or part of the issues."); *cf.* C.R.C.P. 56(h) (trial court may enter an order deciding a question of law "at any time after the last required pleading"). But C.R.C.P. 50 does not provide for a partial directed verdict within a single claim.

¶ 41 The trial court's ruling is also problematic because plaintiffs' single discrimination claim encompassed a series of closely related actions arising from building regulations adopted, interpreted, and enforced by the County. These actions involved the same owners, the same building, the same primary actor for the County, and overlapping facts. However, the trial court's ruling and instructions foreclosed the jury from considering that the County's dealings with plaintiffs, in their totality, showed a discriminatory motive. *See Beasley v. Potter*, 493 F. Supp. 1059, 1069 (W.D. Mich. 1980) ("The courts have frequently noted the difficult and sensitive task of ascertaining the intent behind official actions. By its very nature a racially discriminatory purpose for challenged acts is unlikely to be expressed on the record. Discriminatory intent, if it exists, necessarily must be inferred by the court from the totality of the evidence, whether direct, indirect, or circumstantial." (citation omitted)); *see also Inmates of Nebraska Penal & Correctional Complex v. Greenholtz*, 567 F.2d 1368, 1375 (8th Cir. 1977) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the

challenged conduct bears more heavily upon one race than another.").

¶ 42 The dispute over the bonds required by the County to repair the septic system and to remediate damage to the wetlands is illustrative. The County asserted that these issues were connected because the wetlands would filter water from the septic system. Plaintiffs argued, and the evidence would have permitted the jury to conclude, that as to the bond for wetlands remediation:

- Plaintiffs submitted a bid from their contractor;
- The County unilaterally solicited other bids;
- The County set a higher bond based on one of these bids; and
- The County could not identify another bonding dispute in which it had sought bids after the owner had submitted a bid.

¶ 43 Hence, from the County's unprecedented action, the jury could have inferred discriminatory intent by the County official who also made other decisions concerning plaintiffs. That inference would not be precluded because plaintiffs failed to identify another homeowner who had been required to post a bond concerning damaged wetlands. But the court prevented the jury from

considering how this action might be informative of the official's intent in his other decisions affecting plaintiffs. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226-27 (2d Cir. 1987) ("intent to discriminate may be inferred from evidence of such facts" including "departures from the normal procedural or substantive standards, contemporary statements by members of the decision-making body, and the totality of the circumstances"); *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 (6th Cir. 1996) ("To establish a genuine issue of material fact that the defendants intentionally discriminated against plaintiff's son . . . proof of discriminatory intent is critical.").

¶ 44 This interpretation of C.R.C.P. 50 does not preclude trial courts from assisting the jury in examining multiple actions within a single claim. *See, e.g., Belt v. St. Louis-San Francisco Ry. Co.*, 195 F.2d 241, 242 (10th Cir. 1952) ("Overruling a motion of the defendant for a directed verdict, the trial court submitted the case to the jury, painstakingly instructing it that two separate and distinct acts of negligence were in issue."). For example, on remand the court could instruct the jury that to find for plaintiffs on any

one of the discriminatory acts alleged, as to that act plaintiffs must have identified a similarly situated heterosexual homeowner, whom the County treated differently than it treated plaintiffs, and that a factor in the County's decision to treat plaintiffs less favorably was their sexual orientation.

¶ 45 Accordingly, the partial directed verdict on the single section 1983 claim was error, and this claim must be retried on remand.

IV. Jury Instructions

¶ 46 Finally, plaintiffs contend the trial court erred in two of its instructions to the jury which, as indicated, limited the scope of the section 1983 claim. Although the court's instructions are a factor in our decision to remand for retrial of the section 1983 claim, we need not further address this contention. The instructions given to the jury following presentation of evidence at retrial must be based on that evidence and in the event of an appeal can be reviewed accordingly.

V. Conclusion

¶ 47 We conclude that the trial court did not err in dismissing two of plaintiffs' claims under C.R.C.P. 8 and 12(b)(5), or in directing a

verdict for the County on the inverse condemnation claim. However, we further conclude that the court misapplied C.R.C.P. 50 in granting a partial directed verdict on three challenged actions within the equal protection claim. Therefore, the case is remanded for retrial of plaintiffs' section 1983 claim.

JUDGE LICHTENSTEIN concurs.

JUDGE FOX concurs in part and dissents in part.

JUDGE FOX concurring in part and dissenting in part.

¶ 48 I endorse the majority's conclusion that the trial court did not err in dismissing two of plaintiffs' claims under C.R.C.P. 8 and 12(b)(5), or in directing a verdict for the County on the inverse condemnation claim. However, because I conclude that the trial court also did not err in entering a directed verdict on three of the four challenged acts in plaintiffs' section 1983 equal protection claim or in its instructions to the jury, I respectfully dissent.

I. Directed Verdict on Section 1983 Claim

¶ 49 The majority finds that there is no authority, under C.R.C.P 50 or anywhere else, authorizing a trial court to grant a partial directed verdict as to part of a claim. It thus concludes that the trial court erred in entering a directed verdict in favor of Summit County on three of the four allegedly discriminatory actions and remands plaintiffs' entire section 1983 claim for a jury to determine whether Summit County's actions constituted a pattern of discriminatory conduct against plaintiffs.

¶ 50 Because I conclude that (1) plaintiffs did not present evidence of similarly situated comparators for three of the four allegedly

discriminatory actions and (2) neither C.R.C.P. 50 nor any Colorado case law prevents a trial court from granting a partial directed verdict as to discrete actions in a section 1983 claim, I would affirm the trial court's grant of a directed verdict as to three of the four acts of discrimination alleged in the section 1983 claim.

A. Equal Protection

¶ 51 In the proceedings before the jury, plaintiffs Rodgers and Hazel claimed, under 42 U.S.C. § 1983, that Summit County violated the Fourteenth Amendment to the U.S. Constitution by discriminating against them because of their sexual orientation and depriving them of equal protection under the laws. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996).

¶ 52 Equal protection "guarantees that all parties who are similarly situated receive like treatment by the law." *Board of County Comm'rs v. Flickinger*, 687 P.2d 975, 982 (Colo. 1984) (quoting *J.T. v. O'Rourke*, 651 P.2d 407, 413 (Colo. 1982)). To prove an equal protection claim, a plaintiff must first show that a government actor

treated similarly situated individuals differently from the plaintiff.[6] *Id.*; *see also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998). When no issues of material fact exist, a trial court can determine, as a matter of law, that there are no similarly situated comparators. *See, e.g.*, *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 568 (2d Cir. 2000) (finding as a matter of law that plaintiff who engaged in a physical fight was not similarly situated to co-workers whose offensive behavior involved words only); *Barney*, 143 F.3d at 1312-13 (holding that female inmates did not present sufficient evidence of the treatment of male prisoners that were similarly situated); *A.B. v. Adams-Arapahoe 28J Sch. Dist.*, 831 F. Supp. 2d 1226, 1254 (D. Colo. 2011) (granting summary judgment against plaintiff on her equal protection claims where she failed to show she was treated differently than someone similarly situated); *Oldfield v. Village of Dansville*, 769 F. Supp. 2d 165, 172 (W.D.N.Y. 2011)

[6] The court instructed the jury: "[When] comparing the Board's relative treatment of Plaintiffs to other 'similarly situated' applicants for a certificate of occupancy, the phrase 'similarly situated' does not mean that Plaintiffs and the other applicants must be in identical circumstances. Rather, the circumstances need only be similar in material, or important, ways."

(holding that plaintiffs failed to show the existence of any similarly situated property owners); *Dickens v. Interstate Brands Corp.*, 06-2868-STA, 2008 WL 2570864 (W.D. Tenn. June 25, 2008) (unpublished order granting summary judgment) (holding that male employee was not similarly situated to female employee because they held different positions and reported to different supervisors), *aff'd*, 384 F. App'x 465 (6th Cir. 2010); *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 322 (Minn. Ct. App. 1996) (holding that as a matter of law, police and fire associations are not similarly situated).

B. Directed Verdict Rule and Standard of Review

¶ 53 Rule 50, on directed verdicts, provides:

> A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

C.R.C.P. 50. The rule, by its own terms, does not specify whether a verdict may be directed only against a claim, a party, or an issue. As discussed below in section I.C, absent such limitation, I agree with those courts that allow a directed verdict when, as a matter of law, a party cannot prevail on a claim or on part of a claim. *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1111 (10th Cir. 2008); *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1106 (6th Cir. 1995); *Hamilton v. Henderson*, 579 S.E.2d 58, 59 (Ga. Ct. App. 2003); *Hammond v. Salvation Army*, 260122, 2006 WL 2271309 (Mich. Ct. App. Aug. 8, 2006) (unpublished per curiam opinion); *In re Commitment of Scott*, 09-11-00555-CV, 2012 WL 5289333 (Tex. App. Oct. 25, 2012) (unpublished memorandum opinion); *see also Gordon v. Boyles,* 9 P.3d 1106, 1113 n.7 (Colo. 2000) (reciting without deciding that the trial court entered a partial directed verdict on the "actual knowledge" element of a defamation claim). A complete lack of evidence on an essential element, like a comparator, allows a court to make such a legal determination. *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 518 (Colo. 1986) ("The trial court should take an issue from the jury

only in the absence of evidence upon which a jury could justifiably determine the issue for the party opposing the directed verdict.").

¶ 54 We review a trial court's ruling on a motion for directed verdict de novo. *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 186 P.3d 80, 82 (Colo. App. 2008). A motion for directed verdict should be granted only when any reasonable juror would conclude that no evidence or inference was presented at trial upon which a verdict against the moving party could be sustained. *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Recreation Dist.*, 271 P.3d 587, 590 (Colo. App. 2011). We review the evidence in the light most favorable to plaintiffs, the nonmoving parties. *Id.*

C. Similarly Situated Comparators

¶ 55 Plaintiffs' October 18, 2011 trial management order (TMO) refined their claims, as the majority notes, to allege that the county's requirements were unreasonable and different from requirements imposed upon other county homeowners in similar circumstances. The trial court later entered a directed verdict in favor of Summit County on three of the four challenged acts because plaintiffs did not present evidence that, even when taken in

the light most favorable to them, could have established an equal protection claim.

¶ 56 The majority does not address the issue of similarly situated comparators, and instead concludes that the jury must determine whether Summit County's actions, taken as a whole, constitute a pattern of discriminatory conduct.

¶ 57 The question of similarly situated comparators is a threshold question in any section 1983 claim, *Flickinger*, 687 P.2d at 982; *see also Cleburne Living Ctr.,* 473 U.S. 439; *Barney*, 143 F.3d at 1312, and plaintiffs did not present evidence of similarly situated comparators for three of the four acts of discrimination in their section 1983 claim.

¶ 58 Summit County refused to grant a certificate of occupancy to plaintiffs because their septic tank was too small, they had not installed the required subsurface drain, and they had damaged wetlands on the property. According to plaintiffs, other property owners were granted certificates of occupancy despite having non-functioning septic systems. However, Summit County's manager of environmental health – who handled septic system issues – testified

that no one was granted a certificate of occupancy with an undersized septic tank. Rather, one property owner with an undersized tank installed a new tank before the county issued a certificate. Another owner had a functioning septic system, and he only needed to complete the final grading and seeding of his property for erosion control. There, Summit County issued a certificate of occupancy and the county planned to verify that the grading and seeding were completed the following spring.

¶ 59 The record supports the trial court's conclusion that plaintiffs did not present evidence of similarly situated property owners. Plaintiffs failed to show anyone who installed an undersized septic system and was still granted a certificate of occupancy.

¶ 60 The trial court also found that plaintiffs failed to present evidence of anyone who disturbed wetlands on their property and was treated differently, by not being required to mitigate or not being required to post a bond for the mitigation work. While several Summit County employees testified that it was not typical for Summit County to get involved with wetlands mitigation or to require bonds for wetlands mitigation before issuing a certificate of

occupancy, plaintiffs failed to identify any property owner who damaged wetlands and was treated differently by Summit County. The erosion control measures required of the property owner who plaintiffs claimed was similarly situated were not like plaintiffs' wetlands issues.

¶ 61 Because the question of similarly situated comparators is a threshold question in any section 1983 claim, *Flickinger*, 687 P.2d at 982; *see Cleburne Living Ctr.*, 473 U.S. 439; *Barney*, 143 F.3d at 1312, I conclude that the trial court properly determined that, as a matter of law, there was no evidence of similarly situated comparators for portions of plaintiffs' section 1983 claim related to the septic system requirements, the wetlands mitigation requirements, and the wetlands mitigation bond. Accordingly, the trial court was under no duty to allow the jury to decide those portions of the section 1983 claim. *See Gordon,* 9 P.3d at 1113 n.7; *Evans v. Webster*, 832 P.2d 951, 954 (Colo. App. 1991).

D. C.R.C.P 50

¶ 62 Plaintiffs contend, without supporting authority, that the trial court erred in analyzing Summit County's conduct as separate

actions, rather than as a pattern of discriminatory conduct. The majority accepts this argument.

¶ 63 I cannot accept that premise because, as in the summary judgment context, where the matter is one of law, courts can and should make the operative decision. *See Anderson v. Liberty Lobby., Inc.*, 477 U.S. 242, 250 (1986) (the standard for summary judgment mirrors the standard for a directed verdict); *Evans*, 832 P.2d at 954 (recognizing that if there is no conflicting evidence with respect to a particular issue raised by the motion for a directed verdict and the only concern is the legal significance of undisputed facts, then an appellate court may make an independent determination of the issue); *see also Thyssenkrupp Safway, Inc.*, 271 P.3d at 590 (directed verdict should only be granted when there is no evidence a reasonable juror could use to find against the moving party).

¶ 64 Plaintiffs' second amended complaint did not identify specific conduct giving rise to the section 1983 claim, but in the TMO they rely on separate instances of discrimination to support the section 1983 claim. Neither the language of C.R.C.P. 50 nor the limited

authority on the subject precludes what the trial court did here — refuse to give a jury instruction on a theory for which no evidence was presented and grant a partial directed verdict as to some of the instances of discriminatory conduct alleged to support plaintiffs' section 1983 claim. *Price-Cornelison*, 524 F.3d at 1111 (separately analyzing two instances of police refusing to enforce a protective order when the complaining individual was in a lesbian relationship with the woman who allegedly violated the protective order); *LRL Properties*, 55 F.3d at 1106 (declining to apply the longer statute of limitations under a "continuing violation" theory where the facts pled constituted a series of discrete and separate acts that were separate incidents of discrimination); *Hamilton*, 579 S.E.2d at 59 (affirming trial court's grant of plaintiff's motion for directed verdict on the issue of comparative negligence, finding no evidence of plaintiff's negligence); *Hammond*, 2006 WL 2271309, at *2 ("We agree with plaintiffs that there was no question of material fact that defendant negligently installed the posts and chain within the public right-of-way, rather than on its own property. Therefore, the trial court erred in denying plaintiffs' motion for a partial directed

verdict on that limited issue."); *In re Commitment of Scott*, 2012 WL 5289333, at *2 ("Although [the directed verdict rule] does not expressly contemplate a partial directed verdict, the trial court may grant a partial directed verdict to remove a certain portion of a case from the factfinder."). I see no justification for limiting C.R.C.P. 50 as plaintiffs request and as the majority accepts.

¶ 65 In my view, a party should not be allowed to manipulate a trial court's duties simply by pleading multiple acts of misconduct within a single claim rather than pleading those acts of misconduct as separate claims.

II. Jury Instructions

¶ 66 Because the majority remanded plaintiffs' section 1983 claim for trial, the majority did not reach plaintiffs' claim that the trial court erred in submitting two instructions to the jury pertinent to their section 1983 claim. Because I conclude that plaintiffs failed to present evidence supporting their proposed jury instructions, I would reach the jury instructions issue and hold that the trial court did not err in its instructions to the jury.

A. Standard of Review

¶ 67 We review a trial court's decision to give a particular jury instruction for an abuse of discretion. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). "A trial court's ruling on jury instructions is an abuse of discretion only when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.*

B. Instruction 3

¶ 68 Plaintiffs argue that Instruction 3 was improper because it instructed the jury to consider only Summit County's conduct regarding its bond requirement for septic system repairs and did not instruct the jury to consider Summit County's other actions related to its requirement of septic system repairs, wetlands mitigation, or the bond requirement for wetlands mitigation.[7]

[7] Instruction 3 stated:

> In order to prevail on their equal protection claim, Plaintiffs must prove, by a preponderance of the evidence, that in response to Plaintiffs' efforts to obtain a certificate of occupancy for their property:
>
> 1. One or more County employees, in making the decision to condition the Plaintiffs' receipt of a certificate of occupancy on their payment of a bond to cover the costs associated with the repairs to their septic system, treated the Plaintiffs more

¶ 69 Plaintiffs contend that the jury should have been instructed to evaluate all of Summit County's actions toward them during the construction process to determine if Summit County discriminated against them and violated their rights to equal protection. The trial court did not limit plaintiffs' presentation of evidence, did not limit their argument to the jury, and even instructed the jury about plaintiffs' theory, as plaintiffs requested, as follows:

> Plaintiffs claim the County . . . treated them in a discriminatory manner throughout construction of the home, and that the discrimination was due to their sexual orientation. Plaintiffs claim the County imposed requirements upon them as conditions of obtaining a Certificate of Occupancy for their Property, which were not required of other Submit County homeowners. Plaintiffs believe the County's decisions, taken as a whole, collectively establish that the County treated them in a discriminatory manner.

> harshly than others who were not a same-sex couple but were otherwise similarly situated to Plaintiffs;
>
> 2. The County employee's or employees' different treatment of Plaintiffs with respect to the foregoing decisions was based on intentional discrimination based on their sexual orientation;
>
> 3. The County employee or employees committed such acts under the color of state law or authority; and
>
> 4. Plaintiffs' sexual orientation was a motivating factor for the County employee's or employees' different treatment of the Plaintiffs.

¶ 70 The trial court found, and I agree, that in three of the four challenged acts — the septic system requirements, the wetlands mitigation requirement, and the wetlands mitigation bond — plaintiffs did not present evidence of similarly situated comparators who were treated differently.

¶ 71 Plaintiffs' only theory of liability under section 1983 for which they presented evidence, without limitation by the court, during trial was whether Summit County discriminated against them when it required a bond for the septic system repairs. I thus conclude that the trial court did not err in limiting the jury instruction to reflect the evidence presented and the elements of a section 1983 claim. *See Hansen v. State Farm Mut. Auto. Ins. Co.,* 957 P.2d 1380 (Colo. 1998) (a party is "entitled to an instruction embodying his or her theory of the case if it is supported by competent evidence"); *Regents of Univ. of Colorado v. Harbert Constr. Co.*, 51 P.3d 1037, 1043 (Colo. App. 2001) ("A trial judge is required to instruct the jury on the law applicable to the case, and a party is entitled to an instruction on its theory of the case if the evidence supports it.").

¶ 72 Plaintiffs also assert that Instruction 3 should have directed the jury to evaluate whether the amount of the bond and the bond requirement itself were within the county septic system regulations. I conclude that it was proper for the trial court not to direct the jury to consider whether Summit County was acting consistently with its regulations because that is not an element of a section 1983 claim. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) (holding that an equal protection inquiry requires asking first whether the challenged state action intentionally discriminates between groups of persons and, if so, whether the decision to discriminate serves a legitimate government purpose).

C. Instruction 10

¶ 73 Instruction 10 stated: "Unless outweighed by evidence to the contrary, you may find that official duty has been properly and regularly performed." Plaintiffs next contend that Instruction 10 was improper because it would only be relevant in quasi-judicial administrative proceedings as an exception to the "mental process rule," which prohibits inquiries into the mental processes of agency employees. Plaintiffs also contend that Instruction 10 "suggests to

the jury that if Plaintiffs present evidence of a discriminatory motive for [Summit County's] conduct and [Summit County] presents evidence of a non-discriminatory reason for the decision, the jury should always presume that the conduct was based on the non-discriminatory reason."

¶ 74 I conclude that Instruction 10 was properly given.[8] "A 'presumption of [validity and] regularity supports the official acts of public officials and in absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Jensen v. City & County of Denver*, 806 P.2d 381, 386 (Colo. 1991) (quoting *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926)); *see also Crested Butte S. Metro. Dist. v. Hoffman*, 790 P.2d 327, 329 (Colo. 1990).

¶ 75 Plaintiffs' argument that this presumption applies only to quasi-judicial administrative hearings as an exception to the mental

[8] Summit County argues that plaintiffs' contention that Instruction 10 is only appropriate for quasi-judicial proceedings was not properly preserved because they objected to the instruction for a different reason at trial. Because I find that the instruction was proper, I need not decide if the contention was properly preserved.

process rule lacks merit. They cite no cases, and I have found none, that so limit the use of the presumption.

¶ 76 I also disagree with plaintiffs' assertion that Instruction 10 required the jury to presume that any discriminatory act committed by Summit County employees was within the scope of their official duties. Instruction 10 clearly began with an important qualifier: "Unless outweighed by evidence to the contrary . . . ." Thus, Instruction 10, combined with Instruction 3, instructed the jury that if plaintiffs presented evidence of intentional discriminatory acts, it should no longer presume the acts were within the government actor's official duties. *See, e.g., Rogers v. Westerman Farm Co.*, 29 P.3d 887, 909 (Colo. 2001) ("Under Colorado law, all of the trial court's instructions are to be considered as a whole when determining whether the necessary law has been properly stated to the jury.").

¶ 77 For these reasons I respectfully dissent. I would affirm all of the trial court's challenged orders.