SUMMARY
July 13, 2023

2023COA66

No. 22CA0680 *Mulberry v. Sunstate* — Eminent Domain — Attorney Fees

A division of the court of appeals addresses the scope of section 38-1-122(1), C.R.S. 2022. Under this statute, when a court rejects a condemnation petition on the grounds that the petitioner isn't authorized to acquire the subject property, "the property owner who participated in the proceedings" is entitled to recover their reasonable attorney fees and costs. The division concludes that the statute provides for a recovery of attorney fees and costs only by property owners — a term that does not include lessees. The division therefore affirms the trial court's order declining to award a lessee attorney fees and costs under the statute.

The division also concludes that the trial court erred by implicitly denying without explanation the lessee's request for

attorney fees under section 13-17-102, C.R.S. 2022, on the basis that the condemnation petition was substantially frivolous, groundless, and vexatious. Accordingly, the division reverses and remands with instructions to make findings on that request.

COLORADO COURT OF APPEALS **2023COA66**

Court of Appeals No. 22CA0680
Larimer County District Court No. 21CV30132
Honorable Gregory M. Lammons, Judge

Mulberry Frontage Metropolitan District, a Colorado special district and political subdivision of the State of Colorado,

Petitioner-Appellee,

v.

Sunstate Equipment Co., LLC, a Delaware corporation,

Respondent-Appellant.

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

Division V
Opinion by JUDGE GOMEZ
Brown and Taubman*, JJ., concur

Announced July 13, 2023

Widlund Law, LLC, Douglas S. Widlund, Centennial, Colorado, for Plaintiff-Appellee

Alderman Bernstein, LLC, Jody Harper Alderman, Amanda A. Bradley, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 The General Assembly has provided that when a court rejects a condemnation petition on the ground that the petitioner isn't authorized to acquire the subject property, "the property owner who participated in the proceedings" is entitled to recover their reasonable attorney fees and costs. § 38-1-122(1), C.R.S. 2022. The question in this case is whether this statute extends to lessees who participate in the proceedings. We conclude that it does not. Accordingly, we affirm the trial court's denial of a request by respondent, Sunstate Equipment Co., LLC (the lessee), for attorney fees and costs from plaintiff, Mulberry Frontage Metropolitan District (the district), under the statute.

¶ 2 We conclude, however, that the trial court erred by not addressing — and thus implicitly denying without explanation — the lessee's request for attorney fees under section 13-17-102, C.R.S. 2022. Accordingly, we reverse and remand with instructions to make findings on that request.

I. Background

¶ 3 The district filed the underlying condemnation petition against the Niesje J. Van Heusden Revocable Trust (the owner), the lessee,

and the Larimer County Treasurer, seeking to condemn real property in Fort Collins for public street improvements. The subject property was part of a larger parcel that the lessee rented under a long-term lease to operate an equipment rental business. The subject property is burdened by a recorded deed of covenant held by the Colorado Department of Transportation (CDOT) prohibiting any construction or improvements in anticipation of a future highway project. The district identified the covenant in its petition but didn't name CDOT as a respondent.

¶ 4 The lessee moved for joinder of CDOT or dismissal of the case for failure to join CDOT. The lessee also requested attorney fees and costs under section 38-1-122(1) — for the entire case if it was dismissed or for just the motion if joinder was ordered.

¶ 5 In an August 2021 order, the court denied the request to dismiss but granted the request for joinder and directed the district to join CDOT to the case. The court also denied the request for attorney fees and costs, reasoning that the lessee is "just a tenant" and "not the property owner" and that section 38-1-122(1) "clearly states that attorney fees shall be awarded 'to the property owner.'"

¶ 6 After the district filed an amended petition joining CDOT, the owner and the lessee jointly moved for dismissal on the ground that the proposed project conflicted with CDOT's covenant. They also jointly requested an award of attorney fees and costs under section 38-1-122(1). The lessee specifically asked the court to "reconsider its interpretation of [section 38-1-122(1)]" and requested, in the alternative, an award of attorney fees under section 13-17-102.

¶ 7 In a November 10, 2021 order, the court dismissed the amended petition, "award[ed] reasonable attorney fees and costs pursuant to [section] 38-1-122," and instructed "Respondents" to file related affidavits. (The order had collectively defined the owner and the lessee as the "Moving Respondents.") The court didn't address the lessee's alternative request for attorney fees under section 13-17-102.

¶ 8 Thereafter, the owner and the lessee filed documents detailing the amount of their requested attorney fees and costs. Meanwhile, the district moved for clarification of the court's ruling on the lessee's request for attorney fees.

¶ 9 On April 14, 2022, the court ruled on the district's motion for clarification, stating that it was "reaffirm[ing] that [the lessee] is not entitled to fees in this matter." The court stated that its August 2021 order had found the lessee ineligible for attorney fees and costs under section 38-1-122(1) and its November 2021 order "did not reconsider [that] finding." Although the court acknowledged that "the use of the plural 'Respondents' in the November [2021] order may have caused confusion," it concluded that "the record does not demonstrate that [it] reconsidered its prior holding." Again, the court didn't address the lessee's alternative attorney fee request under section 13-17-102.

¶ 10 On April 26, 2022, the lessee filed its notice of appeal. Soon thereafter, the trial court issued an order establishing the amount of attorney fees and costs awardable to the owner.

¶ 11 On appeal, the lessee contends that the trial court erred by denying its request for attorney fees and costs under section 38-1-122(1) and by not addressing its request for attorney fees under section 13-17-102. The district disagrees with both contentions and further contends that we lack jurisdiction over the

appeal because the lessee's notice of appeal was untimely. We address each of these contentions in turn, beginning with the district's jurisdictional argument.

II. Appellate Jurisdiction

¶ 12 We first reject the district's contention that we lack jurisdiction over this appeal. According to the district, the court's November 10, 2021 order dismissing the condemnation petition constituted a final judgment on the lessee's request for attorney fees and costs. Thus, the district contends, the lessee's notice of appeal, filed over five months later on April 26, 2022, was untimely. We disagree.

¶ 13 Under C.A.R. 4(a), a party in a civil case must file a notice of appeal within forty-nine days after the entry of a final judgment or order, unless the deadline is extended by a timely filed C.R.C.P. 59 motion. *Amada Fam. Ltd. P'ship v. Pomeroy*, 2021 COA 73, ¶ 73. A party's failure to file a timely notice of appeal generally deprives this court of jurisdiction to review the merits of the appeal. *Id.*

¶ 14 Typically, a judgment is final if it disposes of the entire litigation on the merits, leaving nothing for the court to do but execute on the judgment. *Grand Cnty. Custom Homebuilding, LLC*

v. Bell, 148 P.3d 398, 400 (Colo. App. 2006). Once a court enters a final judgment, the court's earlier orders merge into the judgment and generally become reviewable. *Town of Monument v. State*, 2018 COA 148, ¶ 6, *aff'd sub nom. Forest View Co. v. Town of Monument*, 2020 CO 52.[1]

¶ 15 However, "the final judgment rule has distinct contours in the context of postjudgment proceedings." *AA Wholesale Storage, LLC v. Swinyard*, 2021 COA 46, ¶ 10. In that context, the underlying action has already concluded with the entry of a final judgment, even as some part of the action remains "live." *Id.* at ¶ 12.

¶ 16 Divisions of this court have applied a two-part test in determining the finality of postjudgment orders. First, we consider whether the order ends "the particular part of the action in which it is entered," leaving "nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to

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[1] As the division pointed out in *Town of Monument v. State*, there are exceptions to this rule. 2018 COA 148, ¶ 6 n.3, *aff'd sub nom. Forest View Co. v. Town of Monument*, 2020 CO 52. For instance, a denial of summary judgment generally is not reviewable on appeal, even after the entry of judgment following a trial on the merits. *See id.*

that part of the proceeding." *Id.* at ¶ 13 (quoting *Luster v. Brinkman*, 250 P.3d 664, 667 (Colo. App. 2010)). And second, we consider whether the order is "more than a ministerial or administrative determination," such that it "affect[s] rights or create[s] liabilities not previously resolved by the adjudication of the merits." *Id.* at ¶ 16 (quoting *Luster*, 250 P.3d at 667). If both elements are satisfied, we treat the order as final. *See id.* at ¶ 23.

¶ 17 A judgment on the merits is considered final and appealable notwithstanding unresolved issues of attorney fees and costs. *L.H.M. Corp., TCD v. Martinez*, 2021 CO 78, ¶ 23; *Laleh v. Johnson*, 2016 COA 4, ¶ 50, *aff'd on other grounds*, 2017 CO 93; C.R.C.P. 58(a). Therefore, the unresolved attorney fee and cost issues didn't prevent the November 10, 2021 order from serving as a final judgment on the merits.[2]

¶ 18 Had the issues concerning the lessee's request for attorney fees and costs been fully and finally resolved as of the time the

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[2] In fact, the district appealed that order, and another division of this court recently affirmed it. *Mulberry Frontage Metro. Dist. v. Niesje J. Van Heusden Revocable Tr.*, (Colo. App. No. 21CA2098, Jan. 26, 2023) (not published pursuant to C.A.R. 35(e)).

judgment on the merits became final on November 10, 2021, they may well have merged into that judgment and become appealable at that time. *See Town of Monument*, ¶ 6. But those issues were not fully and finally resolved as of that time. They only later became final and, thus, they were separately appealable. *See USIC Locating Servs. LLC v. Project Res. Grp. Inc.*, 2023 COA 33, ¶ 34.

¶ 19 Although the trial court had denied the lessee's earlier request for attorney fees and costs under section 38-1-122(1), the November 10, 2021 order seemingly changed course, suggesting that the lessee could recover its fees and costs and directing it (as one of the "Respondents") to file documents supporting its requested fees and costs. *Cf. Blecker v. Kofoed*, 672 P.2d 526, 528 (Colo. 1983) ("[A]n appellate court should . . . construe an ambiguous order to arrive at a result that is as fair and reasonable as possible rather than one that is harsh and unreasonable.").

¶ 20 Moreover, nothing in the November 10, 2021 order could be read as even implicitly denying the lessee's request for attorney fees under section 13-17-102. The order said nothing of any attorney fee request being denied. And the previous order denying the

lessee's earlier request for fees and costs was entered before the lessee had made any request under section 13-17-102.

¶ 21 Thus, it is clear that the attorney fee and cost issues were not entirely resolved as of November 10, 2021. Indeed, there were later pleadings and rulings on those very issues.

¶ 22 Applying Colorado's postjudgment finality test, then, the issues concerning the lessee's request for attorney fees and costs were not finally resolved until, at the earliest, April 14, 2022, when the trial court entered its order on the motion for clarification, stating that it was denying the request. Before that date, the court hadn't entered an order on fees and costs that ended "the particular part of the action in which it [wa]s entered," leaving "nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that part of the proceeding." *AA Wholesale Storage*, ¶ 13 (quoting *Luster*, 250 P.3d at 667). And, clearly, the April 14, 2022 order was "more than a ministerial or administrative determination" because it "affect[ed] rights or

create[d] liabilities not previously resolved by the adjudication of the merits." *Id.* at ¶ 16 (quoting *Luster*, 250 P.3d at 667).[3]

¶ 23 Thus, the lessee's notice of appeal, filed on April 26, 2022, was timely. We therefore have jurisdiction over the appeal. Accordingly, we now turn to the lessee's contentions.

III. Attorney Fees and Costs under Section 38-1-122(1)

¶ 24 The lessee contends that the trial court erred by denying its request for attorney fees and costs under section 38-1-122(1). The lessee maintains that it qualifies as a "property owner" within the meaning of the statute and, therefore, that it is entitled to an award of its reasonable attorney fees and costs. We disagree.

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[3] Arguably, the rulings on attorney fees and costs weren't final until the trial court entered final rulings on the related requests by the owner because the lessee's and the owner's requests were made jointly, relied on some of the same statutory provisions, and involved some overlapping issues. *See, e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1173-74 (10th Cir. 2023) (postjudgment orders on attorney fees weren't final until all outstanding fee issues had been resolved); *Mayer v. Wall St. Equity Grp., Inc.*, 672 F.3d 1222, 1224 (11th Cir. 2012) (a postjudgment order denying the defendants' request for attorney fees wasn't final because "the other fee motion [filed by the plaintiff] remain[ed] outstanding"); *see also Luster v. Brinkman*, 250 P.3d 664, 667 (Colo. App. 2010) (federal case law is persuasive in resolving issues of finality). But because it's clear that the appeal was timely even applying the earliest possible deadline, we needn't decide this issue.

¶ 25 Section 38-1-122(1) provides as follows:

> If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.

The trial court concluded that this provision doesn't apply to lessees because lessees are not property owners.

¶ 26 We review a trial court's interpretation of a statute de novo. *Nesbitt v. Scott*, 2019 COA 154, ¶ 19. Our primary purpose in interpreting a statute is to ascertain and give effect to the General Assembly's intent. *McCoy v. People*, 2019 CO 44, ¶ 37. To do so, we start with the language of the statute, giving the statutory words and phrases their plain and ordinary meanings, *id.*, and reading the statutory scheme as a whole so as to give all of its parts a consistent, harmonious, and sensible effect, *Doubleday v. People*, 2016 CO 3, ¶ 20. If the language is unambiguous, we look no further, *McCoy*, ¶ 38, but simply apply that language, presuming that the General Assembly "meant what it plainly said," *Kroesen v.*

Shenandoah Homeowners Ass'n, 2020 COA 31, ¶ 40 (quoting *Miller v. Curry*, 203 P.3d 626, 629 (Colo. App. 2009)).

¶ 27 We conclude that section 38-1-122(1) is unambiguous. Its plain language provides for recovery of attorney fees and costs only by property owners — a term that does not include lessees. And, of course, under the American Rule, absent a statutory or contract provision providing for the recovery of attorney fees, each party is responsible for paying their own attorneys. *Guarantee Tr. Life Ins. Co. v. Est. of Casper*, 2018 CO 43, ¶ 23.

¶ 28 Because the statute doesn't define an "owner" of property, we consider the common usage of that term. *See Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31, ¶ 18. Merriam-Webster Dictionary defines an "owner" as "a person who owns something," "one who has the legal or rightful title to something," or "one to whom property belongs." Merriam-Webster Dictionary, https://perma.cc/JVB7-NJCN. Likewise, the Restatement (First) of Property describes an "owner" as "[a] person who has the totality of rights, powers, privileges and immunities which constitute complete property in a thing." Restatement (First)

of Prop. § 10 cmt. b (Am. L. Inst. 1936). And Black's Law Dictionary defines "ownership" as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." Black's Law Dictionary 1332 (11th ed. 2019). Nothing in these definitions or descriptions suggests that the term "property owner" encompasses lessees.

¶ 29 The lessee's reliance on general property law principles is misplaced. It is true that a leasehold is a property interest. *See Better Baked, LLC v. GJG Prop., LLC*, 2020 COA 51, ¶ 24 (A "lease create[s] interests in real property for [the] tenant."); *Kunz v. Cycles W., Inc.*, 969 P.2d 781, 783 (Colo. App. 1998) ("A commercial lease is both a conveyance of an interest in real property and a contract."). But that doesn't make a lessee a property owner. A lessee's interest is in the *possession* — not the *ownership* — of property. *See Wilson v. Marchiondo*, 124 P.3d 837, 840 (Colo. App. 2005) (recognizing a lessee's possessory interest in leased property); *Rare Air Ltd., LLC v. Prop. Tax Adm'r*, 2019 COA 134, ¶ 25 (noting that "[a] possessory interest is '[t]he present right to control property, including the right to exclude others, by a person who is

not necessarily the owner'" (quoting Black's Law Dictionary 1353 (10th ed. 2014))); *see also Cantina Grill, JV v. City & Cnty. of Denver Bd. of Equalization*, 2012 COA 154, ¶ 7 (recognizing a distinction between possessory interests and ownership interests), *aff'd on other grounds*, 2015 CO 15; *People v. Barefield*, 804 P.2d 1342, 1345 (Colo. App. 1990) (same); Restatement (First) of Prop. § 7 (describing possessory interests in land).

¶ 30 It is also true that lessees are generally entitled to receive compensation for any taking of their property interest in condemnation proceedings. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) ("[T]he holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.") (footnote omitted);[4]

[4] The Fifth Amendment to the United States Constitution provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." Although *Alamo Land & Cattle Co. v. Arizona* refers only to takings by the United States, 424 U.S. 295, 303 (1976), the Fifth Amendment also applies to takings by state and local governments. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Knick v. Township of Scott*, 588 U.S. ___, ___, 139 S. Ct. 2162, 2170 (2019).

Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 375 (Colo. 1990) ("A lessee generally is entitled to compensation for the condemnation of the lessee's unexpired leasehold interest in property."); *Petry v. City & Cnty. of Denver*, 123 Colo. 509, 514, 233 P.2d 867, 869 (1951) ("[A] tenant ha[s] a compensable interest in [a] property being taken by condemnation as well as the landlord . . . ."). But this merely signifies that a lessee's *possessory interest* in property must be compensated if it's taken through condemnation, unless a lessor and lessee have provided otherwise in their lease. *See Fibreglas Fabricators*, 799 P.2d at 375. It doesn't signify that a lessee is an *owner* of the property.

¶ 31 Nonetheless, the lessee contends that our supreme court cited a state constitutional provision concerning property owners in its *Fibreglas Fabricators* holding that a lessee is generally entitled to compensation upon the condemnation of their property interest. *See id.* The supreme court cited three sources in support of that holding. Aside from our state constitution, the other two sources were *Alamo Land & Cattle*, 424 U.S. at 303, which addresses lessees' rights to compensation for the taking of their leasehold

interest under the Federal Constitution, and *Roth v. Wilkie*, which provides that our state constitution guarantees compensation "when some specific private property, or some right or interest therein or incident thereto, peculiar to the owner, is taken or damaged for public or private use," 143 Colo. 519, 522, 354 P.2d 510, 512 (1960) (quoting *Gilbert v. Greeley, Salt Lake & Pacific Ry.*, 13 Colo. 501, 508, 22 P. 814, 816 (1889)).

¶ 32 The cited Colorado Constitutional provision, article II, section 15, provides, in pertinent part, as follows:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested . . . .

The protection conferred in the first sentence of this provision doesn't refer to an *owner* of property. Instead, it provides broadly that "[p]rivate property" cannot be taken or damaged without just compensation. And while the second sentence describes the

compensation required by the first sentence and indicates that "the owner" cannot be divested of the property until that compensation is paid, it doesn't narrow the broad protection conferred by the first sentence so as to limit it to only property owners. Instead, fairly read, it simply sets forth how compensation must be determined (including that it must be by a jury if the owner requires one) and reiterates that an owner's rights cannot be divested or needlessly disturbed until just compensation is paid.

¶ 33 Thus, our supreme court's recognition that this provision supports a right to compensation by lessees — who would be entitled at any rate to compensation under the Fifth Amendment — does not signify that a lessee is an "owner" of property under the state constitution.

¶ 34 Nor does it suggest that the General Assembly intended to adopt such an expansive meaning of a "property owner," rather than the commonly understood meaning of the term, in the eminent domain statutory scheme. Throughout the eminent domain statutes, the General Assembly distinguished "owners" from others holding interests in a property, thus recognizing that while those

with non-ownership interests have rights to compensation and participation in condemnation proceedings, they don't have the same rights as "owners" in those proceedings.

¶ 35 For instance, section 38-1-121(1), C.R.S. 2022, requires a condemning authority to give notice of its intent to acquire an interest in property "to anyone having an interest of record in the property involved" before commencing condemnation proceedings.[5] Section 38-1-102(1), C.R.S. 2022, then requires condemnation petitions to include "the names of all persons interested as owners or otherwise." Section 38-1-109, C.R.S. 2022, permits anyone claiming to be "an owner" or to "ha[ve] an interest in the property" to seek intervention in the proceeding. And section 38-1-105(1), C.R.S. 2022, sets forth a process for determining the total compensation to be made to "the owner and persons interested in the . . . property," after which, under section 38-1-105(3), the persons "interested as owner or otherwise in the property" can

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[5] A division of this court has interpreted this provision as requiring notice only to holders of recorded interests, and thus not to a tenant with an unrecorded leasehold interest. *City & Cnty. of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1143 (Colo. App. 2003).

either agree on how to distribute that amount between themselves or bring a separate proceeding to determine the distribution.[6]

¶ 36 Yet other sections of the eminent domain statutory scheme, like section 38-1-122(1), reference only property owners. For instance, section 38-1-101(2)(b), C.R.S. 2022, provides that, absent consent from "the owner of the property," the burden of proof is on the condemning authority to demonstrate that the taking is for a public use. Section 38-1-105(6)(b) allows "the owner" to withdraw a portion of the funds deposited by the condemning authority into the court registry as partial payment for the final condemnation award, but only if "all parties interested in the property . . . consent and agree to such withdrawal." And in accordance with article II, section 15 of the Colorado Constitution, section 38-1-106, C.R.S. 2022, permits "[t]he owner of the property" to request a jury trial to determine the amount of compensation owed.

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[6] Our supreme court has recognized that this provision applies to disputes between landlords and tenants about the apportionment of the proceeds of a condemnation. *Total Petroleum, Inc. v. Farrar*, 787 P.2d 164, 166-67 (Colo. 1990).

¶ 37 From these references, we conclude that the General Assembly applied the common meaning of the term "property owner" in the eminent domain statutes. We also conclude that when the General Assembly intended a provision in the statutes to apply only to the owner of a property, it provided specific references to an "owner"; but when it intended a provision to apply more broadly to holders of other property interests, it included references to other interested parties. *Cf. City & Cnty. of Denver v. Bd. of Assessment Appeals*, 947 P.2d 1373, 1378 (Colo. 1997) ("When the General Assembly wanted to limit applicability of the statute [governing real estate appraisers] to federal transactions, it did so expressly."); *Reg'l Transp. Dist. v. Aurora Pub. Schs.*, 45 P.3d 781, 783 (Colo. App. 2001) ("[W]hen the General Assembly wanted [the Regional Transportation District] to be included within the scope of a particular provision of the No-Fault Act, it expressly did so.").

¶ 38 Thus, we presume that, had the General Assembly intended to allow lessees, as non-owners holding possessory interests in property, to recover attorney fees and costs under section 38-1-122(1), it would have said so. Because it didn't, we presume

that it intended the recovery provision to be available only to property owners and not to lessees.[7]

¶ 39 Finally, the lessee offers reasons why it would make sense to reimburse a lessee its reasonable attorney fees and costs after a failed condemnation petition, while the district offers reasons why it would make sense to limit the attorney fees that might be assessed against a public entity in a condemnation proceeding. Those arguments present a policy choice that is for the General Assembly — not this court — to make. *See Bill Barrett Corp. v. Lembke*, 2020 CO 73, ¶ 25. Because the statutory language is clear and

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[7] In comparison, where courts in other states have allowed lessees to recover attorney fees in condemnation proceedings, the statutes have expressly allowed all interested parties — not just owners — to recover such fees. *See, e.g.*, *Outfront Media, LLC v. City of Sandy Springs*, 847 S.E.2d 597, 613 (Ga. Ct. App. 2020) (applying a statute that provides for an award of attorney fees to "the owner of any right or title to or interest in [the] real property" (quoting Ga. Code Ann. § 22-1-12 (West 2022))); *In re Village of Haverstraw*, 120 N.Y.S.3d 380, 383-85 (App. Div. 2020) (applying a statute that provides for an award of attorney fees to any condemnee (citing N.Y. Em. Dom. Proc. § 701 (McKinney 2022))); *In re Condemnation by the Penn. Tpk. Comm'n of 14.38 Acres in Fee Simple*, 698 A.2d 39, 43 (Pa. 1997) (applying a statute that provides for an award of attorney fees to "[t]he owner of any right, title, or interest in [the] real property" (quoting 26 Pa. Stat. and Cons. Stat. § 1-610 (West 1997))).

unambiguous, we must apply it as written. *See McCoy*, ¶ 38; *Kroesen*, ¶ 40.

¶ 40 Accordingly, we affirm the trial court's denial of the lessee's request for attorney fees and costs under section 38-1-122(1).[8]

IV. Attorney Fees under Section 13-17-102

¶ 41 The lessee also contends that the trial court erred by not addressing its request for attorney fees under section 13-17-102. We agree.

¶ 42 Section 13-17-102(2) and (4) provide for the recovery of attorney fees when a court finds that an action, defense, or part thereof is substantially frivolous, groundless, or vexatious. An action or defense is substantially frivolous if "the proponent can present no rational argument based on the evidence or law in support of [it]." *City of Aurora v. Colo. State Eng'r*, 105 P.3d 595, 620 (Colo. 2005). It is substantially groundless if it is "not supported by any credible evidence." *Id.* at 618. And it is substantially vexatious if it is "brought or maintained in bad faith to

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[8] We don't address any potential recovery of costs under C.R.C.P. 54(d), as the lessee doesn't raise that issue on appeal, nor did it seek costs under this rule in the trial court.

annoy or harass another." *In re Parental Responsibilities of I.M.*, 2013 COA 107, ¶ 29.

¶ 43 The trial court is in the best position to determine whether an action, defense, or part thereof satisfies these standards. *See Argo v. Hemphill*, 2022 COA 104, ¶ 51. Therefore, we generally review a trial court's decision whether to award attorney fees under section 13-17-102 for an abuse of discretion. *See In re Parental Responsibilities Concerning D.P.G.*, 2020 COA 115, ¶ 32.

¶ 44 But even when denying an award of fees under the statute, the court "must make sufficient findings such that adequate appellate review can be exercised." *Munoz v. Measner*, 247 P.3d 1031, 1034 (Colo. 2011).[9] In the absence of sufficient findings, we must reverse and remand the matter for the trial court to explain the basis for its decision. *See id.* at 1034-35; *In re Marriage of Rodrick*, 176 P.3d 806, 816 (Colo. App. 2007) ("[B]ecause the court did not address [a

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[9] The lessee points out that the supreme court in *Munoz v. Measner* held that a trial court doesn't have to make specific factual findings applying the statutory factors when it denies an attorney fee request under section 13-17-102, C.R.S. 2022, as it does when it grants such a request. 247 P.3d 1031, 1034-35 (Colo. 2011). But the court also held that a trial court has to make sufficient findings to allow for appellate review of its decision to deny attorney fees. *Id.*

party's] request for an award of attorney fees under § 13-17-102, we are unable to determine whether the court abused its discretion by not awarding attorney fees under that statute."); *Stearns Mgmt. Co. v. Mo. River Servs., Inc.*, 70 P.3d 629, 634 (Colo. App. 2003) ("[W]e cannot conclude, absent findings of fact, that the trial court's denial of attorney fees is not an abuse of discretion.").

¶ 45 In this case, the trial court didn't rule on the lessee's request for fees and costs under section 13-17-102 and, thus, it implicitly denied the request without explanation. *See FSDW, LLC v. First Nat'l Bank*, 94 P.3d 1260, 1265 (Colo. App. 2004) (deeming a party's request for fees to have been implicitly denied where the trial court never expressly ruled on the request but didn't award the requested fees). In the absence of any explanation, we can't determine whether the trial court properly exercised its discretion.

¶ 46 Accordingly, we reverse the trial court's implicit denial of attorney fees under section 13-17-102 and remand the case for the trial court to make findings on that request.

V. Appellate Attorney Fees

¶ 47 The lessee requests an award of its appellate attorney fees under section 38-1-122(1). *See Nesbitt*, ¶ 21 (appellate fees should be included in an award of fees under section 38-1-122(1)). Because we have concluded that the lessee isn't entitled to attorney fees under section 38-1-122(1), we deny its related request for appellate attorney fees.

VI. Disposition

¶ 48 The trial court's attorney fee order is affirmed to the extent that it denied the lessee's request for attorney fees and costs under section 38-1-122(1) but is reversed to the extent that it implicitly denied the lessee's request for attorney fees under section 13-17-102. The case is remanded for the trial court to make findings on the section 13-17-102 request.

JUDGE BROWN and JUDGE TAUBMAN concur.