The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
February 29, 2024

2024COA24

No. 23CA0522, *Center for Wound v Kit Carson* — Taxation — TABOR; Special Districts — Contracts — Appropriation Contingency Clauses

In accord with *Board of County Commissioners v. Dougherty, Dawkins, Strand & Bigelow Inc.*, 890 P.2d 199, 207-08 (Colo. App. 1994), *overruled on other grounds by In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 556 (Colo. 1999), a division of the court of appeals holds that (1) a multi-year contract between a hospital district and a private entity does not violate article 10, section 20 of the Colorado Constitution because it makes a hospital district's future fiscal year financial obligations contingent on annual appropriations; and (2) factual disputes precluded entry of judgment as a matter of law with respect to the monies potentially owed in the fiscal year of the hospital district's

alleged breach of the contract. On its own motion, the division also strikes the parties' notices of supplemental authority because they were not compliant with C.A.R. 28(i).

COLORADO COURT OF APPEALS **2024COA24**

Court of Appeals No. 23CA0522
Kit Carson County District Court No. 21CV30012
Honorable Carl S. McGuire, III, Judge

Center for Wound Healing & Hyperbaric Medicine, LLC of Burlington Colorado,

Plaintiff-Appellant,

v.

Kit Carson County Health Service District,

Defendant-Appellee.

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

Division VII
Opinion by JUDGE GROVE
Tow and Lipinsky, JJ., concur

Announced February 29, 2024

Greenberg Traurig, LLP, Craig M. Waugh, Phoenix, Arizona, for Plaintiff-Appellant

Hall, Render, Killian, Heath & Lyman, P.C., Melvin B. Sabey, M. Brian Sabey, Lindsay K. McManus, Denver, Colorado, for Defendant-Appellee

¶ 1 In this contract dispute, plaintiff, the Center for Wound Healing & Hyperbaric Medicine, LLC of Burlington Colorado (the Center), appeals the judgment entered on the trial court's order dismissing the Center's complaint against defendant, Kit Carson County Health Service District (the District). We conclude that the trial court correctly interpreted contractual language that was intended to ensure compliance with article 10, section 20 of the Colorado Constitution, also known as the Taxpayer's Bill of Rights (TABOR), when it ruled that the District's liability for certain financial obligations arising after the contract's termination was contingent on annual appropriations that the District never made. However, we also conclude that factual disputes precluded dismissal of the Center's claim for money damages reflecting the Center's loss of the revenue it would have received during the fiscal year of the alleged breach had no breach occurred. (On our own motion, we also strike the parties' notices of supplemental authority and the accompanying responses.) We therefore affirm the judgment in part and reverse it in part.

I. Background

¶ 2 The Center and the District entered into an "Administrative Services Agreement" (the ASA) in 2018, in which the parties agreed that the Center would establish and manage a hyperbaric oxygen therapy and wound care facility at Kit Carson County Memorial Hospital, which the District operates. As compensation, the District agreed to pay the Center eighty percent of the District's net collections for hyperbaric treatment and, for wound care, $75 per procedure performed at the facility, with annual upward adjustments of three percent. The District's payments were due on the fifteenth day of every month, with no exceptions.

¶ 3 The ASA's initial term was for seven years, and it specified that early termination was permissible only in the following circumstances: an uncured material breach by either party; the filing of bankruptcy by either party; the disqualification of either party from federal health care programs; or a conviction against either party for a criminal offense related to the provision of healthcare items or services. In the event of a material breach, the nonbreaching party was required to give the breaching party notice of the breach and allow for a forty-five-day cure period.

¶ 4 Subsection 6.1 of the ASA, which is titled "Compensation to [the Center]," contains an acceleration clause providing, as relevant here, that

- "[i]n the event of an expiration, non-renewal or termination of this Agreement, for any reason or no reason, [the District] shall promptly pay to [the Center] any and all amounts payable for the Services that have accrued pursuant to this Agreement, and any and all exhibits, schedules or other documents ancillary hereto, through the date of such . . . termination"; and
- "[i]n the case of termination by [the Center]," the District will pay "an amount equal to the product of the average monthly Fee earned from the beginning of the Term to such date of termination, multiplied by the number of calendar months remaining until the end of the Term, payable in one lump sum within thirty (30) Days of such . . . termination date."

¶ 5 In recognition of TABOR's potential impact on the ASA, subsection 7.4 included the following provision:

> The parties acknowledge that [the District] believes that it is subject to Section 20 of Article X of the Constitution of Colorado. To that end, any provision of the Agreement (or any exhibit, amendment, or addendum hereto) that requires payment of any nature in fiscal years subsequent to the current fiscal year,[1] and for which there are no present cash reserves pledged irrevocably for purposes of the payment of such obligations shall be contingent upon future appropriations by [the District] of sufficient funds for purposes of payment of such obligations for any future fiscal year.

The District maintains — and the trial court agreed — that, without subsection 7.4, the ASA would run afoul of TABOR, which bars the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" absent voter preapproval. Colo. Const. art. X, § 20(4)(b); *see City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006).

¶ 6 In August 2020, the District received a letter from a Medicare administrative contractor noting that the contractor had "identified potential aberrancies with billing patterns for your practice in regard to Hyperbaric Oxygen Therapy for Diabetic Wounds." After

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[1] The parties agree the "current fiscal year" referred to in subsection 7.4 is fiscal year 2018, when the ASA was executed. The District's fiscal year coincides with the calendar year.

investigating the matter internally, the District became concerned that there were indeed compliance concerns (a point that the Center vigorously disputes), and it therefore ceased submitting claims from the Center to Medicare for reimbursement.

¶ 7 In May 2021, the District received a letter from a Unified Program Integrity Contractor affiliated with the Centers for Medicare & Medicaid Services stating that it would be "conducting a review of selected claims you have submitted to Medicare and/or Medicaid." The District conducted an internal review of the relevant records and became concerned enough about some of them that it submitted a confidential self-disclosure to the Office of the Inspector General at the Department of Health and Human Services (again, we acknowledge that the Center disagrees with the District's assessment of its own and the Center's compliance).

¶ 8 On June 25, 2021, the Center notified the District that the District had materially breached the ASA by failing to pay for the Center's services. Three days later, the District informed the Center that it was terminating the ASA, effective immediately, and ceased compliance with the ASA. The Center sent the District a demand letter alleging breach of contract and seeking (1) immediate

payment for the remaining term of the ASA based on the acceleration clause; (2) recovery of the invoiced amounts due for procedures through the end of June 2021 and for claims scheduled for submission by the District for insurance reimbursement in July 2021, and (3) the unamortized/undepreciated amount of the Center's investment in the facility.

¶ 9 The District paid the June 2021 invoice plus contractual interest, but it made no further payments to the Center. The Center then filed suit, seeking to recover $404,583.68 for its July 2021 invoice and $7,679,447.19 (plus contractual interest) under the acceleration clause. The District pleaded affirmative defenses and counterclaims. The Center moved for summary judgment, which the court denied, and the District filed its own motion for summary judgment.

¶ 10 While the District's summary judgment motion was pending, it filed a "Motion in Limine with Grounds for Dismissal of Plaintiff's Claims" arguing that, based on TABOR and subsection 7.4 of the ASA, the Center could not claim any damages resulting from the District's termination of the ASA. The District supported the motion in limine with a declaration from its board chair stating, in

pertinent part, that the board (1) had not "irrevocably allocated" any funds for "payment of future year obligations" relating to the ASA and (2) had no intention of appropriating "any funds for any payments" related to the ASA. The lack of such appropriations, the District argued, precluded recovery under subsection 7.4 of the ASA, since that provision made "payment of any nature in fiscal years subsequent to the current fiscal year . . . contingent upon future appropriations by [the District] of sufficient funds for purposes of payment of such obligations for any future fiscal year."

¶ 11 The trial court granted the District's motion in limine. It explained that, while "the [ASA] would violate TABOR on its face" if it did not include subsection 7.4, the inclusion of that provision ensured compliance with TABOR by making the District's future payment obligations contingent on annual appropriations for that purpose. In the absence of any such annual appropriations (or previously irrevocably pledged reserves), subsection 7.4 made clear that the District could not be required to make payment "of any nature" under any provision of the ASA. As the court put it, subsection 7.4 makes "performance of the District's obligations under the [ASA] . . . expressly subject to appropriation of funds by

the District." Consequently, "in the event that funds are not appropriated in whole or in part sufficient for the performance of the District's obligations under the [contract], the District may terminate [the ASA] without compensation to the Center."

¶ 12 In granting the District's motion in limine, the trial concluded that "there is no mechanism that complies with TABOR that would allow recovery of damages by [the Center] for the alleged breach of contract by [the District]." Accordingly, the court dismissed the Center's claims for relief.

¶ 13 Shortly thereafter, the parties stipulated to the dismissal of the Center's declaratory judgment claim, which the Center had asserted in a separate civil action against the District before the claim was consolidated into this case, and the trial court entered final judgment in favor of the District. This appeal followed.

II. Analysis

¶ 14 The Center primarily contends that, because "TABOR does not regulate damages," the trial court erroneously concluded that the Center could not recover breach of contract damages from the District in the absence of appropriations by the District for that specific purpose. Although the strictures of TABOR provide

important context for our analysis, we need not address this argument directly because we agree with the trial court's interpretation of subsection 7.4. That subsection renders irrelevant the relationship between TABOR and damages awards under the ASA. By its plain language, subsection 7.4 makes any payment arising under the ASA — including payments contemplated by the acceleration clause — contingent either on an irrevocable pledge of cash reserves or an appropriation of funds by the District. Because, for the purpose of prospective damages, neither condition occurred here, the Center cannot invoke the acceleration clause to require the District to make payments corresponding to any fiscal year following fiscal year 2021. Thus, the trial court correctly concluded, as a matter of law, that the Center could not recover any monies that it claims the District owes under the acceleration clause corresponding to the years following the alleged breach.[2]

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[2] For simplicity's sake, when we refer to payments due under the acceleration clause, we are contemplating payments corresponding to the anticipated revenues of the medical facility beginning in fiscal year 2022, which is the fiscal year following the District's alleged breach. As we explain further below, there are factual disputes over whether the District appropriated funds for the entirety of fiscal year 2021. This dispute precluded entry of judgment as a matter of

¶ 15 We cannot, however, reach the same conclusion with respect to the Center's claims for payments that it alleges are owed for services rendered *before* the District's alleged breach, as well as for payments that would correspond to the remaining months of fiscal year 2021. On this record, it is unclear whether the District appropriated funds for the purpose of payments to the Center for the entirety of fiscal year 2021, and if so, whether the Center would be entitled to recover those appropriated funds under the terms of the ASA if it prevailed on its claim for breach of contract. We therefore reverse the trial court's order to the extent the trial court found, as a matter of law, that the Center could not recover payments it claims are owed for services rendered before the alleged breach of the ASA or payments due under the acceleration clause for the remainder of fiscal year 2021. And we remand for findings regarding whether the District owes the Center any payments for fiscal year 2021.

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law against the Center with respect to damages in the form of payments due in fiscal year 2021.

A. Standard of Review

¶ 16 When a ruling on a motion in limine ends the litigation, our appellate review is de novo. *Bd. of Cnty. Comm'rs v. Kobobel*, 176 P.3d 860, 862-63 (Colo. App. 2007).

¶ 17 Likewise, we review de novo questions of constitutional and contract interpretation. *Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶ 30 (interpreting TABOR); *Fed. Deposit Ins. Corp. v. Fisher*, 2013 CO 5, ¶ 9 (interpreting a contract). When reviewing contractual terms, we ascribe the ordinary meaning to the language used, *Weitz Co. v. Mid-Century Ins. Co.*, 181 P.3d 309, 312 (Colo. App. 2007), and will not read any term to be superfluous or meaningless, *Fisher*, ¶ 12.

B. Legal Principles

¶ 18 TABOR was enacted to constrain the growth of government by imposing various limits on the ability of state and local government to tax and spend absent prior voter approval. *Barber v. Ritter*, 196 P.3d 238, 252-53 (Colo. 2008). Section 20(4)(b) of TABOR requires "districts"[3] to obtain prior voter approval for the "creation of any

[3] TABOR defines "district" as "the state or any local government, excluding enterprises." Colo. Const. art. X, § 20(2)(b).

multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." Colo. Const. art. 10, § 20(4)(b).

¶ 19 Colorado's courts have declined to interpret TABOR in a way that prevents effective day-to-day governance. *See, e.g.*, *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999) (rejecting an interpretation of TABOR that would "cripple the everyday workings of government"); *TABOR Found. v. Colo. Bridge Enter.*, 2014 COA 106, ¶ 20 (same). Thus, multi-year contracts that lack either voter approval or pre-pledged funds are void under TABOR only if they create "constitutional debt." *Colo. Crim. Just. Reform Coal. v. Ortiz*, 121 P.3d 288, 293 (Colo. App. 2005).

¶ 20 "Indications of debt in a constitutional sense" include the following:

> (1) the obligation pledges revenues for future years;
>
> (2) the obligation requires use of revenue from a tax otherwise available for general purposes;

> (3) the obligation is legally enforceable against the state in future years; or
>
> (4) appropriation by future legislatures of monies and payment of the obligation is nondiscretionary.

Id. Consistent with this framework, a multi-year contract avoids "constitutional debt" by making the government's obligations contingent upon sufficient annual appropriation, and in the event of non-appropriation, termination of the contract without the payment of damages. *Bd. of Cnty. Comm'rs v. Dougherty, Dawkins, Strand & Bigelow Inc.*, 890 P.2d 199, 207-08 (Colo. App. 1994), *overruled on other grounds by In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d at 556; *see Glennon Heights, Inc. v. Cent. Bank & Tr.*, 658 P.2d 872, 878-79 (Colo. 1983) (interpreting pre-TABOR constitutional provision imposing similar restrictions on multi-year obligations).

¶ 21 In *Dougherty*, Boulder County, without first holding an election, entered into a lease-purchase agreement under which a bank bought a road grader and leased it to the county for eight months with four additional one-year renewal terms. 890 P.2d at 201. In pertinent part, the agreement provided as follows:

> ALL PAYMENT OBLIGATIONS OF THE COUNTY UNDER THE LEASE, INCLUDING, WITHOUT LIMITATION, THE COUNTY'S OBLIGATION TO PAY BASE RENTALS, ARE FROM YEAR TO YEAR ONLY AND DO NOT CONSTITUTE A MULTIPLE–FISCAL YEAR DIRECT OR INDIRECT DEBT OR OTHER FINANCIAL OBLIGATION OF THE COUNTY. THE LEASE IS SUBJECT TO ANNUAL [RENEWAL] [CANCELLATION] AT THE OPTION OF THE COUNTY AND WILL BE TERMINATED UPON THE OCCURRENCE OF AN EVENT OF NONAPPROPRIATION.

Id. at 202.

¶ 22 After a dispute arose over whether the agreement was compliant with TABOR, Boulder County filed suit seeking a declaration that it was. A division of this court upheld the agreement because, due to the inclusion of the language quoted above, "the County need not pay for the use of the equipment until the year in which it is utilized. Thus, the Agreement may be considered as a series of one-year contracts which the County can elect, in each year, to accept or reject without penalty." *Id.* at 207.

¶ 23 Analogously, in *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981), the Colorado Supreme Court, applying a different constitutional provision that "prohibit[ed] the city from incurring a general obligation debt unless approved by the voters," *id.* at 699,

held that a rental agreement was not void because the agreement did not obligate future legislatures to appropriate funds. The *Gude* court relied on the contract itself to find that the "rental obligations for future years do not constitute debt in contravention of Colo. Const. Art. XI, § 6 [because of] the lease provision that those obligations are contingent upon exercise of the city's renewal options."[4] *Id.*

C. Application

1. Recovery under the Acceleration Clause

¶ 24 Determining whether the Center may recover from the District for the payments it anticipated receiving after the District's alleged breach requires us to consider two questions. First, is the ASA TABOR-compliant? Second, if it is compliant, does subsection 7.4

[4] Even where, as here, a private party is unable to collect damages from a governmental entity due to a void contract or an unfulfilled contractual contingency, the party may still be able to recover whatever personal property remains in the government's possession. *See, e.g.*, *La Plata Med. Ctr. Assocs., Ltd. v. United Bank of Durango*, 857 P.2d 410, 418 (Colo. 1993) (discussing the availability of equitable relief where a contract was void under article XI, section 6(1) of the Colorado Constitution because a hospital district incurred debt by loan without prior voter approval). In this case, the Center recovered all of its hyperbaric equipment shortly after the District terminated the ASA.

preclude recovery under the acceleration clause? We conclude that subsection 7.4 makes the ASA compliant with TABOR; however, that provision also renders the District's obligations under the acceleration clause contingent upon sufficient annual appropriation by the District for future fiscal years.

¶ 25 First, the ASA is TABOR-compliant. While section 20(b)(4) of TABOR prevents districts from creating any multiple-fiscal year debt or other financial obligations without prior voter approval or irrevocably pledging funds for the purpose of the debt or obligation, a multi-year contract such as this one does not run afoul of TABOR so long as the governmental entity retains discretion to appropriate or not appropriate funds without financial consequence. *See, e.g.*, *Dougherty*, 890 P.2d at 207; *Ortiz*, 121 P.3d at 293. It is thus unsurprising that the ASA resembles the lease-purchase agreement in *Dougherty* insofar as subsection 7.4 makes a "payment of any kind" after fiscal year 2018 (the first year of the agreement) contingent on sufficient annual appropriation for the purpose of that obligation. *See Dougherty*, 890 P.2d at 207 ("The Agreement does not create a 'debt' or 'other financial obligation' in any future year because it does not require funds to be appropriated for that

purpose, nor does it obligate future commissioners to tax for that purpose.”).

¶ 26 True, in contrast to the provision at issue in *Dougherty*, subsection 7.4 does not explicitly terminate the ASA in the event of non-appropriation, but that is a distinction without a practical difference. Indeed, if the entirety of the District’s obligations are contingent upon sufficient appropriation, then the ASA would not renew upon non-appropriation, as the District’s obligations for that fiscal year would be unenforceable. *Cf. Clark v. Scena*, 83 P.3d 1191, 1194 (Colo. App. 2003) (holding, when interpreting an option contract, that “no valid contract to purchase exists until the buyer exercises the option”). This reasoning finds support in *Ortiz* because if non-appropriation did not terminate the ASA, then the District would be financially bound in future years — a result barred by TABOR. *See* 121 P.3d at 293.

¶ 27 In short, because subsection 7.4 made any kind of payment to the Center in the fiscal years after 2018 contingent upon specific appropriations for that purpose, it ensured that the District would not be financially bound in later fiscal years. This discretion over whether to appropriate funds to continue services under the ASA is

precisely what renders the ASA valid under section 20(4)(b) of TABOR.

¶ 28 Second, the ASA's acceleration clause calls for "payment" within the meaning of subsection 7.4. Subsection 6.1 states that, if the Center terminates the ASA due to the District's material breach, the District must promptly pay the Center a lump sum amount approximating the Center's anticipated income for the remainder of the agreement's term. Likewise, subsection 7.2(D) refers to amounts owed as a result of termination and material breach as "payments" and states that they are to be made pursuant to a "repayment schedule." When a contract uses the same term multiple times, we ascribe that term the same meaning. *See generally Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153 (Colo. App. 1998) (rule of consistent usage requires that, when the same words are used in different parts of a statute, then those words are ascribed the same meaning). Therefore, the amounts owed under the acceleration clause of subsection 6.1 and required by subsection 7.2(D) are "payments" within the meaning of subsection 7.4.

¶ 29 We recognize that concluding that subsection 7.4 applies to subsection 6.1's acceleration clause means that the District will be largely insulated from the consequences of a material breach. But that result is consonant with the analysis in *Dougherty*, where the division endorsed Boulder County's freedom not to appropriate funds for an extension of the lease-purchase agreement, even if the result of doing so would leave the other contracting party with "a road grader which is of very little use in the investment banking business." 890 P.2d at 207.

¶ 30 So too here. When considered in light of the holding of *Dougherty*, subsection 7.4 is clear and unequivocal about the necessity of specific appropriations for "payment of any nature" in future fiscal years under "any provision of the [ASA]." And, as in *Dougherty*, because the Center did not insist that the District irrevocably pledge funds or hold a vote before entering into the ASA, there was "a distinct possibility" that the District might choose not to continue making appropriations for its entire anticipated term. *Id.* The Center nonetheless agreed to the ASA even though, due to the contingencies in subsection 7.4, it "surrendered all of the remedies it might otherwise have against the [District] which could

in any way compel the [District] to perform in future fiscal years or respond in damages." *Id.* The courts will not interfere with sophisticated parties' bargained-for agreements. *Wenner Petroleum Corp. v. Mitsui & Co. (U.S.A.)*, 748 P.2d 356, 357 (Colo. App. 1987).

¶ 31 We are not persuaded otherwise by the footnote in *City of Golden*, 138 P.3d at 295 n.4, in which the supreme court wrote that *Dougherty* "does not stand for the proposition that agreements subject to annual appropriations are unenforceable beyond one year." The agreements in *City of Golden* did not have a contingency clause. "On the contrary, the language of the Agreements contemplate[d] that the Developers could continue to 'earn back' reimbursements during the life of the contract, *whether or not appropriation is made in any one year*." *Id.* (emphasis added). This provision stands in sharp contrast to the ASA, which explicitly makes payments — including those that might become due under the acceleration clause — contingent on sufficient annual appropriations.

2. Recovery for the Fiscal Year of the Alleged Breach

¶ 32 Our determination that subsection 7.4 applies to payments that would be due under the acceleration clause is dispositive only

of those obligations for which the District has not and will not make appropriations. For fiscal years after 2021, it is undisputed that no such appropriations will occur. But because the agreement was terminated midway through fiscal year 2021, the status of any obligations arising during that year is less certain, and we conclude that such uncertainty should have precluded entry of judgment as a matter of law with respect to any payments for fiscal year 2021 that the District never made.

¶ 33 The District attached to its motion in limine a declaration from the District's board chair stating that the District had never "irrevocably allocated in 2018 or at any time since then [funds] for payment of future year obligations," and that, after the District terminated the ASA in June 2021, the board had no intention of appropriating any additional funds related to the ASA.

¶ 34 This declaration does not speak to whether the District appropriated funds to make all payments otherwise due to the Center during fiscal year 2021, and other parts of the record suggest that there were at least some such appropriations. For example, the hyperbaric chambers and the Center are referenced in the District's fiscal year 2021 budget request, and the District made

payments to the Center during the first several months of 2021, and did so even after it had ceased submitting Medicare claims for treatments at the Center. Given this history, we disagree with the trial court's apparent conclusion that there were no issues of material fact concerning appropriations for fiscal year 2021. Entry of judgment as a matter of law was therefore inappropriate. *See Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 13. On remand, the trial court should determine the extent to which the District allocated funds to pay what it anticipated owing the Center for the 2021 fiscal year. If funds were appropriated for fiscal year 2021, and the District did not pay certain of those funds to the Center, the court should determine whether the Center may recover them.[5]

[5] We do not address whether the trial court should have granted the Center's motion for summary judgment with respect to payments allegedly owed during the latter half of 2021 because the court's order denying summary judgment was not final and appealable. *See, e.g.*, *Ball Aerospace & Techs. Corp. v. City of Boulder*, 2012 COA 153, ¶ 9 ("In general, a denial of summary judgment is not appealable because it is not a final order.").

III. Supplemental Authorities

¶ 35 C.A.R. 28(i) states that, "[i]f pertinent and significant new authority, including legislation, comes to a party's attention after the party's brief has been filed, a party may promptly advise the court by giving notice, with a copy to all parties." The rule also outlines the required structure for a notice of supplemental authority: "The notice must set forth the citation and state, without argument, the reason for the supplemental citation, referring either to the page of the brief or to a point argued orally. The body of the notice must not exceed 350 words." *Id.*

¶ 36 "[T]he purpose of the rule is to provide counsel with an opportunity to bring to the attention of the court new authority, not available when briefs were submitted." *Glover v. Innis*, 252 P.3d 1204, 1212 (Colo. App. 2011). The rule does not serve as "an open invitation to counsel to conduct additional research after the close of briefing and then present the fruits of such research to the court on the eve of argument." *Id.*

¶ 37 In the week before oral arguments, counsel for both sides submitted a flurry of filings under C.A.R. 28(i). As we explain below, neither the parties' notices themselves nor the responses to

those notices complied with the rule. Accordingly, we strike the notices, the responses, and attachments, and caution counsel that, in the future, any citation to supplemental authority that does not comply with C.A.R. 28(i) "may result in sanctions, including payment of costs." *Glover*, 252 P.3d at 1212.

¶ 38 The District kicked off the exchange by submitting a copy of Senate Bill 23-298, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023), which allows for "collaborative arrangements" between rural hospitals "to improve quality, increase access, and reduce costs of care to the communities they serve." § 25.5-1-1001(1)(a)(V), C.R.S. 2023; *see* Ch. 343, sec. 1, § 25.5-1-1001, 2023 Colo. Sess. Laws. 2053. Senate Bill 23-209 was not "new" because the governor had signed it on June 3, 2023 — more than two months before the District filed its answer brief. Nor was it "pertinent and significant." To the contrary, as the District acknowledged in its C.A.R. 28(i) notice, "this legislation does not address the substantive issues in this case." The notice was therefore improper under the rule.

¶ 39 Not to be outdone, the Center submitted its own notice of supplemental authority, attaching an unpublished order denying a motion for summary judgment issued by a federal district court in a

TABOR-related case. *City of Fort Collins v. Open Int'l, LLC*, Civ. A. No. 21-cv-02063, 2023 WL 3585214, at *11-12 (D. Colo. May 22, 2023). This authority was not "new," having been issued weeks before the Center filed its opening brief, and we struggle to see how it could be "pertinent and significant" given that it was an unpublished interlocutory order interpreting contractual language that is distinguishable from the ASA and was issued by a court whose decisions do not bind us. Therefore, the Center's notice was also improper.

¶ 40 That brings us to the parties' responses. C.A.R. 28(i) permits a response to a notice of supplemental authority but provides that the response must be "similarly limited" to the notice itself — meaning that it must comply with the 350-word limit and may not contain argument. We recognize the dilemma that this can create; after all, what is the point of a response if it may not include argument?[6] That said, the parties in this case could have walked

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[6] Uncertainty about what constitutes "argument" and what does not prompted a 2002 amendment to Fed. R. App. P. 28(j), which previously required parties to submit supplemental authorities "without argument," but now "permits parties to decide for themselves what they wish to say about supplemental authorities," so long as they comply with the rule's word limit. Fed. R. App. P.

that narrow line by focusing their responses on the untimeliness and impertinence of the notices. The Center's response did that, at least in part, by pointing out that the "background context" that the submission of Senate Bill 23-298 was supposed to provide had no apparent connection to the issues presented on appeal. The District's response, however, strayed further from the rule by attempting to distinguish the federal summary judgment order submitted by the Center from the circumstances in this case and even attaching copies of the underlying contract as support for its arguments. However flexible the rule may be, it does not allow supplementation of the record via attachments to a response.

¶ 41 Accordingly, on our own motion, we strike the parties' notices of supplemental authorities, responses, and attachments thereto.

IV. Disposition

¶ 42 We affirm the trial court's entry of judgment to the extent that it precludes the Center from recovering payments due under the acceleration clause corresponding to years following fiscal year

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28 advisory committee's note to 2002 amendments. The current version of C.A.R. 28(i) tracks the federal rule's 350-word limit, but it still prohibits notices of supplemental authority filed under the rule — and any responses — from containing "argument."

2021. We reverse the trial court's entry of judgment to the extent that it precludes the Center from recovering unpaid sums that the Center claims correspond to fiscal year 2021, and we remand that portion of this matter for further proceedings consistent with this opinion.

JUDGE TOW and JUDGE LIPINSKY concur.