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Colorado Court of Appeals no. 2015CA1505 Published opinion, 2016COA131 Judges Taubman (author), Freyre (concurring) and Dailey (specially concurring)	
District Court, City and County of Denver, Case no. 2015CV32088, Judge Morris Hoffman	
Plaintiffs / Appellants /Petitioners: KEITH LOVE AND SHANNON LOVE, v. Defendants / Appellees / Respondents: MARK KLOSKY AND CAROLE BISHOP.	▲ COURT USE ONLY ▲
Attorneys for Plaintiffs / Petitioners: William R. Meyer, #34012 Bennett L. Cohen #26511 POLSINELLI PC 1401 Lawrence Street, Suite 2300 Denver, CO 80202 Phone Number: (303) 572-9300 Email: bcohen@polsinelli.com	Case No. 2016 SC 815

LOVES' OPENING BRIEF

I certify that this brief satisfies the requirements of C.A.R. 28, 32 and 57. It uses 7,968 of the 9,500 words permitted by C.A.R. 28(8).

s/ Bennett L. Cohen

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I. STATEMENT OF THE ISSUE

Whether this court should overrule its decision in *Rhodig v. Keck*, 421 P.2d 729 (Colo. 1966)? (as reframed by the Court)

II. STATEMENT OF THE CASE

A. Procedural posture

The Loves filed this lawsuit to enjoin their neighbors, Klosky and Bishop (the Kloskys), from cutting down a healthy, mature, 70-foot-tall catalpa tree whose nearly five-foot trunk straddles their mutual property line. R.CF 9.[1] The trial court entered a stipulated TRO, R.CF 36; and set a preliminary injunction that the parties agreed to treat as a trial on merits, per C.R.C.P. 65(a)(2). The parties returned to the trial court a week later to deliver closing arguments.

After closing arguments, the trial court delivered a detailed bench ruling instead of a written ruling. The trial court explained that it wanted to save the boundary tree. But since the trunk was mostly on

[1] All citations to the appellate record are to the PDF page number of the Court File, which contains the transcript of closing arguments from the preliminary injunction hearing and the trial court's detailed bench ruling.

the Kloskys' property, the controlling Colorado Supreme Court case of *Rhodig v. Keck*, 421 P.2d 729 (Colo. 1966), appeared to give the Kloskys sole ownership of the tree, and allowed them to chop it down. R.CF 209, transcript 49:16-18; R.CF 100 (trial court order denying preliminary injunction). The trial court stayed its order pending all appeals, so the tree would not be cut down while it might still be saved by an appellate court. R.CF 109.

The Loves filed their notice of appeal, R.CF 125, and sought C.A.R. 50 certiorari before judgment in the Colorado Supreme Court. This Court declined to grant certiorari before judgment, so the appeal proceeded in ordinary course. Like the trial court, the Court of Appeals held that it was bound by *Rhodig*, and urged this Court to reconsider that precedent. 2016COA131 at ¶¶ 27-30. This Court granted certiorari to do so.

B. Statement of facts

The Loves and Kloskys own adjacent lots in the Denver neighborhood of Washington Park. Straddling their mutual property line is a healthy, mature, 70-foot-tall catalpa tree.

"Catalpa trees are deciduous trees with large, heart-shaped leaves. In the spring, they produce large white or yellow flowers. In the fall, they bear long fruits that resemble slender bean pods." 2016COA131 ¶5. The tree is seventy to ninety years old. Neither party planted it. The tree was growing and its trunk straddled the property line when the Kloskys purchased their home in 1986. *Id.* ¶6; R.CF 182, transcript at 22:1-12; R.CF 198, transcript at 38:16-20; R.CF 203, transcript at 43:15-20.[2] The Loves purchased the adjacent property in 2005. They built their home in Washington Park in part because of the numerous mature trees in that neighborhood that provide "shade, beauty, and comfort." 2016COA131 ¶7; R.CF 182 transcript at 22:13-17.

[2] Before the dispute went to court, Mr. Klosky maintained that the tree was a sapling and entirely on the Kloskys' side of the property line when they first rented or purchased the property in 1985. R.CF 152 ¶3. The trial court expressly rejected this position as incredible, and noted that Mr. Klosky admitted at the preliminary injunction hearing that the tree predated the Kloskys' ownership. R.CF 198, transcript at 38:6-22 ("[O]ne of the reasons I found the Loves more credible than at least Mr. Klosky is that Mr. Klosky said a lot of things in his letter [R.CF 152] that were not true. Such as this tree was a sapling when I moved in. We know from both arborists that was not true.")

Both parties' surveyors determined that about a quarter of the five-foot trunk, at ground level, is on the Loves' side. R.CF 136-37 (surveys admitted into evidence at preliminary injunction hearing). The parties introduced photographs at the preliminary injunction hearing that show the tree in its full arboreal magnificence, and its precise location on the parties' property line. R.CF 138-49.[3]

1. Proceedings in the trial court

The evidence at the preliminary injunction hearing / trial regarding the tree generally was not disputed. R.CF 198-200, transcript at 38:22-40:25 (findings of fact), esp. 38:22-23 (bench ruling: "Let me talk about the facts. They are largely undisputed."). The trial court specifically found the tree's trunk at ground level is 76% on the Kloskys' property and 24% on the Loves' property; and the trial court inferred from this location that the tree started its growth on what is

[3] After collaborating with their neighbors, the Loves built a backyard fence with a 45 degree dog-ear at the lot corner to avoid harming the boundary tree or damaging the fence, as shown in the pictures.

now the Kloskys' property. R.CF 199-200, transcript at 39:19-21 and 40:18-25.

The trial court ruled from the bench that its decision was controlled by *Rhodig v. Keck*. As discussed in detail below, *Rhodig* appears (on first reading) to create a Colorado rule for boundary trees that is contrary to the prevailing common law rule. Under the mainstream common law rule, boundary trees are jointly owned. Under the typical reading of *Rhodig*, boundary trees belong exclusively to the owner of the land where tree started growing, unless the proponent of joint ownership proves more:

> In addition to proving it straddles the line, which the Plaintiffs have proven, the Plaintiff has to prove that the tree was jointly planted by the property owners or their predecessors, that it was jointly maintained, or that it was jointly treated as the boundary.

R.CF 201, transcript at 41:13-17 (reciting *Rhodig*'s apparent holding).

The trial court found that both parties cared for the tree (*e.g.* they both watered it), but struggled with whether this satisfied *Rhodig*'s "joint care" requirement. R.CF 203, transcript at 43:9-11 ("Another problem with … *Rhodig* … is what does joint mean?"). The trial court

decided as a matter of law that both parties watering the tree did not constitute "joint care" because they were acting without an express agreement or coordination:

> Watering the tree is … maintenance, but it's not joint maintenance. It's a little bit like tangoing. You're not doing the tango if you're each tangoing in your own homes. That's, that's something, but it's not the tango. That's my understanding of what joint maintenance means.

R.CF 205, transcript at 45:14-19.

The trial court remarked that it was "amazing" that *Rhodig* was still good law. R.CF 201, transcript at 41:18. But since it was (*Rhodig* has never been cited in Colorado until this case), the trial court regrettably concluded that it was compelled to allow the Kloskys free rein to cut down the tree. R.CF 201-09, transcript at 41-50; R.CF 100 (trial court order denying preliminary injunction). The trial court most clearly expressed its regret at having to follow the apparent rule of *Rhodig* toward the end of its bench ruling:

> [T]he law often requires me [to] do things I don't want to do. **If I was the emperor of Washington Park, I would, I would order this tree not cut down.** It's a beautiful tree, it's a great tree. But that's not my role. I'm not the emperor of Washington Park. I have to follow what I think the law is, and my conclusion is that the Loves have not met their

> burden of proof [under any of *Rhodig*'s three prongs],... so the temporary restraining order is dissolved . . .

R.CF 209-10, transcript at 49:17-50:3 (emphasis added). The trial court stayed its ruling so the tree would not be cut down during appeal. R.CF 109.[4]

2. Appeal

The Loves appealed. The Loves decided not to challenge any of the trial court's factual determinations, since they would be reviewed deferentially, but focused only on the legal rulings. Because the trial court's bench ruling contained an ample recitation of the undisputed facts, the Loves chose not to incur the expense of transcribing the testimony from the preliminary injunction hearing / trial.

On appeal, the Loves offered a deeper reading of *Rhodig* as hewing to the mainstream common law rule, but creating an exception for "encroaching" boundary trees – those deliberately planted on or near a property line that grow to straddle the property line. The Court of

[4] The Loves' primary goal here is to save the tree, not recover damages for its removal.

Appeals declined to consider this interpretation of the case because it was not advanced in the trial court. 2016COA131 ¶11.

Instead, the Court of Appeals read *Rhodig* as other courts have – as creating a minority rule for all boundary trees in Colorado. *Id.* ¶14. The Court of Appeals nonetheless noted several problems with *Rhodig*'s apparent analysis and holding, and noted the criticism the decision has engendered by other states' courts. The Court of Appeals urged this Court to take certiorari to revisit this area of Colorado law. *Id.* ¶¶19-30. The Court of Appeals also continued the stay, to protect the tree while the Loves sought (and obtained) certiorari review in this Court. *Id.* ¶31.

III. SUMMARY OF THE ARGUMENT

Rhodig is not a well-written opinion. On initial reading, it appears to create a minority rule for all Colorado boundary trees. A closer, more careful reading, however, shows that the *Rhodig* Court noted and accepted the mainstream common law rule of joint ownership for boundary trees, and intended only to create an exception for trees that were planted by trespass on neighboring property and then grow

back over the property line to become boundary trees. Unfortunately, no court (including the Colorado trial and intermediate appellate courts below) has read the decision this way.

This Court need not overrule *Rhodig*, but can instead clarify that Colorado follows the mainstream common law rule for general boundary tree situations, subject to the exception created by *Rhodig* for "trespass" trees. If, however, this Court reads *Rhodig* as announcing a rule that applies to all boundary trees, then this Court should overrule *Rhodig* and bring Colorado law in line with the better reasoned common law rule of joint ownership.

If the Court does not clarify or overrule *Rhodig* as requested, then it should address how the various exceptions for joint ownership announced in *Rhodig* operate. This case developed the issue of whether activity has to be concerted in order to be "joint," for purposes of *Rhodig*'s "joint care" requirement. This Court should hold that where, as here, both parties pursue the same course of conduct (watering the tree) for the same purpose (keeping the tree alive and healthy), there is

no further requirement that the parties have an express agreement or coordinate their conduct for it to constitute joint care.

Finally, because this case may present the last opportunity this Court will have to expound on the common law of boundary trees, the Loves offer additional observations that the Court may wish to consider so as announce a more complete and coherent common law rule that will not only resolve this case but provide sound guidance for other boundary tree situations.

IV. ARGUMENT

> *When you are attacking a town and the war drags on, you must not cut down the trees with your axes. You may eat the fruit, but do not cut down the trees. Are the trees your enemies, that you should attack them?*

Deuteronomy 20:19 (New Living Translation, 1996).

Ancient sources of law, like the above excerpt from Deuteronomy, recognize how trees merit special consideration and rules for their

protection. English common law sources as far back as Bracton (13th c.) recognize the rule of joint ownership for boundary trees.

Colorado's sole foray into this area of the common law is the unclear and likely misinterpreted decision of *Rhodig v. Keck*, 421 P.2d 729 (Colo. 1966). Given that no other boundary tree dispute case is likely to be litigated to this Court again, due to litigation costs, this case presents what may well be the last opportunity this Court will have to clarify and settle Colorado's law governing boundary trees.

A. This Court should clarify *Rhodig* as announcing an exception to the mainstream common law rule of joint ownership, which applies here.

1. Standard of review and preservation.

The lower courts' legal analysis in interpreting Colorado Supreme Court precedent presents a legal issue that this Court reviews *de novo*. *E.g. Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226, 1232 (Colo. 2011).

The argument presented here regarding how to interpret *Rhodig* was developed in the Court of Appeals. *Rhodig* is like an autostereogram – a design that shows one pattern on an initial, casual

viewing, but with a deeper and more intense focus reveals an entirely different image. Courts discussing *Rhodig* (including the lower courts here) have uniformly interpreted *Rhodig* as announcing a minority rule for Colorado that applies to all boundary trees. But as this case moved up the judicial hierarchy, counsel further reviewed *Rhodig* and concluded that this apparent holding is not its actual holding. The Court of Appeals declined to consider this deeper interpretation of *Rhodig* because it was not raised early enough in the litigation. 2016COA131 ¶11.

The rules of appellate preservation and waiver do not prevent a party from offering new authority or a different interpretation of a controlling case on appeal. *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 550–51 (Colo. 2006) ("Appellate courts are … not limited to the constructions of controlling law relied upon by the lower courts or offered by the parties…. [A] reviewing court cannot be constrained by the failure of a party to specifically identify [a] misreading [of controlling law] and bring it to the trial court's attention.") The Loves' argument regarding the correct way to interpret *Rhodig* argument was

therefore adequately raised, and the Court of Appeals should not have treated the argument as having been waived.

In any event, this Court can overlook any ostensible waiver in order to address important legal issues. *Roberts*, 144 P.3d at 550 (Colorado appellate courts have "discretion to notice any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal."); *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1008-09 (Colo. 2008) (appellate courts may consider an unpreserved issue on appeal where the issue is one of law that is reviewed *de novo* and does not require additional factual development); C.A.R. 1(d) ("the court in its discretion may notice any error appearing of record"). Accordingly, any concerns about preservation should not and need not be an impediment to clarifying or correcting Colorado law here. Indeed, this Court would not have taken certiorari otherwise.

2. The common law of boundary trees, and *Rhodig*'s "apparent" holding

The mainstream common-law rule for boundary trees is ancient and well-established: a tree whose trunk straddles a common boundary is treated as property owned by both landowners as tenants in common,

so that neither owner can chop down the tree without the other's consent. *E.g. Weisel v. Hobbs*, 294 N.W. 448, 451 (Neb. 1940) ("A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other."), quoting *Griffin v. Bixby*, 12 N.H. 454, 457-58 (1851), reviewing early English cases such as *Waterman v. Soper*, 1 Ld. Raym. 737 (Kings Bench 1697-98) (attached); *Rhodig*, 421 P.2d at 731 (Frantz. J. dissenting, describing *Waterman* as stating the "early English common law" rule of joint ownership); *Dubois v. Beaver*, 25 N.Y. 123, 126-28 (1862) (citing numerous old English cases).

This rule is also clearly stated in treatises:

> **II. TREES ON OR NEAR BOUNDARY LINE – 1. Ownership.** A tree is wholly the property of him upon whose land it stands, notwithstanding that the root extend into, or the branches overhand, the land of an adjoining owner. **If the tree stands directly on the boundary line**, however, and grows partly on the soil of each, **it is the property of both as tenants in common**, and if one of them cuts it down or uses it, **the other may** maintain trespass therefore, or **enjoin the cutting**.

Charles F. Williams, ed., *The American and English Encyclopaedia of Law*, Vol. XXVI, Trees (Edward Thompson Co. 1894) (emphases added,

citations omitted). *See also* 1 Am.Jur.2d *Adjoining Landowners* §§17-18; 2 Tiffany Real Property § 603; 2016COA131 ¶¶22-26 (survey of state law).

Legal scholar Roscoe Pound has traced the common law rule of joint ownership for boundary trees law back through the earliest common law treatise by Bracton (13th c.), to Roman law, and to Classical Greek philosophy. Pound, *Juristic Science and Law*, 31 Harv.L.Rev. 1047, 1049-53 (June 1918), citing Bracton, "On the Laws and Customs of England," Vol. II pp. 46-47, available at bracton.law.harvard.edu.

Colorado appears to reject this ancient common law rule due to this Court's cryptic holding in the 1966 case of *Rhodig*. Rhodig and Keck were adjoining property owners. Rhodig planted several trees on his neighbor Keck's property near the lot line. 421 P.2d at 730. When Keck decided to install a boundary fence, his survey revealed that one of the four trees was wholly on his (Keck's) property, and the other three trees had grown back across the property line but were mostly on Keck's property. *Id.* The dispute arose because Rhodig – an apparent trespasser since he planted trees on his neighbor's property without

consent – actually sued Keck for damages for cutting down these trees to install the fence.

Rhodig invoked the common law rule that trees straddling a boundary are common property that cannot be cut down unilaterally. *Id.* This Court first noted that Keck could certainly cut down the one tree that was wholly on his property without liability to Rhodig. *Id.* With respect to the three other trees, this Court's analysis is far less clear. This Court discussed how the three boundary trees constituted a trespass, because Rhodig had planted them entirely on Keck's property without consent:

> In the instant case the trees in question, when planted, must necessarily have been wholly upon Keck's property and no agreement or consent was shown concerning ownership.

Id. This Court therefore held that the case was "not a true boundary line case," but a case about "remov[al of an] encroachment." *Id.* at 730, 731.

But if this Court intended to acknowledge the mainstream common law rule of joint ownership for ordinary boundary trees and

announce a "trespass tree" exception to that rule, it failed to express that holding with any clarity. This Court held:

> **Apparently a test** in determining whether trees are boundary line subjects entitled to protection is whether they were planted jointly, or jointly cared for, or were treated as a partition between adjoining properties. *Weisel v. Hobbs*, 138 Neb. 656, 294 N.W. 448 (1940); *Hancock v. Fitzpatrick,* 183 Mo.App. 220, 170 S.W. 408 (1914).

421 P.2d at 731 (emphases added). This cryptic sentence lies at the heart of the problems in this case.

The *Rhodig* Court never expressly rejected the majority rule of joint ownership for boundary trees – the Court noted the majority rule, but distinguished it as "not in point" because "this is not a true boundary line case" but an "encroachment" case. *Id.* at 730-31. At the same time, this Court did not expressly state that it was announcing an exception to the ancient common law rule for boundary trees planted via trespass. Instead, this Court announced "a" test (not "the" test) that "apparently" could be applied to the situation before it – without making clear whether it was stating a rule applicable to all boundary trees, or just boundary trees that had been planted via trespass, or

perhaps any trees that had encroached over the property line during the present landowners' tenure. *Id.* at 731.

Two justices dissented, arguing that the common law rule of joint ownership should apply regardless of whether Rhodig had trespassed in planting the trees. *Id.* As a result, the dissent does not help clarify the majority's holding because it does not indicate whether the dissenters viewed the majority as creating a rule for all boundary trees, or just for "trespass" trees.

As the Court of Appeals explained, the test that *Rhodig* adopted came primarily from a Nebraska case that addressed ownership of a **non**-boundary tree. In *Weisel v. Hobbs*, like here, a landowner sued to enjoin his neighbor from cutting down an apparent boundary tree. 294 N.W. at 449. Based on surveys, the trial court determined that the tree was not a boundary tree, but was wholly on the property of the party who wanted to cut it down. *Id.* at 450-51. On appeal, the Nebraska Supreme Court accepted the trial court's factual determination that the tree was wholly on one side; but held that the tree should nonetheless be treated as common property because years earlier the neighbors had

heroically rescued the tree from an arboreal crisis using cables, turnbuckles, boards and car tires. *Id.* at 451. *Weisel* thus held that non-boundary trees could be subject to joint ownership, like boundary trees, based on evidence of extraordinary and coordinated joint care. *Id.* at 452.

In the *Hancock* case cited by *Rhodig*, the Missouri Supreme Court held that an agreement between property owners gave them co-ownership rights in some boundary trees; but the Missouri court did not discuss what the neighbors' rights in the boundary trees would have been in the absence of the agreement, under default common law rules. 170 S.W. at 409. *Hancock* is thus a contract case that followed the landowners' agreement regarding partition trees – it did not address or apply any common law property rule to determine ownership.

A close and careful reading of *Rhodig* thus reveals that the *Rhodig* Court did not intend to announce a general rule for all Colorado boundary trees. The *Rhodig* Court distinguished the general common law rule of joint ownership as "not in point" because the case before it was an "encroachment" case; and the *Rhodig* Court fashioned a rule

specifically for this encroachment situation, based primarily on a case that saw fit to find joint ownership of a non-boundary tree. *Rhodig* thus followed the classic common law process of creating a new legal category for "trespass" trees (*i.e.* trees that are planted over a boundary line via trespass and then become boundary trees when they grow back over the property line), and announcing a different legal rule for this new category. Not only does this interpretation of *Rhodig* best account for the opinion's actual language and facts, but it accounts for Rhodig's conduct as a trespasser with the ancient equitable maxim that no man should be permitted to benefit from his own wrong. *E.g. Toll v. McKenzie*, 299 P. 14, 17 (Colo. 1931) ("[N]o man may take advantage of his own wrong."); *Houston v. Walton,* 129 P. 263, 267 (Colo.App. 1912) ("No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.")

The *Rhodig* Court thus acknowledged the mainstream common law rule of joint ownership, but held that a "trespass" boundary tree should not be subject to this rule without some additional reason to recognize an ownership interest in the trespasser, such as joint planting

(which would show consent that negates the trespass), joint care (which shows acquiescence, as in *Weisel*), or treatment as a partition by agreement (which also shows acquiescence, as in *Hancock*).

Unfortunately, *Rhodig* was written in such a summary and unclear fashion that no court has interpreted the case this way. Every court examining *Rhodig* (including the trial court and Court of Appeals below) has held that it announces an extreme minority rule for all boundary trees in Colorado.

Only one other state has actually followed *Rhodig*'s rule as a general rule for boundary trees. *Holmberg v. Bergin*, 172 N.W.2d 739, 743 (Minn. 1969); 2016COA131 ¶22. *Holmberg* involved an encroaching but not trespassing boundary tree – the owners of one property planted the tree on their own land near the boundary line, and the tree eventually grew over the line to become a boundary tree. 172 N.W.2d at 741. The tree had also become a nuisance, with roots that destroyed a sidewalk and fence. *Id.* The Minnesota Supreme Court chose to follow *Rhodig* in large part because the tree was planted right at the property line, encroached over the line during the parties' ownership, and then

became a nuisance to the adjoining landowner. *Id.* at 744 ("[O]ne cannot exercise his right to plant a tree in such a manner as to invade the rights of adjoining landowners.") But *Holmberg* did not limit its adoption of the *Rhodig* rule to encroaching or nuisance trees, but rather followed *Rhodig* as a general rule for all boundary trees.[5]

Another case that follows *Rhodig*, but as an exception to the general common law rule, is *Garcia v. Sanchez*, 772 P.2d 1311 (N.M. 1989). *Garcia* acknowledged the general rule of joint ownership, but applied *Rhodig*'s rule for trees planted near the boundary line that grow to encroach over the property line during the parties' ownership. *Id.* at 1313-14.

No other cases follow *Rhodig*.[6] All other boundary tree cases from other jurisdictions follow the mainstream common law rule, and

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[5] This Minnesota case is also the first published boundary tree decision after *Rhodig*, so it was decided at a time when *Rhodig* was the most recent state supreme court decision on the subject.

[6] The other cases cited by the Court of Appeals as being in the *Rhodig* camp involve hedges or trees intentionally planted to demarcate a property line, act as a fence, or provide wood for fence posts, per the neighboring landowners' agreement. 2016COA131 ¶22. These cases do not reject the general common law rule of joint ownership for boundary

therefore have no need to call out or examine *Rhodig*. *E.g. Patterson v. Oye*, 333 N.W.2d 389, 391 (Neb. 1983).[7] The only two modern boundary tree cases that have engaged *Rhodig*'s analysis have expressly rejected its perceived holding, and criticized it as poorly reasoned. *Ridge v. Blaha*, 520 N.E.2d 980, 983 (Ill.App. 1988) (rejecting and criticizing *Rhodig* on facts similar to those at bar in favor of the mainstream common law rule); *Happy Bunch, LLC v. Grandview North, LLC*, 173 P.3d 959, 964-65 (Wash.App. 2007) ("*Rhodig*'s reasoning is not compelling..... [We reject *Rhodig* and] join the courts of a sister state" following the mainstream common law rule).

The Court of Appeals noted these criticisms of *Rhodig* in its published opinion. 2016COA131 ¶26. The Court of Appeals also undertook a broad survey of boundary tree law, which confirmed just

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trees, but are rather contract cases, like *Hancock*, where ownership is determined by the neighboring landowners' agreement rather than the rules of property law that would apply in the absence of an agreement.

[7] Some states, like California, have even codified the common law rule of joint ownership. *See* Cal. Civ. Code § 834 ("Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.").

how few jurisdictions depart from the mainstream common law rule. *Id.* ¶¶ 22-23.[8] The Court of Appeals also noted how *Rhodig* appears to have transposed a rule for non-boundary trees into a general rule for boundary trees in Colorado. *Id.* at ¶27.

3. This Court should clarify *Rhodig* as creating an exception to the common law rule, and confirm that Colorado applies the common law rule to ordinary boundary trees like the one at bar.

As discussed above, a close reading of *Rhodig* indicates that the *Rhodig* Court did not intend to announce a general rule for all boundary trees, but intended to announce an exception to the common law rule of joint ownership for trespass situations – where a landowner plants

[8] The Court of Appeals omitted the Nebraska case of *Patterson v. Oye*, *supra*, and the California statute in its tally of the far more numerous state decisions that follow the mainstream common law rule. A more accurate tally is: one state follows *Rhodig* as a general rule for boundary trees (Minnesota); one state "apparently" does (Colorado); one state (New Mexico) follows the general rule but applies *Rhodig* as an exception for trees that encroach the boundary line during the parties' ownership; and at least 23 states follow the mainstream common law rule of joint ownership for all boundary trees (adding Nebraska and California to the Court of Appeals' tally). As noted, cases that discuss parties' express agreements concerning ownership of boundary trees or hedges are not really boundary tree cases expounding a default rule of real property ownership, but are contract cases.

trees over the property line without consent (*i.e.* via trespass), and those trees grow back over the property line.

The catalpa tree at issue here is not a "trespass" tree. No one knows who planted the tree. From the current owners' perspective the tree has always been there, straddling the property line. It is a classic boundary tree, which the *Rhodig* Court probably intended would be subject to the mainstream common law rule of joint ownership, since the *Rhodig*'s holding, properly understood, is a rule for "trespass" trees (boundary trees planted via trespass) rather than all boundary trees.

Accordingly, this Court can resolve this case, and clarify Colorado law of boundary trees, by simply clarifying that *Rhodig* did not reject the general common law rule of joint ownership for boundary trees, but rather announced an exception to the common law rule for "trespass" trees. Such a holding would be perfectly consistent with *Rhodig*, which acknowledged the general rule and did not reject it, but rather distinguished it as "not in point" for the "encroachment" case before it. Indeed, by acknowledging the common law rule and not rejecting it, *Rhodig* implicitly adopted the common law rule for ordinary boundary

tree situations – *i.e.* trees that have always straddled the property line from the perspective of the current owners.

To the extent that this Court is hesitant to hold that *Rhodig* adopted the common law rule for ordinary boundary tree situations like this one, either expressly or by implication, then it should hold that the common law rule entered Colorado law via C.R.S. § 2-4-211, Colorado's reception statute that adopts the English common law as it existed prior to the fourth year of the reign of James I, or 1607. *See Kolkman v. People*, 300 P. 575, 582 (Colo. 1931) (determining the date of reception). As discussed above, the common law rule of joint ownership is ancient, and can be traced back to Bracton in the 13th century. The *Rhodig* dissent described the common law rule as "early English common law." *Rhodig*, 421 P.2d at 731 (Frantz. J. dissenting, emphasis added), citing *Waterman v. Soper*, 1 Ld. Raym. 737 (Kings Bench 1697-98) (attached). In addition to containing an excellent analysis of the common law rule, the New York case of *Dubois v. Beaver*, 25 N.Y. 123, 126-27 (1862) cites an anonymous case report from 1623 that states the ancient common

law rule. *Id.*, citing *Anon.*, 2 Roll., 255, attached with highlighting.[9] The common law rule was obviously well-established at that time, as evidenced by the fact that the anonymous case report simply states the rule in a single sentence, with no need for additional discussion. This anonymous and summary 1623 case report thus describes the common law as it existed at the time, and hence as it must have existed in 1607.[10] And if that is not an old enough source, there is always Bracton's 13th century treatise "On the Laws and Customs of England," which recognizes the rule of joint ownership. Bracton, Vol. II pp. 46-47, at bracton.law.harvard.edu. Thus, should this Court decide that *Rhodig*

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[9] This anonymous case report (a single sentence in old French describing the common law rule of joint ownership for boundary trees) appears in Sir Henry Rolle's reports of King's Bench cases with the heading "Mich. XX Jacobi in Banco Regis," indicating that the anonymous case was decided in the 20th year of the reign of James I, or 1623. Fluent French speakers at undersigned counsel's firm concur in the following translation: "*If a tree grows in a hedge that divides the land of A and B, and by its roots takes nourishment from the land of A and also B, they are tenants in common of that tree, so it is adjudged.*"

[10] Some later English cases like *Waterman v. Soper* (1697-98) also acknowledge the ancient common law rule, but focus more on ownership of trees with trunks on one side of the property line and whose roots extend over that line. *See Waterman*, attached; *Griffin v. Bixby*, 12 N.H. 454, 457-58 (1851) (discussing *Waterman*).

did not adopt the mainstream common law rule expressly or by implication, the rule would still be part of Colorado common law by operation of C.R.S. § 2-4-211. This ancient common law rule has never been rejected by any Colorado court – just distinguished in *Rhodig* as "not in point."

Applying this common law rule here resolves this case correctly, and as the lower courts desired to do, but could not because they thought *Rhodig*'s exception for trespass trees was a rule that applied to all boundary trees in Colorado. It is not. *Rhodig*'s rule applies only to trespass trees, and the mainstream common law rule of joint ownership applies to ordinary boundary trees. The instant catalpa tree is an ordinary boundary tree, because from the perspective of the current owners, it has always been there, straddling the property line. It is therefore jointly owned by the Loves and Kloskys as tenants in common, and the Kloskys can be enjoined from unilaterally cutting it down. This Court should confirm that *Rhodig* gives the trial court authority to save the tree, as that court wished to do.

B. If necessary, this Court should overrule *Rhodig*.

In the event that this Court declines to read *Rhodig* as creating an exception to the general common law rule, but instead as announcing a minority rule applicable to all Colorado boundary trees, then this Court should overrule *Rhodig*.

The mainstream common law rule of joint ownership is the better rule. It has withstood the test of time. It is easy to understand and apply. It avoids conflict between adjoining property owners. It obviates what might be impossible fact issues in determining where a boundary tree started to grow, particularly for old trees.[11] It keeps property lines and property rights stable.[12] It is what people presume the law to be.[13]

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[11] Trees typically grow reasonably straight, but not always. It is possible that a tree with a trunk mostly located on one side of a property line might have started growing on the other side of the line. The only way to determine where the tree started growing is to cut it down at the base of the trunk and examine the growth rings.

[12] *Happy Bunch* criticized *Rhodig* as effectively creating a new theory of adverse possession. 173 P.3d at 965.

[13] Not only tree professionals but even lay people know the mainstream common law rule. Common law rules work best where they reflect existing social norms and understandings, so courts should have good reasons for departing from the common law mainstream.

And the majority rule is more protective of trees, since it requires both property owners' agreement to chop down a boundary tree.

Victor Merulo, an attorney and arborist who has authored a treatise on tree law, has criticized *Rhodig's* apparent rule in his "Tree and Neighbor Law" blog:

> **This rule, adopted in *Rhodig v. Keck*, creates no end of mischief**. Instead of a clear rule that parties can understand and accept without resort to lawyers and courts, *Rhodig* makes every boundary tree issue a legal taffy-pull, with the parties trying to spin alternate histories about who said what and who did what over the 50+ years of a tree's existence.

https://treeandneighborlawblog.com/2016/09/20/case-of-the-day-tuesday-september-20-2016/ (9/20/2016 blog entry on the Court of Appeals' decision in this case) (emphasis added);

http://www.treeandneighborlaw.com/About-Us_ep_7.html (web page with Mr. Merulo's vitae).

Rhodig's requirements for joint ownership derive from exceptional situations, like non-boundary trees and partition hedges. *Rhodig*, 421

E.g. Richard Posner, *Social Norms and the Law: An Economic Approach*, 87 American Economic Review no. 2, p. 368 (1997).

P.2d at 731; *Weisel*, *supra*. As discussed below, *Rhodig* might be properly applied in such situations, but should not be the general common law rule for ordinary boundary trees like the one at bar. 2016COA131 ¶22. This case presents a paradigm situation for applying the sound and mainstream common law rule of joint ownership, as the trial court in particular lamented it wished it could do, but was prevented by its reading of *Rhodig*.

Thus, to the extent this Court reads *Rhodig* as creating a minority rule for all Colorado boundary trees, this Court should overrule *Rhodig* and adopt the mainstream common law rule of joint ownership for ordinary boundary trees (trees that from the perspective of the current owners have always straddled the property), like the catalpa tree on the Loves' and Kloskys' border here.

C. If this Court does not clarify or overrule *Rhodig*, it should apply *Rhodig*'s "joint care" exception, which does not require concerted action.

The Loves submit that this Court should either interpret *Rhodig* correctly as a rule for trespass trees, or if necessary overrule the case and bring Colorado boundary tree law in line with mainstream common

law. If, however, this Court chooses to maintain *Rhodig*'s rule as a general rule that applies to all Colorado boundary trees, it should still reverse the lower courts because the Loves come within *Rhodig*'s exception for joint care.

Because the trial court interpreted *Rhodig* as stating a rule for all boundary trees, the Loves had to satisfy one of *Rhodig*'s three requirements for joint ownership: joint planting, joint care, or treatment as a partition. There was evidence that the parties treated the catalpa tree as partition, but the trial court decided that this evidence was not sufficient to find joint ownership. R.CF 205, transcript at 45:21-23. The Loves chose not to appeal that heavily fact-bound determination.

Instead, the Loves focused on the joint care prong of the *Rhodig* rule. The trial court found that each side watered, raked, trimmed branches, and cleaned up after the tree. R.CF 205, transcript at 45:1-15. The trial court did not view raking or cleaning up as constituting care. *Id.* The trial court also viewed the trimming branches as unilluminating because both parties would trim the branches of a non-boundary tree as well. *Id.* But the trial court acknowledged that

watering the tree constituted maintenance (*i.e.* care). *Id.* at 45:14-15. The trial court discussed how *Rhodig* offered no explanation or discussion of what "jointly cared for" means. R.CF 203, transcript at 43:9-14 ("Another problem … with Rhodig, … is what does joint mean?"). Because *Rhodig* cited the heroic tree-rescue case of *Weisel*, the trial court interpreted joint care as requiring the same sort of expressly coordinated care by neighbors:

> Watering the tree is not joint maintenance. **It's maintenance**, but it's not **joint** maintenance. It's a little bit like tangoing. You're not doing the tango if you're each tangoing in your own homes. That's, that's something, but it's not the tango. That's my understanding of what joint maintenance means.

R.CF 205, transcript at 45:14-19 (emphases added).

This holding was error because Colorado law recognizes that conduct can be "joint" even where it is not expressly coordinated, so long as both parties are undertaking actions in pursuit of the same goal. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1057 (Colo. 1995) (interpreting "joint" action as occurring where parties "pursue a common plan or design" without any express agreement).

The trial court's error here stemmed from its reference to the Nebraska case of *Weisel v. Hobbs* as the paradigm for interpreting what "joint care" should mean under *Rhodig*. *Weisel*, however, involved a non-boundary tree which the neighbors saved through amateur tree surgery, splitting the cost of their coordinated efforts. The trial court held, based on the example of *Weisel*, that *Rhodig* implicitly required a similar express coordination of extraordinary care to establish joint ownership. R.CF 205, transcript at 45:14-19.

Weisel, however, was an extreme case – both in terms of the type of care that the neighbors undertook (amateur tree surgery with cables, turnbuckles, etc.), and because the tree was not an actual boundary tree. The Nebraska Supreme Court held that the neighbors' actions in *Weisel* described the extraordinary level of joint care that could justify treating a non–boundary tree as joint property. 294 N.W. at 451-52. *Weisel* therefore does not suggest that less intense or less coordinated efforts could not satisfy a joint care standard when applied to a true boundary tree. *Rhodig* sheds no additional light because it provides no

guidance as to what "joint care" requires. R.CF 203, transcript at 43:9-14 ("Another problem … with Rhodig, … is what does joint mean?").

The Loves submit that the most appropriate interpretation of "joint care" in the context of a true boundary tree would permit joint care to be found when neighbors do what they ordinarily and typically do for boundary trees: each does his or her part to further the common goal of maintaining the boundary tree, regardless of whether they have an express agreement, or coordinate their efforts. This Court has interpreted joint conduct to include such non-coordinated conduct. *Heiserman*, 898 P.2d at 1057 ("joint" action occurs where parties "pursue a common plan or design" without any express agreement). *Heiserman*, rather than the Nebraska case of *Weisel*, properly controls this Court's interpretation of joint care here.

Interpreting "joint care" consistently with *Heiserman* has the additional virtue of being more reasonable and contextual. In most situations, neighbors have no reason to coordinate or even discuss their simultaneous care for a boundary tree unless a dispute or crisis arises. Where, like here, adjoining landowners can successfully care for a

boundary tree by watering, raking, and pruning, then there is no need to expressly discuss who owns the tree, who is responsible for its maintenance, discuss a watering schedule, etc.

Heiserman's understanding of "joint" should be properly applied here to permit joint care to be found on the record evidence that both the Loves and Kloskys cared for the tree, without any additional requirement that they expressly coordinated their care, or agreed to split the costs of care. Accordingly, if this Court does not clarify or overrule *Rhodig* as the Loves urge, it should provide the guidance as to the meaning of "joint care" that the trial court lacked. Per the controlling law of *Heiserman*, the catalpa tree here is jointly owned under the *Rhodig*'s joint care prong. It is enough that both the Kloskys and Loves watered the catalpa tree, as the trial court found. R.CF 205, transcript at 45:14-19. There is no additional requirement that they have discussed and agreed upon a watering schedule.

D. The Court may wish to take this opportunity to provide further guidance on Colorado boundary tree law.

As this Court appreciates (and discussed in the certiorari briefing), this may well be the last boundary tree lawsuit that will ever

reach this Court. Indeed, given the costs of litigation, it is remarkable that a boundary tree case should have been filed at all in the 21st century, let alone litigated all the way to this Court. This Court may therefore wish to go beyond a narrow opinion and provide more guidance on Colorado boundary tree law. The Loves offer additional observations and analysis for the Court's consideration.

The caselaw identifies two types of encroaching trees:

- Trees that are intentionally planted over the property line on a neighbor's land, without consent, and grow back over the property line to become boundary trees (the "trespass tree" situation in *Rhodig*); and
- the presumably more common situation where trees are planted close to the edge of one's own property, and grow over the property line to become a boundary trees during the present owners' tenure (the situation in *Garcia v. Sanchez* and *Holmberg v. Bergin*).

Both situations involve some degree of imposition on a neighbor's property rights. *Holmberg*, 172 N.W.2d at 744 ("[O]ne cannot exercise his right to plant a tree in such a manner as to invade the rights of adjoining landowners.") Both situations therefore involve conduct that is wrongful or at least negligent, and can merit application of the

equitable maxim that a person should not be permitted to benefit from his own wrong. *Toll*, 299 P. at 17.

In these situations, it is reasonable for courts to apply an exception to the general rule of joint ownership by requiring some additional reason to recognize a property right in the trespasser or encroacher, such one of *Rhodig*'s requirements: joint planting, joint care, or an agreement to treat the boundary tree as a partition. Joint planting indicates that the location of the boundary tree is consensual, negating any trespass. Joint care indicates acquiescence to the trespass. Likewise, treating an encroaching boundary tree as a partition also indicates acquiescence.

The Loves submit that *Rhodig*'s rule is sound when applied (as the *Rhodig* Court likely intended) to encroaching trees, and it makes sense for this Court to retain *Rhodig*'s rule for those situations. *Accord Garcia*, *Holmberg*. Again, this is not the situation at bar. The Loves discuss encroaching tree scenarios only to assist the Court should it decide to issue a broad ruling, since this may be the last boundary tree dispute to come before this Court.

V. CONCLUSION

Judge Hoffman may not be the emperor of Washington Park, but this Court has plenary authority over Colorado common law. This Court should correct Colorado common law by clarifying that *Rhodig* did not announce a general rule for all boundary trees, but rather created an exception to the common law rule that was intended to apply to trespass trees. This Court should confirm that Colorado law follows the majority common law rule of joint ownership for ordinary boundary trees like the catalpa tree at bar, either through a clarification of *Rhodig*'s cryptic and misunderstood holding, or through the operation of C.R.S. § 2-4-211.

If this Court concludes that *Rhodig* did in fact create a rule that applies to all boundary trees, it should overrule *Rhodig* in favor of the better common law rule that has been adopted by the overwhelming majority of states.

If the Court holds that *Rhodig*'s rule applies to all boundary trees, then it should clarify the joint care prong of *Rhodig* to hold that where,

as here, neighbors both care for a boundary tree, their actions need not be expressly coordinated in order to constitute joint care.

Under all three approaches, the result is the same: a determination that Colorado law treats the catalpa tree at bar as jointly owned by the Loves and the Kloskys, so that the Kloskys may not chop it down without the Loves' consent.

While not necessary to resolve this case, the Court may also wish to provide guidance regarding the category of "encroaching" boundary trees recognized in *Rhodig*, given the unlikelihood of another boundary tree dispute ever making its way to this Court again. The Loves submit that the rule of *Rhodig* is sound when applied (as likely intended) only to those boundary trees that grow to straddle a property line because they were intentionally or negligently planted over, on, or unreasonably close to a property line.

The trial court made clear that it would have enjoined the Kloskys from cutting down the tree if *Rhodig* had permitted such a result. This Court should therefore remand this case to the Court of Appeals, with instructions to remand it to the trial court for further proceedings

consistent with this Court's opinion, which will presumably include the entry of an injunction against cutting down the catalpa tree without the consent of both neighbors.

Dated this 28th day of February, 2017.

Respectfully submitted,

POLSINELLI PC

s/ William R. Meyer
William R. Meyer
Bennett L. Cohen
Attorneys for Petitioners the Loves

CERTIFICATE OF SERVICE

I certify that on February 28, 2017, I served via ICCES a copy of the foregoing on:

Richard J. Gleason
The Overton Law Firm
165 S. Union Blvd., Suite 542
Lakewood, CO 80228
Rick.gleason@overtonlawfirm.com
Attorneys for Respondents the Kloskys

/s/ Polsinelli