

<p>SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>Appeal from District Court, Water Division No. 1 Case No. 2018CW3166 The Honorable James F. Hartmann</p>	<p>▲ COURT USE ONLY ▲</p>
<p>In the Case of:</p> <p>Plaintiffs: THE ESTATE OF ROBERT KINT GLOVER; FRIDAY LLC; and GERALD KIEFER</p> <p>v.</p> <p>Defendants: RESOURCE LAND HOLDINGS, LLC; SERRATOGA FALLS, LLC; JESSE MCDOWELL; KITCHEL LAKE DEVELOPMENT CORPORATION; KITCHEL LAKE PARTNERS LLC; JAMES RIGHEIMER; LEE LOWREY; and KENNETH MITCHELL</p>	<p>Supreme Court Case No:</p> <p>2020SA278</p>
<p>Attorneys for Appellant/Interested Party Gregory J. Cucarola: Michael T. McConnell, Atty. Reg. No. 10600 Robert W. Steinmetz, Atty. Reg. No. 34660 McConnell Van Pelt, LLC 4700 South Syracuse Street, Suite 200 Denver, CO 80237 (303) 480-0400 mmcconnell@mvp-legal.com rsteinmetz@mvp-legal.com</p>	
<p>INTERESTED PARTY GREGORY J. CUCAROLA'S NOTICE OF APPEAL</p>	

Pursuant to C.A.R. 3 and 4, Appellant/Interested Party Gregory J. Cucarola (Mr. Cucarola) files this Notice of Appeal, requesting this Court to review the district court's determination that the Defendants were entitled to an award of certain attorney fees incurred in the defense of certain claims, as follows:

I. Nature of the Case.

A. Statement of Controversy.

This matter stems from the Parties' inability to informally resolve their disagreements regarding the Plaintiffs' prescriptive easement rights as compared to the Defendants' desires to develop their servient real estate interests.

The Parties' disputes were tried to the Court from February 10, 2020 to February 19, 2020. This Court found in favor of the Plaintiffs' prescriptive easement rights and adopted the Defendants' plans for modification of those rights pursuant to *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001). This Court also found in Defendants' favor on Plaintiffs' civil claims pursuant to purported ancillary jurisdiction. At the conclusion of trial, this Court considered and immediately ruled upon the oral request by Defendants that they be awarded certain attorney fees pursuant to C.R.S. §13-17-102.

B. Order Being Appealed and Basis for Jurisdiction

On March 24, 2020, the district court signed its "Ruling and Judgment of the

Court” (March 24, 2020 Judgment). On June 23, 2020, the district court issued its “Order re: Mr. Cucarola’s Motion for Relief Under Rule 59, C.R.C.P” (June 23, 2020 Order). Mr. Cucarola appeals the March 24, 2020 Judgment and the June 23, 2020 Order. Jurisdiction is proper in this Court pursuant to C.R.S. § 13-4-102(1)(d) and C.A.R. 1(a)(2) and (e).

C. Whether the Order Resolved All Issues.

The March 24, 2020 Judgment resolved the disputes between the Parties and determined the Defendants’ entitlement to an award of attorney fees pursuant to C.R.S. §13-17-102 (Fees Award). The amount of the Fees Award and Defendants Bills of Costs are presently unresolved.

D. Date Order was Entered.

March 24, 2020 and June 23, 2020.

E. Motions for Post Trial Relief.

On April 21, 2020, Mr. Cucarola filed his timely Motion for Reconsideration and Requests for Opportunities to Brief and Be Heard Re: Necessity of and Responsibility For Fees Award (Mr. Cucarola’s Rule 59 Motion). The same day, the Plaintiffs filed their timely Motion for Post-Trial Relief pursuant to C.R.C.P. 59 (Plaintiffs’ Rule 59 Motion) and their Motion for Relief from Judgment Pursuant to C.R.C.P. 60(b)(3).

On June 23, 2020, the district court denied Mr. Cucarola's Motion for Reconsideration and Plaintiffs' Rule 59 Motion.

F. Extension to File Notice of Appeal.

No extension to file a Notice of Appeal was granted.

II. Advisory Listing of the Issues to be Raised on Appeal.

Whether the water court had jurisdiction for and/or erred in its determination that the Defendants were entitled to an award of attorney fees jointly against Plaintiffs and Mr. Cucarola because "Defendants were called upon to spend time and money on claims that lacked substantial justification and were frivolous, vexatious, and litigious," where, *inter alia*: (1) Mr. Cucarola zealously represented his clients; (2) Mr. Cucarola reasonably relied upon retained independent experts and his clients; (3) as to claims for, *inter alia*, trespass, trespass to water rights and private nuisance, Mr. Cucarola presented meritorious but unsuccessful claims, pursued creative legal theories and/or advocated for the extension or modification of existing law to protect his clients' rights; and (4) the district court granted an oral fees request at the close of evidence without due process and requisite findings.

III. Whether a Transcript is Necessary.

A trial transcript is necessary for this appeal, has been ordered and obtained.

IV. Whether the Order was Issued by a Magistrate.

No magistrates participated in the matter.

V. Counsel for the Parties.

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VI. Appendix.

The following district court orders are included in the Appendix to the Notice of Appeal:

1. March 24, 2020 Ruling and Judgment of the Court.
2. June 23, 2020 Order re: Mr. Cucarola's Motion for Relief Under Rule 59, C.R.C.P.

Respectfully submitted this 11th day of August, 2020.

McCONNELL VAN PELT, LLC

By: /s/ Michael T. McConnell
Michael T. McConnell, #10600
Robert W. Steinmetz, # 34660

ATTORNEYS FOR
APPELLANT/INTERESTED PARTY
GREGORY J. CUCAROLA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August, 2020, a true and correct copy of the foregoing **NOTICE OF APPEAL** was electronically filed and served via US Mail and the Colorado Courts E-Filing on the following:

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Clerk of the Court
Weld County District Court
Water Division No. 1
901 9th Avenue
P.O. Box 2038
Greeley, CO 80632
(970) 475-2540

Division 1 Water Engineer
State of Colorado DWR Division 1

/s/ Lindsay Gonzales
Lindsay Gonzales, Legal Assistant

In accordance with C.R.C.P. 121, § 1-26(7), the filing party maintains a printable copy of the foregoing with electronic signatures.

DATE FILED: August 13, 2020

GLOVER, et al. v. RESOURCE LAND HOLDINGS, LLC, et al.
District Court, Water Division No. 1, Case No. 2018CW3166

APPENDIX (1)

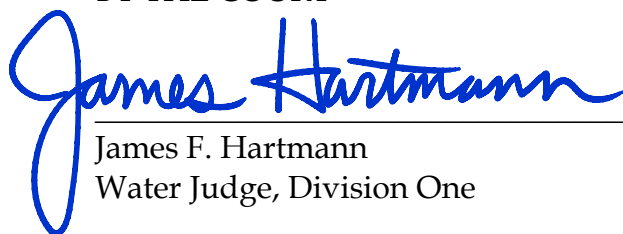
March 24, 2020 Ruling and Judgment of the Court

District Court, Weld County P.O. BOX 2038 Greeley, CO 80632 (970) 475- 2400	DATE FILED: March 24, 2020 8:41 AM CASE NUMBER: 2018CW3166
Plaintiffs: ROBERT KINT GLOVER, FRIDAY LLC, GERALD KIEFER v. Defendants: RESOURCE LAND HOLDINGS, L.L.C.; JESSE MCDOWELL; KITCHEL LAKE DEVELOPMENT CORPORATION; KITCHEL LAKE PARTNERS LLC; JAMES RIGHEIMER; LEE LOWREY; KENNETH MITCHELL; and Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff: SERRATOGA FALLS, LLC v. Third-Party Defendants: The TOWN OF TIMNATH; the MARJORIE R. KIEFER MARITAL TRUST; JANE RAELEEN DUNN; and the BLAIR A. KIEFER FAMILY TRUST.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2018CW3166 Courtroom: 1
RULING AND JUDGMENT OF THE COURT	

The Court's verbal ruling and judgment entered on February 19, 2020, transcribed and attached hereto, is adopted and made the final judgment of the Court.

Dated: March 24, 2020.

BY THE COURT


 James F. Hartmann
 Water Judge, Division One

1 DISTRICT COURT, WATER DIVISION I)
STATE OF COLORADO)
2 Court Address:)
901 9th Avenue)
3 Greeley, Colorado 80631)
(970) 475-2520)
4 _____)
Case No.: 2018CW3166)
5 _____)
6 Plaintiffs: ROBERT KINT GLOVER,)
FRIDAY LLC, GERALD KIEFER,)
7 vs.)
8 Defendants: RESOURCE LAND)
HOLDINGS, LLC; JESSE McDOWELL;)
9 KITCHEL LAKE DEVELOPMENT)
CORPORATION; KITCHEL LAKE PARTNERS)
10 LLC; JAMES RIGHEIMER; LEE LOWREY;)
KENNETH MITCHELL,)
11 and)
12 Defendant, Counterclaim Plaintiff)
and Third-Party Plaintiff:)
13 SERRATOGA FALLS, LLC,)
14 v.)
15 Third-Party Defendants:)
The TOWN OF TIMNATH; The MARJORIE)
16 R. KIEFER MARITAL TRUST; JANE)
RAELEEN DUNN; and the BLAIR A.)
17 KIEFER FAMILY TRUST.)

18 REPORTER'S TRANSCRIPT
19 EXCERPT OF TRIAL: RULING OF THE COURT
Wednesday, February 19, 2020
20 VOLUME VII

21 The above-entitled trial was conducted at
22 Courtroom 1, Weld County Courthouse, 901 9th Avenue,
Greeley, Colorado 80631, to begin at 9:00 a.m., on
23 Monday, February 10, 2020, and concluded, on
Wednesday, February 19, 2020, at 5:18 p.m., before the
24 Honorable James F. Hartmann Jr. The proceedings of
February 19, 2020, which began at 9:00 a.m., were
25 reported by Wendy McCaffrey, Registered Professional
and Notary Public.

1
2
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1 P R O C E E D I N G S

2 WHEREUPON, the following proceedings were
3 taken pursuant to the Colorado Rules of Civil
4 Procedure.

5 * * * * *

6 (Beginning of the Court's ruling at
7 4:30 p.m.)

8 THE COURT: Thank you, Mr. Cucarola. The
9 Court is prepared to enter a ruling at this time.
10 Counsel is correct that, at various times in the case,
11 the Court has described the issues in this case as
12 really very simple.

13 And the heart of the matter is that the
14 Plaintiffs, who own farmland on the lower end of the
15 lateral, want to maintain their water rights. They
16 want to ensure that the water continues to be delivered
17 through the ditch, to which they have rights to convey
18 that water after the Defendants engage in the
19 construction project.

20 In addition, they want to ensure that their
21 Paige Brothers Seep rights continue to accrue in the
22 Paige Brothers Reservoir.

23 That's really the heart of the whole case is
24 they want to make sure that, at least for the water
25 that is delivered initially through the Larimer and

1 Weld Canal across another's land is continuing in the
2 future and that they maintain their easement rights to
3 maintain the conveyance structure so that there is no
4 injury.

5 The parties have each all cited at various
6 times to the Roaring Fork Club case. And as was noted
7 by Mr. Cucarola, the water right itself is only a part
8 of the equation. It includes an easement. It includes
9 not only the decreed water right but any other benefits
10 that may stem from that structure, including water that
11 accrues naturally to the ditch. That's why we -- why I
12 asked a lot of the questions that I did.

13 The K-G Lateral is a concrete-lined ditch for
14 nearly its entire distance. There is a piped portion
15 at the lower section of the ditch, installed in the
16 early 1960s. We can debate the overarching reason why
17 the pipe was installed.

18 Be that as it may, when both Mr. Kiefer and
19 Mr. Glover acquired their property, it had long been in
20 place. Mr. Kiefer's family purchased their farm
21 beginning in 1975, Mr. Glover in 1991.

22 But that structure was there. And it was an
23 integral -- is an integral part of the overall delivery
24 system from the Larimer and Weld Canal to the
25 properties on the south side of Prospect.

1 The Paige Brothers rights were from 1911.
2 And quite clearly, those rights involve the
3 accumulation of tail waters from irrigation seepage,
4 et cetera, in this area that we've described as the
5 Paige Seep, or the wetland area, clearly defined in
6 everyone's mind, that begins on the north side of
7 Prospect, north of Paige Brothers Reservoir, and spills
8 through a tile or a pipe into the reservoir.

9 That decree is quite clear. It is defined
10 first by the amount of storage. That's the capacity of
11 the reservoir. And we won't quibble about this -- the
12 amount of silt that's acquired over the past 109 years.

13 But it's also equally clearly defined by the
14 structure, the reservoir, which has not been
15 significantly modified since the decree was entered.
16 It's defined by its -- its banks, and there's a
17 structure that allows the reservoir to spill when it
18 hits a certain capacity, and that water ends up in the
19 Timnath Reservoir.

20 And, once again, Plaintiffs want to ensure --
21 Plaintiff Mr. Kiefer; Mr. Glover doesn't divert water
22 from Paige Brothers -- but Mr. Kiefer wants to make
23 sure that he's allowed to use that water.

24 So turning again to the Roaring Fork
25 decision, it's not only the decreed amount of the water

1 that is diverted down the K-G Lateral from Larimer and
2 Weld. It's also the free river conditions.

3 What hasn't been touched upon by the
4 attorneys but is clearly known by them, I'm sure, is
5 that even when there's free river, you can't divert
6 unless you put it to beneficial use.

7 So even if water is available in addition to
8 what would be available under their various shares, if
9 they can't put that water into Lewis Lakes for
10 Mr. Kiefer or apply the water to direct flow irrigation
11 for Mr. Kiefer and Mr. Glover, it's academic. They
12 can't divert that water.

13 Free river only applies if you can divert it
14 for beneficial use. I say that because, even if the
15 Court considered a free river condition and diverting
16 at capacity for Mr. Glover and Mr. Kiefer's water
17 rights, we're talking about 6 CFS, to a maximum of 12.
18 And I think 12 is even stretching the limit here.

19 At a time when there was that much moving
20 through the K-G Lateral, the evidence convinces me that
21 there were water users on the north side of Prospect
22 who were also diverting water.

23 As Mr. Becker candidly said, There are times
24 I put too many wood gates and I caused some spillage, to
25 get the water to the field he was irrigating on the

1 north side of Prospect.

2 That's really the reality when it comes to
3 this type of a ditch configuration, where you have
4 users from the headgate all the way down to where
5 the -- where the lateral ends.

6 Mr. Glover and Mr. Kiefer could not divert
7 water at the 34 Headgate if they weren't going to put
8 it to beneficial use and simply allow that water to
9 head all the way down to Timnath. Nor would I expect
10 them to.

11 But, once again, that's an integral fact when
12 it comes to the operation of this ditch over time and
13 how much water was actually being conveyed.

14 Although I don't have a number as to how many
15 shares equates to a certain CFS, what I did hear,
16 again, convincingly, is that the velocity of the water
17 as it's being released from the Larimer and Weld Ditch
18 up at the headgate defines how much water the ditch
19 rider can let in.

20 That gate was never fully opened, from the
21 testimony I heard, because it would flood the ditch.
22 And that's what the ditch rider does. That's what the
23 water commissioner makes sure the ditch riders do, and
24 that's what the division engineer ultimately has to
25 maintain, is that there's not an expansion of the water

1 rights, there's not waste, there's water being placed
2 to beneficial use. All of those things are part of
3 that bundle of sticks that Mr. Cucarola referred to,
4 the comment that Justice Kourlis made.

5 I'm using it more along the lines of what
6 Justice Hobbs frequently placed in his opinions over
7 time in the water court.

8 What's -- what's equally clear to me is that
9 there was a significant level of difficulty in
10 communication over the course of time by people
11 involved in this case. When we talk about years
12 elapsing, that's true, that the discussions occurred
13 over the course of many years.

14 But what is also equally apparent is that,
15 during the time where the negotiations and the
16 communications hit an impasse or simply stopped, there
17 were still other activities that were going on by
18 Defendants.

19 They didn't have to wait for a final answer
20 on, will this be piped the entire length of the ditch?
21 to continue with their activities.

22 Mr. Sommermeyer, who was authorized to act on
23 behalf of Mr. Glover and Mr. Kiefer, was negotiating
24 the easement width. And it's important that we
25 separate the various components of these negotiations

1 because they don't depend upon one another completely.

2 The easement width is a critical piece for
3 setting up the lot lines. And that's where the
4 reliance was, is, here's what the easement is going to
5 look like, even if we haven't reached an agreement on
6 how the water is going to be moved from the Larimer and
7 Weld Canal down that mile-long ditch.

8 So while there was not an agreement whether
9 the ditch would be a 4-by-4 box culvert or remain an
10 open-air ditch with crossings or piped, it doesn't take
11 away from the fact that the Defendants did, in fact,
12 rely upon what that easement width would be.

13 If Mr. Sommermeyer had not provided over the
14 course of time these dimensions, you-all would have
15 been here much sooner because the Serratoga Group could
16 not have proceeded with Timnath to map out what the
17 plats were going to look like.

18 As I mentioned during my ruling on
19 Defendants' 41-1 -- or, I'm sorry; 41 -- I spilled over
20 into the criminal arena -- 41 -- Rule 41, and I did
21 that inadvertently, they moved that second plat to
22 take out the ditch from consideration so they could
23 move forward with their plan based upon the
24 representations of Mr. Sommermeyer.

25 Okay? Now, we know what the Plaintiffs are

1 requesting as far as the easement and what will
2 suffice. So now we're going to lay out a plat, and
3 we'll send it to Timnath.

4 Again, I'll reiterate, that wasn't an intent by
5 the Defendants to try and cloud the title to the
6 easement. The Defendants always knew there was going
7 to be an easement. Always. It's just a question of
8 how that would look.

9 It was the Defendants, through Mr. McDowell
10 and his correspondence, who first brought up, If we
11 can't reach an agreement, we're going to have to seek
12 court intervention under Roaring Fork after conferring
13 with Mr. Flanagan's firm or another attorney's office
14 who's currently representing him.

15 It was only after that was broached that the
16 Plaintiffs filed their lawsuit. And the initial
17 Complaint was much more straightforward. Its
18 declaratory relief, primarily, and injunctive relief --
19 and we want to make sure water rights are here -- and
20 they amended that Complaint and made very specific
21 allegations.

22 Frankly, when I read through these
23 allegations, I had in my mind something much different
24 than what was presented during the course of trial.
25 Much different.

1 And it required the Defendants to take a
2 different approach. If this had just been declaratory
3 relief and injunctive relief regarding the ditch and
4 the Paige Seep, Defendants would not have had to take
5 the actions that they did, at great expense.

6 The trespass, which has been dismissed by the
7 Court; the nuisance, the allegations of conspiracy, and
8 slander of title, acting with malice and intent, there
9 just simply was not any evidence to support that. And
10 yet the Defendant went to great lengths to defend that.

11 And it was known at the time of the filing
12 that the Plaintiffs didn't incur any costs. It was
13 repaired by Mr. Massey's clients at their expense.
14 There was no allegation -- I'm sorry -- no proof, even
15 though there was an allegation that, at the peak of
16 irrigation season, which, in the Court's mind, is there
17 are crops withering in the field because water can't
18 make its way down-ditch, there's no evidence that a
19 single drop of water that was called for by the tenant
20 farmers didn't make it down there to the fields.

21 This case was made so much more complex by
22 Plaintiffs' allegations, unsubstantiated allegations,
23 than it needed to be. It's a simple, simple case. How
24 is that water going to get from Point A to Point B in
25 the same quantity, quality, and timing, as it has

1 always been delivered in this existing structure?

2 Does the existing structure need to remain?

3 Or, under the restatement of property, have the
4 Defendants shown that there is another method that can
5 be employed that will not significantly lessen the
6 utility of the easement, increase the burden on the
7 owner of the easement in its use and enjoyment, or
8 frustrate the purpose for which the easement was
9 created?

10 With regard to the Paige Brothers Reservoir
11 and the Paige Seep, Defendants have shown that water
12 will continue to be delivered after the development
13 occurs. It hasn't been quantified.

14 When you put pavement down, it can actually
15 increase the amount of water that makes its way down to
16 the Paige, and that could cause injury too. I'm not
17 here to decide whether or not putting water in that
18 reservoir will cause the injury. It depends upon the
19 amount of water that's making its way to the structure
20 that diverts the water down.

21 What defendants have shown is that the
22 footprint of the Paige Seep will remain, and the Paige
23 Number 1 will remain.

24 There hasn't been any evidence shown that the
25 reservoir won't fill. And under the one-fill rule,

1 during the year, when the water can accumulate, unless
2 there's a refill right, you can use that amount of
3 water. And once it's gone, you have to wait till the
4 reservoir refills.

5 I'm not ordering that the engineers do any
6 type of administration on this reservoir. That's their
7 job already. The decree says what it says. And the
8 engineers are tasked with their responsibility. The
9 water court decrees the water right. The state
10 division engineers administer those water rights.

11 With regard to the Prospect Lateral, I've
12 already dismissed that claim, and, as Mr. Corona
13 stated, that construction of the ditch isn't necessary,
14 but having the ability to divert the water in that
15 location hasn't existed.

16 There has been a diversion -- it's not a
17 decreed diversion -- down the north side of Prospect,
18 as I said in my order dismissing the Prospect
19 Lateral.

20 And what was shown is that wasn't a Lewis
21 Lakes diversion. The water never made it to Lewis
22 Lakes from that pivot irrigation pond that was
23 installed.

24 So now, turning to the K-G Lateral. One,
25 again, I believe that it was only a matter of time

1 before Defendants were going to file their own request
2 for declaratory relief. Plaintiffs just beat them to
3 the courthouse doors by filing first.

4 And I'm convinced of that because of
5 Mr. McDowell's email. Just, I can't remember how many
6 months ahead of time, but it was a relatively short
7 period of time between events.

8 This is what we have to do if we don't get an
9 agreement because we're now at the point where
10 decisions have to be made about the K-G Lateral. We
11 could put it off for years while we're doing everything
12 else. But now, we are at the point where the
13 development and the widening of the road on Prospect,
14 we're at that point.

15 I believe that you all would have been here
16 eventually, whether it was the Defendants who filed or
17 the Plaintiffs who filed, regarding the Paige Brothers
18 water right and the K-G Lateral, and maybe the Prospect,
19 if Plaintiffs would have added that and had the
20 Defendants filed first.

21 So I -- I don't see that the litigation on
22 those issues would have been avoided. I think you
23 would have been here anyways because, as made clear by
24 the Roaring Fork Club case, the preference is that the
25 easement parties -- and I'll use the old-fashioned

1 terms of dominant and servient holders of the easement
2 rights -- the dominant estate and the servient estate
3 should try and work it out and agree. If they can't,
4 then the option is to come to court and not utilize
5 self-help.

6 The Defendants didn't use self-help. I asked
7 that question specifically. Did you attempt to pipe
8 this lateral without permission? And the answer was,
9 No. There was no self-help regarding the conveyance
10 structure. And there was reasonable reliance on the
11 width of the -- of the easement from Mr. Sommermeyer to
12 Mr. McDowell, et al.

13 With regard to the Plaintiffs' request that
14 it be an open-air ditch, I understand, it's worked for
15 a hundred years. There certainly are arguments in
16 support of keeping this ditch as a concrete-lined
17 structure.

18 Roaring Fork makes clear that the request of
19 both the dominant and the servient estate holder must
20 be reasonable. Or can't be unreasonable. I'll turn
21 that around. And because the Defendants didn't use
22 self-help, I'm not called upon to decide whether their
23 actions in self-help by actually moving the ditch were
24 reasonable under the equity principals.

25 Instead, I'm called upon to determine

1 whether, under the restatement of third -- restatement
2 third of property, that there can be changes made to
3 the location or the structure, considering whether or
4 not each of the three criteria have been met: Does it
5 lessen the utility of the easement? Does it increase
6 the burden on the owner of the easement or use of
7 enjoyment? Or frustrate the purpose for which the
8 easement was created?

9 I'm going to start with the last one first.
10 It doesn't frustrate the delivery of the water. The
11 Court has heard that the 24-inch pipe will deliver more
12 water than was historically delivered to Plaintiffs,
13 once again, because all of the water being diverted
14 down that pipeline will belong to Plaintiffs.

15 There won't be any diversions north of
16 Prospect through the lateral if the Court approves the
17 plan.

18 Does it lessen the utility of the easement?
19 Well, the easement was relied upon by -- the easement
20 width was relied upon by the Defendants, by
21 Mr. Sommermeyer. They actually increased that to
22 50 feet.

23 The utility of the easement, the width, will
24 not be significantly lessened. In fact, I think it
25 will be enhanced because it will be continuous from

1 north to south along the Prospect -- north of the
2 Prospect side of the ditch.

3 That really never existed in the past. There
4 were portions where you could access it on the east,
5 portions you could access it on the west, and some
6 portions where it was really tough.

7 And I'm sure there was a lot of walking with
8 shovels and walking and clearing out the sediment and
9 the debris that had accumulated in the ditch between
10 November 1st and March 31st, before irrigation water
11 started running on April 1st.

12 So the question, does it increase the burden
13 on the owner of the easement in the use and enjoyment?
14 What Serratoga, through the Metro District, have pledged
15 is that they will take care of the entire pipe.
16 They'll flush it. They'll remove the sediment. They
17 will ensure that it is maintained at their cost.

18 In essence, that's their pipeline. It's
19 conveying water for another person, but what they've
20 assured the Court is that they're going to be fully
21 responsible for that portion.

22 That doesn't increase the burden on that
23 stretch of the conveyance structure; it actually
24 lessens the burden. I think it's still important that
25 the owner of the water right, right now, Mr. Kitchel --

1 I'm sorry; Mr. Kiefer and Mr. Glover still have the
2 ability to traverse the entire portion to make sure the
3 thing's running right.

4 But they're not going to be financially
5 responsible. They don't have to get the specialized
6 vehicles with the forced water spray and the vacuum
7 tubes. That's going to be paid for by the Metro
8 District.

9 And that's something that they can share
10 through the fees to all the homeowners once this is
11 built out.

12 It's not unusual for developments such as
13 this to share those costs amongst many. They recognize
14 the cost. They are going to pay for that cost and go
15 forward.

16 The Court simply proposed making it an
17 open-air portion of the ditch on the lower portion to
18 avoid the possibility of injury if there is water that
19 accumulates.

20 And you don't find out that there is a crack
21 until you start to run water, come spring. And then it
22 may be too late. May not be, if that removal of the
23 water occurs every year, and there wasn't specific
24 information that it would be cleaned out in the fall,
25 after the water starts running, before we get a hard

1 freeze, or, at least, freeze to the level of the pipe.

2 It was simply a question that I had as to
3 whether this was an option. And that would make it
4 very easy to apportion the responsibilities of the
5 maintenance of the ditch.

6 The open-air concrete portion would be
7 maintained by Mr. Kiefer and Mr. Glover at the headgate
8 area and the lower portion, where it feeds to the pipe
9 that goes under Prospect. And the piped portion would
10 be maintained by the Metro District.

11 Seems like it might be a workable solution.
12 I'm not an engineer. I don't profess to be. And it
13 may not be completely workable. I just put that on the
14 table as a possible option.

15 What should be clear to everybody, given the
16 history, is that if there was a continued attempt by
17 the parties to divide the tasks, where one year it's
18 Mr. Glover and Mr. Kiefer who maintain the pipeline,
19 and the next year it's the Metro District, history has
20 shown that's not going to be a workable solution.

21 There has been too many things that have
22 occurred that have caused a divide between those
23 groups, which was another reason why I was proposing
24 having clear delineation of responsibilities.

25 And the fact that this lower portion of the

1 ditch, where it meets up with Prospect, isn't going to
2 be developed because of the topography and the drainage
3 may be a very suitable area to come up with alternative
4 plans.

5 Right now, it's piped. And the structure
6 that has been working actually works well enough to
7 push the water upgradient a little ways underneath the
8 Prospect Road.

9 So the Court further finds that it will not
10 increase the burden if Serratoga and Kitchel are
11 allowed to install the pipeline. The Court finds that
12 the Defendants have met their burden to show that there
13 will not be injury or a lessening of the utility of the
14 easement or frustrating the purpose for the easement if
15 they allow for the 50-foot easement and they pipe this
16 portion of the ditch.

17 With regard to the possibility of the Metro
18 District enjoying some immunity here, in that, if there
19 was a breach, it would fall upon the Plaintiffs, that's
20 why I have proposed that this pipeline is really on --
21 completely on the Serratoga property.

22 It's going to be their pipeline. They have
23 the obligation to maintain that as an easement in favor
24 of the Plaintiffs in this action. I cannot, of course,
25 comment on what might happen in the future. But if

1 Plaintiffs didn't maintain the concrete portion, and it
2 sits up higher, and there's a breach that occurs at
3 night while water's running, and now all the property
4 that is downgradient from the existing ditch gets
5 flooded, whose responsibility would that have been?
6 I'm not answering that question one way or the other.

7 So I don't think that the mere fact that the
8 Metro District could assert some type of limited
9 liability or immunity increases the burden on
10 Plaintiffs in this action.

11 The Court further finds that special damages
12 are not warranted in Plaintiffs' behalf. The Court is
13 further finding that Plaintiffs are not the prevailing
14 party. I'm not going to award attorneys' fees.

15 The Court will find that, for purposes of the
16 claims that were dismissed, that Defendants are
17 entitled to their attorneys' fees. I will grant leave
18 to file an invoice and affidavit of attorneys' fees.

19 If there is a request for hearing on the
20 reasonableness of these attorneys' fees, I will
21 schedule a hearing after setting a status conference.

22 It should have been apparent early on in this
23 case to Plaintiffs -- and that's a joint with the
24 Plaintiffs and Mr. Cucarola. I can count on one hand
25 with fingers left over how many times I've done this in

1 the 17 years I've been a judge. But I think this is a
2 case that warrants such action.

3 Defendants were called upon to spend time and
4 money on claims that lacked substantial justification
5 and were frivolous, vexatious, and litigious.

6 Mr. Corona and Mr. Cucarola, are you asking
7 that I make any additional findings for purpose of the
8 appellate record? Mr. Corona first.

9 MR. CORONA: Your Honor, for clarification.

10 THE COURT: Yes.

11 MR. CORONA: For the claims that were
12 dismissed -- excuse me -- the Defendants were entitled
13 to attorney fees. Apparently, this is my pet subject
14 area, but are you referring to the claims of a right
15 and easement of the Prospect Lateral?

16 THE COURT: I'm sorry. Say that again.

17 MR. CORONA: Are you referring to a claim --
18 the claims regarding the Prospect Lateral?

19 THE COURT: I am not referring to the
20 Prospect Lateral.

21 MR. CUCAROLA: Thank you, Your Honor.

22 THE COURT: No, I'm not. I'm referring to
23 the claims of individual liability of Mr. Righeimer,
24 and Mr. Lowrey, and Mr. Mitchell; the trespass to water
25 rights, the trespass to easement and ditch and ditch

1 access, the claim of nuisance, acting with malice,
2 violation of the statutes 7-42-109 and 37-89-101, the
3 slander of title, the fraudulent conveyance, and the
4 civil conspiracy.

5 So it's going to be passed to Defendants'
6 counsel to separate those out because, as I said
7 before, I think the parties would have been here on the
8 issue regarding the Paige Brothers Seep, the Prospect
9 Lateral, to be quite honest, and the K-G Lateral.

10 Mr. Sims.

11 MR. SIMS: Your Honor, you've mentioned the
12 individual claims against Mr. Righeimer, Lowrey, and
13 Mitchell.

14 THE COURT: Oh, and also Mr. McDowell. I'm
15 sorry. Yes. Mr. McDowell's individual tort liability.
16 There simply was no evidence presented for individual
17 liability.

18 I left the door open just a crack, if the
19 Court had awarded damages under piercing the corporate
20 entity veil. But that was not asserted.

21 Mr. Cucarola, I jumped right over you. Do
22 you have any request that I make further finding for
23 the appellate record?

24 MR. CUCAROLA: At this time, I don't know of
25 any requests. I haven't had time to analyze this.

1 THE COURT: Okay. Mr. Sims, Mr. Weiss, or
2 Mr. Farbes? For purposes of the appellate record,
3 would you like me to make any additional findings? Is
4 there something that you think I missed?

5 MR. SIMS: No, Your Honor. We think your
6 ruling was comprehensive.

7 THE COURT: Mr. Massey?

8 MR. MASSEY: I have nothing to add, Your
9 Honor.

10 THE COURT: Thank you. So the Court is not
11 awarding attorneys' fees in favor of Timnath in this
12 action. Mr. Rose isn't here today to argue that. But
13 his argument focused in on the Prospect Lateral.
14 Okay.

15 Thank you, everyone, for staying late and
16 spending the last seven days.

17 MR. MASSEY: Your Honor.

18 THE COURT: Yes, Mr. Massey.

19 MR. MASSEY: The attorneys' fees, I assume,
20 will be, pursuant to Rule 121, we have 21 days to
21 submit the affidavit?

22 THE COURT: I actually give 30 days.

23 MR. MASSEY: Thank you.

24 THE COURT: 14 days to file a response, and a
25 request for hearing. There would not need to be a reply

1 if there's a request for a hearing on reasonableness
2 because -- we'll set hearing.

3 And what I would do is I would set a status
4 conference to discuss the amount of time necessary for
5 a hearing. And that would be on the reasonableness
6 issue only.

7 MR. MASSEY: Thank you, Your Honor.

8 THE COURT: And I should say that the Court's
9 verbal ruling is the order of Court. You may request a
10 transcript. If you would like me to sign that after
11 it's been prepared so that it's in written form, I
12 would be happy to do so.

13 MR. FARBES: Thank you, Your Honor. We may
14 request one.

15 THE COURT: And then the time for appeal
16 would run from that point in time that anyone is
17 requesting that the transcript be prepared of the
18 Court's ruling.

19 Otherwise, the time would commence as of
20 today. Although, I suppose -- let me just rephrase.
21 Because the issue of attorneys' fees is still open, it
22 may not be a final judgment yet. My ruling has been
23 entered. But that may be subject of an appeal as well.

24 I'd have to think about that further. I just
25 want to make sure no one is misled as to when the clock

1 begins on filing appeal.

2 MR. FARBES: Thank you, Your Honor.

3 WHEREUPON, the within proceedings were
4 concluded at 5:18 p.m. on the 19th day of February,
5 2020.)

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Attachment to Order - 2018CW3166

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, WENDY McCaffrey, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the said proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form, consisting of 27 pages herein; that the foregoing is a true transcript of the questions asked, testimony given and proceedings had. I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature and seal this 22nd day of February, 2020.

My commission expires January 31, 2024



Wendy McCaffrey
Wendy McCaffrey
Registered Professional Reporter

DATE FILED: August 13, 2020

GLOVER, et al. v. RESOURCE LAND HOLDINGS, LLC, et al.
District Court, Water Division No. 1, Case No. 2018CW3166

APPENDIX (2)

*June 23, 2020 Order re: Mr. Cucarola's Motion for Relief Under Rule
59, C.R.C.P.*

<p>WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400</p>	<p>DATE FILED: June 23, 2020 5:46 PM CASE NUMBER: 2018CW3166</p>
<p>Plaintiffs: Robert Kint Glover; Friday LLC; and Gerald Kiefer</p> <p>v.</p> <p>Defendants: Resource Land Holdings, LLC; Serratoga Falls, LLC; Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell</p> <p>and</p> <p>Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff: Serratoga Falls, LLC</p> <p>v.</p> <p>Third-Party Defendants: The Town of Timnath; the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No. 2018CW3166</p>
<p align="center">ORDER RE: MR. CUCAROLA’S MOTION FOR RELIEF UNDER RULE 59, C.R.C.P.</p>	

This matter comes before the court on a motion for post-trial relief pursuant to C.R.C.P. 59 filed by Mr. Gregory Cucarola, the former attorney for Plaintiffs Robert Glover, Friday, LLC, and Gerald Keifer (collectively, “Plaintiffs”), and Third-Party Defendants Marjorie Kiefer Marital Trust, Jane Raeleen Dunn, and Blair Kiefer Family Trust. The present motion was filed on April 21, 2020 at 6:51 p.m. The court calculates today – June 23, 2020 – as the sixty-third day after the motion was filed. See C.R.C.P. 59(j)

("The court shall determine the motion within 63 days (9 weeks) of the date of the filing of the motion.").

Mr. Cucarola requests the court vacate the findings that claims presented in this action lacked substantial justification and the award of Defendants' attorney fees against Mr. Cucarola and Plaintiffs Misters Glover and Kiefer jointly and severally. Mr. Cucarola argues that Defendants were required to file a written motion requesting attorney fees under C.R.C.P. 121, sect. 1-22(2), rather than presenting their motion verbally to the court at the conclusion of trial. Mr. Cucarola further argues that he has the right to a hearing regarding the apportionment of the payment of Defendants' attorney fees between him and his former clients.

The court received responses from Defendants Resource Land Holdings, LLC, Serratoga Falls, LLC, and Jesse McDowell (collectively, "RLH Defendants"), and Defendants Kitchel Lake Development Corporation, Kitchel Lake Partners, LLC, James Righeimer, Lee Lowrey, and Kenneth Mitchell (collectively, "Kitchel Lake Defendants").

I. Legal Standard

Rule 59(a), C.R.C.P. permits a party to move for post-trial relief within fourteen days of the date judgment was entered. Post-trial relief may include an amendment of the court's findings, C.R.C.P. 59(a)(3), and amendment of judgment, C.R.C.P. 59(a)(4). Rule 59 affords the court with an opportunity to correct errors in its findings or the judgment rendered. *Harriman v. Cabela's, Inc.*, 371 P.3d 758, 761-763 (Colo.App. 2016).

II. Analysis

The court first finds that Mr. Cucarola was quite aware of the fact that Defendants would be seeking payment of their attorney fees prior to, during the trial when Defendants moved to dismiss certain claims under C.R.C.P. 41 at the conclusion of Plaintiffs' case, and upon completion of trial. Defendants articulated verbally during their arguments at the conclusion of trial their bases for their assertions that Plaintiffs' claims lacked substantial justification. The court provided Mr. Cucarola the opportunity

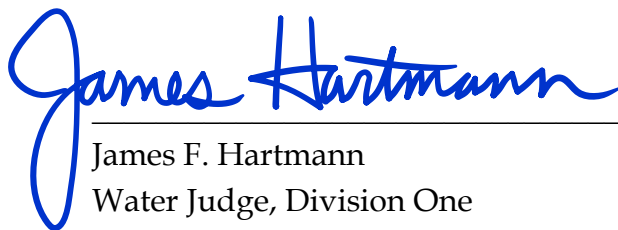
to respond prior to entering its findings on the issue of Plaintiffs' claims lacking substantial justification and finding that Mr. Cucarola and Misters Kiefer and Glover should be held jointly and severally responsible for Defendants' attorney fees.

The court directed Defendants' counsel to file their invoices and granted Mr. Cucarola and Plaintiffs leave to respond and request a hearing on the question of reasonableness. The court granted Mr. Cucarola and Plaintiffs' request for a stay on the time to file a response pending the outcome of the present motion.

As the court wrote in the order issued earlier today on Plaintiffs' separate motion for post-trial relief, Mr. Cucarola and Plaintiffs had ample opportunities to back away from the claims that they knew or should have known lacked substantial justification. Their failure to do so resulted in Defendants incurring great time and expense defending claims that should have never been pursued by Plaintiffs and Mr. Cucarola. Although the court stands by its findings and ruling that Mr. Cucarola and Plaintiffs bear responsibility for payment of Defendants' attorney fees, the court finds that the question of apportionment of the payment of the Defendants' attorney fees between these three persons should be included as part of the question of the reasonableness of attorney fees. The court will permit Mr. Cucarola and Plaintiffs to address these issues in their responses to the Defendants' request for attorney fees and Defendants may address Defendants' arguments in their replies.

Dated: June 23, 2020.

BY THE COURT:


James F. Hartmann
Water Judge, Division One