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Colorado Supreme Court Withdraws Opinion Establishing Jury Trial Right in Eviction Proceedings

In a prime example of the importance of both knowing your record in an appellate proceeding and carefully reading the statute at issue, the Colorado Supreme Court recently withdrew its opinion in *In re Mercy Housing Group v. Bermudez*, which established a jury trial right in Colorado for eviction proceedings. After the Colorado Supreme Court found in favor of Naomi Bermudez (who had demanded a jury), she filed a petition for rehearing, apparently to alert the Supreme Court to a factual error that underpinned much of its opinion. That factual error was that Bermudez had been personally served with the summons and complaint when in fact she had been served only by posting on the door to her apartment. Bermudez asserted that factual error did not change the outcome of the case. The Colorado Supreme Court, however, disagreed because the subsections of the statute at issue – C.R.S. § 13-40-115 – use differing language depending on the manner of service on the tenant.

Specifically, C.R.S. § 13-40-115(1) applies when "service was had only by posting." Subsection 1 then states, "if the **court** finds that the defendant has committed an unlawful detainer, the **court** shall enter judgment for the plaintiff . . ." (emphasis added). Section 13-40-115(2), on the other hand, applies "after personal service has been made upon the defendant." Subsection 2 then provides "if the court **or jury** has not already tried the issue of unlawful detainer, it may do so." (emphasis added).

In its order withdrawing its prior opinion, the Colorado Supreme Court found that the different language used in these two subsections changed the outcome of the case. The Court implied that the General Assembly may not have intended to grant a jury trial right to eviction defendants served by posting. Alternatively, the Court determined that the legislature's intent in this regard was ambiguous. The Court declined "to proceed by judicial fiat" and resolve any ambiguity. Rather, it left the

matter "up to the legislature to clarify its intent."

This turn of events highlights the importance for appellate practitioners to know their record and to closely read all statutes implicated in a case. The parties' principal briefs to the Colorado Supreme Court did not clearly state the method by which the landlord served Bermudez, leaving it to the Court to fill in that gap. Had either or both parties clearly stated in their briefs the method of service, post-opinion proceedings may have been unnecessary, saving all parties and the Court time and resources.

Further, with the *Bermudez* opinion withdrawn, it is again an open question in Colorado whether a jury trial right exists in all eviction proceedings. Of course, as the Colorado Supreme Court stated, the General Assembly can amend section 13-40-115 to make clear one way or the other whether the right exists. But, more practically for landlords and tenants, the re-opening of this question underscores the importance of jury trial waivers in lease agreements.

In Colorado, contractual jury trial waivers are generally enforceable, even in residential lease agreements. Given the posture of *Bermudez*, it does not appear the lease agreement at issue had such a contractual waiver. Had one existed, litigation over this issue may not have been nearly as protracted, bringing much more expedient closure to the parties' dispute. Landlords, in particular, will want to closely review their lease agreements to ensure they include a jury trial waiver provision. If they do, they should consult with counsel regarding enforceability. If they do not, though, landlords should consult with counsel to determine whether to include a waiver provision and whether, in the specific context of the type of property at issue, such a waiver would be enforceable.

This blog post was drafted by Jacob Hollars, a partner in the Spencer Fane Denver office. For more information visit www.spencerfane.com.

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