| **DISTRICT COURT MONTEZUMA COUNTY, COLORADO**<br>Court Address:<br>109 West Main, Room 210, Cortez, CO, 81321-3190<br><br>Phone Number: (970) 565-1111<br>---<br>Plaintiff: **Cedar Mesa Ranches Homeowners Association**<br>v.<br>Defendant: **Craig D. Lyons** | DATE FILED: October 18, 2017 12:01 PM<br>CASE NUMBER: 2016CV18<br><br>**COURT USE ONLY** |
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| | Case No.: 2016CV18 |

**ORDER DENYING MOTION TO INTERVENE**

The Plaintiff Cedar Mesa Ranches Homeowners Association, Inc. ("CMR" or "Plaintiff") brought suit against the Defendant Craig D. Lyons ("Lyons" or "Defendant") in the Small Claims Division of the Montezuma County Court in Docket No. 2016S16 on March 18, 2016.

Defendant's counterclaims resulted in the removal of this matter from the Small Claims Division of the Montezuma County Court to the Montezuma County District Court and this action was filed in the Montezuma County District Court on September 1, 2016.

This matter concerns the roads within the Cedar Mesa Ranches Subdivision ("Subdivision" or "Cedar Mesa Ranches"). Cedar Mesa Ranches is a rural subdivision in Montezuma County, Colorado.

The parties agreed to resolve this matter by cross motions for summary judgment and this Court issued a Summary Judgment Order on May 25, 2017. In Summary Judgment Order, the

Court found that (1) the roads in the Subdivision are private roads; (2) the private roads in the Subdivision were not dedicated to Montezuma County or any other government or private entity; (3) the ownership of the private roads in the Subdivision is undetermined; and (4) the private roads in the Subdivision are the common property of the Subdivision. In the Summary Judgment Order, the Court held that the Plaintiff " has the authority to make and collect assessments to maintain the common areas of the Subdivision – including the private roads."

The Cedar Mesa Lot Owners Association, Inc. ("Lot Owners") filed a Motion to Intervene and Vacate Judgment on June 28, 2017. The Motion to Intervene was signed and submitted by non-attorney - Mr. Nighteagle. The Lot Owners is a corporation - represented by non-attorney, David Nighteagle. The Lot Owners claim that it was not on notice that the Court would consider the findings and issues set forth in the Summary Judgment Order.

The Plaintiff filed a Response on July 19, 2017 objecting to the Motion to Intervene on the basis that it was untimely.

After reviewing the pleadings, the Court raised the additional issue of a non-attorney representing the Lot Owners. The Court raised this issue in its gatekeeper role under C.R.S. 13-1-127 and pursuant to the mandate all judicial officers have to prevent the unauthorized practice of law in the Courts of the State of Colorado.

A hearing was held on the Motion to Intervene on August 30, 2017. At the August 30, 2017 hearing, Mr. Nighteagle represented the Lot Owners, Mr. Reynolds (attorney) appeared for the Defendant, and Mr. Lyons (attorney) appeared for the Plaintiff. The Court heard testimony at the hearing from Mr. Torin Andrews, the sole shareholder of the Lot Owners and from the President of the Plaintiff - Diane Cherbak. The sole issue at the hearing was the timeliness of the Motion to Intervene and the ability of Mr. Nighteagle to represent the Lot Owners - not the

request to vacate the judgment.

These two issues are before the Court:

1. Can Mr. Nighteagle represent the Cedar Mesa Lot Owners Association, Inc. in this action pursuant to C.R.S. 13-1-127?; and
2. Is the Motion to Intervene and Vacate Judgment timely?

C.R.S. 13-1-127 / Non-Attorney Representation

C.R.S. 13-1-127(2) provides that a non-attorney may represent a closely held corporation if: (1) the individual representing the closely held corporation is an officer of that corporation, (2) The officer has authority to appear on behalf of the corporation, and (3) The amount at issue in the controversy before the court does not exceed fifteen thousand dollars. The only requirement that is contested in this case is the amount in controversy. It is not disputed that Mr. Nighteagle has authority to represent and is an officer of the Lot Owners.

Ms. Cherback testified credibly at the hearing that the annual expenses for road maintenance and snow removal in the Subdivision cost the Plaintiff $60,000 per year. The Plaintiff collects assessments to pay the $60,000 per year costs. Ms. Cherbak estimated that there are approximately 10 miles of roads that are about 25 feet wide in the Subdivision (approximately 30 acres of road). This evidence offered by Ms. Cherbak was not controverted.

In Keller Corp. v. Kelley, 187 P.3d 1133 (Colo. App. 2008), the Colorado Court of Appeals discussed C.R.S. 13-1-127. Keller Corp. concerned an alleged violation of a covenant not to compete. Id. at 1135. The trial court allowed a non-attorney to represent a corporation in a preliminary injunction hearing. Id. at 1136. The trial court justified this decision by concluding that “there was no amount in controversy” at the time of the preliminary injunction hearing. Id. The Colorado Court of Appeals found that this was in error and remanded the case to determine

the amount in controversy. Id. at 1137. The Colorado Court of Appeals held that the "statute does not permit a closely held corporation to be represented by a layperson on a motion simply because the motion itself will not result in any monetary liability; it is, rather, the amount involved in the overall litigation that is the test under section C.R.S. 13-1-127(2)(a)." Id. at 1136. Keller Corp. directs this Court to make a determination as to the amount involved in this overall litigation.

Colorado district courts are courts of general jurisdiction. Accordingly, Colorado district courts rarely need to determine the amount in controversy as a jurisdictional matter. On the other hand, federal courts frequently assess the amount in controversy because it is a prerequisite for diversity jurisdiction. Looking to the federal courts in assessing the amount in controversy provides guidance.

The Lot Owners argued at the August 30, 2017 hearing that C.R.S. 13-1-127 does not bar their participation because they only seek declaratory judgment.

Federal courts frequently assign an amount in controversy to declaratory judgment actions. In cases seeking declaratory relief, "the amount in controversy is measured by the value of the object of the litigation." Lovell v. State Farm Mut. Auto Ins. Co., 466 F.3d 893, 897 (10th Cir. 2006)(citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977)). In calculating the amount in controversy the court may consider the complaint's allegations, interrogatories, admissions, or evidence introduced at a hearing. McPhail v. Deere & Co., 529 P.3d 947, 954 (10th Cir. 2008)(citing Meridian Security Ins. Co. v. Swadowski, 441 F.3d 536, 541-42 (7th Cir. 2006)).

Case law and the plain meaning of C.R.S. 13-1-127, direct this Court to calculate the amount in controversy for declaratory judgment actions by determining the value of the overall

litigation. The Court finds that the overall value of this litigation is $60,000 per year. This is the amount collected and expended by the Plaintiff every year to maintain the roads in the Subdivision. Additionally, the value of the roads (approximately 30 acres) – is at least more than $15,000.

The statute states that a non-lawyer may represent a corporation if "the amount at issue in the controversy or matter before the court or agency does not exceed fifteen thousand dollars, exclusive of costs, interest, or statutory penalties, on and after August 7, 2013." There is no provision excluding declaratory judgment cases or other cases that seek non-monetary relief from this statute. One of the purposes of the statute is to prevent laying "open the gates to the practice of law for entry to those corporate officers or agents who have not been qualified to practice law and who are not amenable to the general discipline of the court." Weston v. T & T, LLC, 271 P.3d 552, 557 (Colo. App. 2011)(citing Woodford Mfg. Co. v. A.O.Q., Inc., 772 P.2d 652, 653 (Colo. App. 1988)). Considering this purpose, it does not make sense that the legislature would allow non-lawyers to represent corporations in declaratory judgment cases affecting valuable assets or liabilities. The plain reading of the statute suggests that the legislature intended that courts perform a traditional assessment of the amount in controversy regardless of the type of relief sought.

Because the amount in controversy of this litigation is at least $60,000 per year, Mr. Nighteagle, a non-attorney, cannot represent the Cedar Mesa Lot Owners Association, Inc. The Motion to Intervene must be stricken and denied on this basis alone.

## Timeliness of the Motion to Intervene

C.R.C.P. 24 requires that an application to intervene be "timely." The timeliness of an application for intervention is a threshold question. Law Offices of Andrew L. Quiat, P.C. v.

Ellithorpe, 917 P.2d 300, 303 (Colo. App. 1995). Courts must make a determination as to the timeliness before considering whether the applicant has complied with other requirements of the rule. Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987). "The determination of timeliness of a motion to intervene is a matter which rests within the sound discretion of the trial court." Moreland v. Alpert, 124 P.35 896, 904 (Colo. App. 2005)(citing In re Marriage of Guinn, 522 P.2d 755 (Colo. App. 1974)). "Absent an abuse of discretion, a trial court's ruling [on an application to intervene] will not be disturbed on appeal." Moreland, 124 P.3d at 904 (citing Tekai Corp. v. Transamerica Title Ins. Co., 571 P.2d 321 (Colo. App. 1977)).

Courts "must weigh the lapse of time in light of all circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case." Law Offices of Andrew L. Auiat, P.C., 917 P.2d at 303. "Motions for intervention filed after judgment or after a decision is rendered on appeal are viewed with disfavor and the moving party has a heavy burden to show facts or circumstances which justify intervention at that late date." Spickard v. Civil Serv. Comm'n of City & Cty. of Denver, 523 P.2d 149, 151 (Colo. App. 1974). "Courts view motions for intervention at these stages of the proceedings with a jaundiced eye because it is assumed that intervention at this point will either (1) prejudice the rights of the existing parties to the litigation, or (2) substantially interfere with the orderly processes of the court." Id.

The Cedar Mesa Lot Owners Association, Inc. filed its Motion to Intervene and Vacate Judgment on June 28, 2017. Mr. Torin Andrews, principal of the Lot Owners testified that he learned of the litigation when the Defendant was sued – March of 2016.

The Lot Owners argue that the "issues raised by the parties did not deal directly with road ownership." Lot Owners Supplemental Memorandum of Law at 1. This argument is without

merit because a simple review of the Plaintiff's and Defendant's summary judgment motions filed in January of 2017 sets forth the disputed issues.

The Plaintiff's Motion for Summary Judgment asserts that that the Plaintiff should be able to assess property owners for maintenance of the roads and that the roads met the restatement definition for common property. Plaintiff's Motion for Summary Judgment at 5-6. Plaintiff further argued that the classification of roads as a common property was appropriate even if Plaintiff did not own the roads. Id. at 6-7. Defendant's Motion for Summary Judgment asserted that the Plaintiff did not have the authority "to own or maintain roads." Defendant's Motion for Summary Judgment at 6. The Defendant also argued that the roads cannot be considered common areas or common property.

Additionally, this Court's factual findings do not affect any ownership rights that the Lot Owners may have in the roads. The Lot Owners take issue with the court's finding that the roads in the subdivision are private roads that were not dedicated to Montezuma County. The Lot Owners represent that the corporation holds a quitclaim deed to the roads. Exhibit A to the Motion to Intervene. This Court ruled that the ownership of the roads was undetermined. The Court's findings of fact did not disrupt or change any ownership rights in respect to the roads.

The Lot Owners' pleadings show that the true reason for intervention is not whether the roads were private; but rather, whether the Plaintiff has the authority to make assessments for road maintenance. The Lot Owner's Memorandum of Law criticizes the court's legal conclusions and analysis on issues beyond the ownership of the roads. There is substantial criticism in the Motion to Intervene of this Court's interpretation of the <u>Evergreen Highlands</u> case and the ability of the Homeowners Association to assess dues at all.

The Lot Owners should have been aware of these issues in January of 2017 – when both

parties filed their briefs and cross motions for summary judgment. The ownership of the roads was not the dispositive fact in the Summary Judgment Order. Rather, the case turned on the ability of the HOA to assess dues for the maintenance of the roads. This consideration included the question of whether the roads could be considered common areas. The challenge to the authority of the CMR was apparent after the defendant filed his answer and counterclaims on May 10, 2016. The Lot Owners were fully aware of this litigation in 2016 and made the choice to wait until June of 2017, after the Court ruled against their position, to attempt intervention.

The Lot Owners want to re-litigate all issues - not simply the ownership of the roads. The Lot Owners have not shown that they were unaware or surprised by the litigation and there will be substantial prejudice from having to re-litigate most of the serious legal issues in the case. Therefore, the Motion to Intervene is also denied as untimely.

IT IS HEREBY ORDERED that the Motion to Intervene and Vacate Judgment filed on June 28, 2017 is stricken for the reasons set forth herein. In the alternative, the Motion to Intervene and Vacate Judgment is denied as untimely for the reasons set forth herein.

Done and Signed this October 18, 2017.

*/s/ Todd Jay Plewe*

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District Court Judge<br>Todd Jay Plewe