<table>
<tr><td>COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">

▲COURT USE ONLY▲</td></tr>
<tr><td>Colorado District Court, Arapahoe County
Case No. 2021CV31592</td></tr>
<tr><td>Plaintiffs-Appellees: Amy F. Dean, Donner E. Dean, Jr., Merryl Learned, And John R. Walls, Jr.,

v.

Defendants-Appellants: Stephanie Casey, Trevor Casey

And

Attorney-Appellants: Stephen A. Fermelia, Mark Cohen, and Mark Cohen J.D., LL.M, a Professional Corporation</td></tr>
<tr><td>Attorneys For Defendants-Appellants Stephanie and Trevor Casey and Attorney-Appellant Stephen A. Fermelia
Joel A. Moritz (reg. no. 9864)
Stephen A. Fermelia (reg. no. 33713)
Moritz Law LLC
3570 E. 12th Ave., Suite 200, Box 103
Denver, Colorado 80206
Phone Number: 303-586-5004
jmoritz@moritzlaw.net
sfermelia@moritzlaw.net</td><td>Court of Appeals Case Number: 2023CA721</td></tr>
<tr><td colspan="2" align="center">OPENING BRIEF OF ATTORNEY-APPELLANT
STEPHEN A. FERMELIA</td></tr>
</table>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g):

It contains 9,406 words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A):

For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

Duly signed original on file at the offices of Moritz Law, LLC

/s/ Stephen A. Fermelia
Stephen A. Fermelia

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE... 2

I. Overview 2

II. Plaintiffs' Claims And Defenses To Them... 4

III. Counterclaims and Evidentiary Support 7

IV. Evidentiary Rulings On Invasion of Privacy and Conspiracy 14

SUMMARY OF THE ARGUMENT 17

ARGUMENT 20

I. Standard of Review and Preservation 20

II. Defenses Actually Raised And Claims Were Not Groundless Or Frivolous... 21

1. Legal Principles 21

2. Defenses Actually Raised Were Based On Evidence Admitted At Trial and Legal Authority.................................... 21

3. Counterclaims Were Based On Evidence Admitted At Trial And Legal Authority 24

A. Declaratory, Injunctive, And Breach Of Conditions Claims 24

B. MCPO/Abuse Of Process... 25

C. Trespasses 26

D. Invasion Of Privacy 27

E. Conspiracy 32

4. Credible Evidence And Rational Argument Supported Claims/Defenses 33

III. Pursuit Of Claims/Defenses Was Not "Vexatious" 34

1. Trial Rulings Preclude the FOJ Conclusion 34

2. Claims Were Not Vexatious Where No Pre-Trial Challenge Existed 35

IV. The Court Erred In The Manner And Substance Of The Fee Award 37

1. The Fee Award Was Arbitrary And Violated Statute 37

2. The Fee Award Improperly Awarded Interest 39

CONCLUSION 40

TABLE OF AUTHORITIES

Cases **Pages**

Ajay Sports, Inc. v. Casazza
1 P.3d 267 (Colo.App. 2000) 22

Amtel Corp. v. Vitesse Semiconductor Corp.
160 P.3d 347 (Colo.App. 2007) 40

Anstine v. Alexander
128 P.3d 249 (Colo.App. 2005) 32

Barker v. Jeremiasen
676 P.2d 1259 (Colo.App. 1984) 22

Blecker v. Kofoed
672 P.2d 526, 528 (Colo.1983) 24

Burt v. Beautiful Savior Lutheran Church of Broomfield
809 P.2d 1064 (Colo.App. 1990) 27

Consumer Crusade, Inc. v. Clarion Mortg. Cap., Inc.
197 P.3d 285 (Colo.App. 2008) 39

Coombs v. J.B. Hunt Transp., Inc.
388 S.W.3d 456 (Ark.App. 2012) 30

Deutsche Bank Tr. Co. Americas v. Samora
2013 COA 81 25

E–470 Pub. Highway Auth. v. Revenig
140 P.3d 227 (Colo.App. 2006)...21

Evans v. Colorado Ute Elec. Association, Inc.
653 P.2d 63 (Colo.App. 1982) 31

Farmers Reservoir & Irr. Co. v. City of Golden
113 P.3d 119 (Colo. 2005) 37, 39

First Hyland Greens Ass'n v. Griffith
618 P.2d 745 (Colo.App. 1980) 23

Fountain v. Mojo
687 P.2d 496 (Colo.App. 1984) 38

Genova v. Longs Peak Emergency Physicians, P.C.
72 P.3d 454 (Colo.App. 2003) 21, 27

Harrison v. Smith
21 P.2d 832 (Colo.App. 1991) 38

Hoffman v. People
780 P.2d 471 (Colo. 1989) 31

Huskey v. National Broadcasting Co., Inc.
632 F.Supp. 1282 (N.D.Ill.1986) 30

In re Est. of Shimizu
2016 COA 163 34

In re Marriage of Kann & Kann
2017 COA 94 22

In re Marriage of Tigges
758 N.W.2d 824 (Iowa 2008) 28

Kidd v. Cigna Corp.
2010 WL 4697986 (M.D.Tenn. Nov. 12, 2010) 29

Lease Fin., Inc. v. Burger
575 P.2d 857 (Colo.App. 1977) 22

Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.
867 P.2d 70 (Colo. App. 1993) 23

M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.
962 P.2d 335 (Colo.App. 1998) 24

Magin v. DVCO Fuel Sys., Inc.
981 P.2d 673 (Colo.App. 1999) 32

Medina v. Conseco Annuity Assur. Co.
121 P.3d 345 (Colo.App. 2005) 38

Padilla v. Ghuman
183 P.3d 653 (Colo.App. 2007) 39

Palmer v. Diaz
214 P.3d 546 (Colo.App. 2009) 26

Pastor v. San Juan Sch. Dist. No. 1
699 P.2d 418 (Colo.App. 1985) 22

Pedlow v. Stamp
776 P.2d 382 (Colo. 1989) 39

Pedlow v. Stamp
819 P.2d 1110 (Colo.App. 1991) 36

Remsburg v. Docusearch, Inc.
816 A.2d 1001 (N.H. 2003) 31

Resol. Tr. Corp. v. Heiserman
898 P.2d 1049 (Colo. 1995) 32

Rinker v. Colina-Lee
2019 COA 45 20

Rugg v. McCarty
476 P.2d 753, 755 (Colo. 1970) 30

Saint John's Church v. Scott
194 P.3d 475 (Colo.App. 2008) 33

Salzman v. Bachrach
996 P.2d 1263 (Colo. 2000) 21

Sanders v. Am. Broad. Companies, Inc.
20 Cal. 4th 907 (1999) 28

Stamp v. Vail Corp.
72 P.3d 437 (Colo. 2007) 34

State Farm Mut. Auto. Ins. Co. v. Johnson
2017 CO 68 20

Stessman v. Am. Black Hawk Broad. Co.
416 N.W.2d 685 (Iowa 1987) 30

Sundheim v. Board of County Com'rs of Douglas County
904 P.2d 1337 (Colo.App. 1995) 30, 31

Tisch v. Tisch
2019 COA 41 37

W. United Realty, Inc. v. Isaacs
679 P.2d 1063 (Colo. 1984) 33, 34, 37

Walker v. Van Laningham
148 P.3d 391 (Colo.App. 2006) 26

Woodmoor Imp. Ass'n v. Brenner
919 P.2d 928 (Colo.App. 1996) 23

Yadon v. Lowry
126 P.3d 332 (Colo.App. 2005) 26

Statutes and Other Authority

C.R.S. § 13-14-104.5 34

C.R.S. § 13-17-102 .... 38, 39

C.R.S. § 13-17-103 .... 38, 39

C.R.S. § 13-51-109 24

C.R.S. §38-33.3-101…………………………………………………………..2

C.R.C.P 57 24

CJI-Civ. 18:4..27

CJI-Civ: 27:1 32

CJI-Civ: 27:2..32

CJI-Civ. 27:3..32

CJI-Civ. 28:1..38

CJI-Civ. 28:2 .... 12, 30

CJI-Civ. 28:3..28

Restatement (Second) of Torts § 652B..28

ISSUES PRESENTED FOR REVIEW

This is an appeal from a bench trial in a suit involving civil claims between neighbors. The district court ruled that virtually all claims and defenses asserted by Attorney-Appellant Stephen A. Fermelia ("**Fermelia**"), on behalf of his clients, were groundless, frivolous, and vexatious, and, *sua sponte*, issued an award of one-half of the opposing parties' attorney fees and costs (collectively, "**Fee Award**") as a sanction against Fermelia and others.

The issues on appeal are whether the district court abused its discretion and acted contrary to law in making the Fee Award, subdivided as follows:

(1) Was the Fee Award improper where: (a) the court was mistaken as to which defenses were asserted, and where the defenses actually asserted were based on credible evidence and law; (b) Fermelia's clients prevailed on several affirmative claims and, as to others, the court was mistaken about its pretrial rulings and misapplied the law; and (c) the claims/defenses were based on rational legal argument and, to the extent, if at all, that defenses/claims were not viable under existing law, they were made in a good-faith argument for extension of existing law;

(2) Did the court err in concluding that litigation was 'vexatious' where: (a) the court's rulings admitting evidence at trial is inconsistent with, and logically precludes, a retroactive finding of 'vexatious' litigation; and (b) the propriety of the

defenses/claims was not substantially questioned by either the opposing parties or the court before trial; and

(3) Did the court err in the manner and amount of the Fee Award where: (a) the *sua sponte* Fee Award for "one half" of fees and costs from case inception was arbitrary and unreasonable, made without hearing, and where the court did not comply with C.R.S. § 13-17-103; and (b) the Fee Awarded included an award of interest, where the Fee Award constitutes one for 'costs' and not 'damages.'

STATEMENT OF THE CASE

I. Overview

The lawsuit involves disputes between neighbors in a rural community which is subject to certain restrictions on property use ("**Conditions**"),[1] and non-exclusive easements, including one for equestrian purposes ("**Easement**").

Plaintiff-Appellants Amy F. Dean and her husband Donner Dean (collectively, "**Deans**"), Merryl Learned, and John R. Walls (collectively, "**Plaintiffs**") brought suit alleging that certain conduct by Defendant-Appellants Clifton and Wendy Brockman (collectively, "**Brockmans**"), and Defendant-Appellants Stephanie and Trevor Casey (collectively, "**Caseys**"), collectively,

[1] The Conditions are **Exhibit 2**. Notwithstanding the Conditions, the Community is not subject to the Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101 *et seq*., and does not have a homeowners' association. (TR 2-2-2023, p. 97:12-16).

"**Defendants**", violated the Conditions and interfered with the Easement, and Plaintiffs also named other parcel owners as defendants for purposes of equitable/declaratory relief. (CF, pp. 9-11).[2] Fermelia represented the Caseys. Brockmans were represented by Attorney-Appellant Mark Cohen and his firm ("**Cohen**").

Defendants counterclaimed.

A bench trial was held from February 1, 2023, through February 3, 2023 ("**Trial**").

The court issued its *Final Order and Judgment* on March 16, 2023 ("**FOJ**") (CF, pp. 1638-1653) on the substantive claims and making the Fee Award, stating, as the basis for the Fee Award:

> [only one of Caseys' counterclaims] required a trial and was supported by the evidence. . . . Literally every other issue presented at trial by Defendants Casey and Brockmans was already resolved by dispositive pretrial orders, unsupported by evidence, or irrelevant to the proceedings* * * [M]ost of the counterclaims and all of the equitable defenses made by the Caseys and Brockmans lacked substantial justification, were vexatious, brought in bad faith and were stubbornly litigious and disrespectful of the truth.

(CF, p. 1651-1652). In the FOJ, the court further stated:

---

[2] Entry of clerk's default was made as to other parties Plaintiffs sued, specifically, Drew G. McCallister, Monique Russell, Greg Royer, and Joyce Henderson (CF, p. 253 and 255), and Victor Manuel Rodriguez Garcia and Azucena Diaz Soto (CF, p. 286-287), but default judgment was never entered as to these parties.

> Judgment is granted in favor of the Plaintiffs and against the Casey's [sic] and Brockmans, and their attorneys, jointly and severally, for one half of Plaintiffs' reasonable attorney's fees and costs…. Plaintiffs shall file a motion and affidavit for attorney's fees, and a bill of costs within twenty-one (21) days.

(CF, p. 1653).

On April 20, 2023, the court awarded Plaintiffs' one-half of their fees since case inception (awarding $75,142.50) and all their costs ($22,509.18), for a combined total of $97,651.68, plus 8% interest, entering judgment, therefore, jointly and severally, against Defendants, Fermelia, and Cohen. (CF, pp. 1852-1853). (*Order Entering Final Judgment Against Defendants' Counsel As To Attorney Fees And Costs)* ("**Judgment**"). This appeal was timely filed on May 1, 2023.

ORDER BEING APPEALED: Fermelia appeals the Judgment and FOJ to the extent it concerns the Fee Award; asks that they be reversed; and asks that the mandate order the district court to release to Fermelia the bond (CF, p. 1995-1997) ("**Bond**"), posted to stay enforcement of the monetary Judgment. (CF, p. 2006-2007).

II. Plaintiffs' Claims and Defenses To Them

Plaintiffs contended that the Conditions prohibited the placement of fencing and gates (collectively, "**Gates**") crossing the Easement and that, by placing Gates on their parcels where the Easement crossed, Defendants were trespassing,

committing a nuisance, and violating the Conditions, and Plaintiffs sought an injunction to prevent Defendants from placing Gates. (CF, pp. 8-12).

The court's finding in the FOJ[3] that Defendants raised defenses of 'abandonment' or 'termination' of the Easement, or that Defendants contended that 'adverse possession' precluded Plaintiffs' claims, is not correct, since such 'defenses' were never alleged or contended by Defendants.[4]

Rather, as defenses, Caseys contended that Plaintiffs' claims:

> …(3) were subject to, limited by, and may be barred by the terms of the Conditions and the relevant Land Survey Plat(s); (4) were contrary to law; (5) were barred by the doctrines of unclean hands, waiver, equitable estoppel, and/or laches; (6) were inconsistent with Plaintiffs' conduct and application of the Conditions; (7) were subject, in whole or in part, to the Caseys' Counterclaims.

See Answer, Counterclaims, *and Jury Demand* p. 8 (CF, p. 222).

All of these defenses were supported by evidence actually admitted at trial. Historically, the Easement had not been free from Gates,[5] and, prior to the lawsuit being filed, it was an accepted practice in the Community that parcel owners,

---

[3] CF, p. 1651 (h. (2), (3),(4),(5), and (6)).

[4] Indeed, that Amy Dean rode the Easement daily for the last 4 years (TR 2-1-2022, p. 25:10-13), never being impeded, was evidence that Defendants were not unlawfully obstructing the EE. (*See, e.g.*, TR 2-1-2023, p. 142:20-23).

[5] TR 2-1-2023, p. 88:2-14.

including all of the Plaintiffs, would have livestock on their parcels,[6] which were allowed to graze on the Easement.[7] Furthermore, it was common practice to use Gates crossing the Easement to contain livestock between parcels.[8]

This was consistent with the Conditions which required, among other things, that the Easement be kept clear for its "intended usues [sic]" (**Exhibit 2**, # 13) (*i.e.*, horseback riding on property zoned for agricultural use on which livestock commonly grazed).

Indeed, all of the Plaintiffs had Gates on the Easement for extended periods of time. Between two parcels (10 and 11)[9] eventually owned by Walls, there was a Gate on the Easement (which had been "put" there or "replaced" by Deans[10]) from "2009, roughly, to 2021."[11] A Gate existed between Walls (lot 10) and Deans' (Lot 9) property on the Easement for over a decade, including when Walls owned the

---

[6] TR 2-1-2-23, p. 83:4-24.

[7] *See, e.g.*, TR 2-1-23, p. 85:22 – p. 86:3; TR 2-1-2023, p. 149:9-15; TR 2-1-2023, p. 156:22-158:5.

[8] TR 2-1-2023, pp. 156:22 -158:5.

[9] *See* diagram, **Exhibit 100**.

[10] TR 2-1-2023, p. 28:5- p. 29:4.

[11] TR 2-1-2023, p. 33:22 - p. 34:1.

property, to keep livestock off Deans' property.[12] Between Deans' (lot 9) and Royers' (lot 8), there was a Gate on the Easement from "2012 to fall of 2022.[13] Learned had a Gate on the Easement to contain his cattle until 2021.[14]

All of the above is referred to herein as the "**Gate History**." Defendants relied on the Gate History in purchasing their properties and placing fencing and gates on across the Easement on their own parcels.[15]

III. Counterclaims and Evidentiary Support

Caseys asserted seven counterclaims: (1) Breach of the Conditions; (2) Various Trespasses; (3) Abuse of Process (not relating to the filing of this suit, but a separate suit by Amy Dean against Stephanie Casey); (4) Invasion of Privacy; (5) Civil Conspiracy, (6) Declaratory Judgment; and (7) Injunctive Relief.

Before trial, Caseys moved for summary judgment on their claim for Breach of the Conditions, contending that Plaintiffs had violated the Conditions in the following manners:

---

[12] TR 2-1-2023, p. 85:2-21; TR 2-1-2023, p. 158:3-5.

[13] (TR 2-1-2023, p. 34:2-5). Such Gates were eventually removed only because Royers no longer had livestock. (TR 2-1-2023, p. 103:15-24).

[14] TR 2-1-2023, p. 156:22 – p. 157:8.

[15] *See, e.g.,* TR 2-2-2023, p. 155:2 – p. 157:24; TR 2-3-2023, p. 154:2- p. 155:9.

> (a) Walls and Learned had prohibited signage on their parcels; (b) Learned had fully blocked the [Easement] on his property; (c) Walls failed to have proper permitting for his residence…; (d) Walls violated 'cleanliness' provisions by maintaining a 'junk pile' on his property…; and (e) Amy Dean violated provisions requiring her to keep her pets contained and controlled….

(CF, pp. 884-900). The court granted summary judgment in Caseys' favor as to (a) and (b), and reserved ruling on the reminder. (CF, p. 1323). However, in the FOJ, the court (incorrectly) stated that it had already granted judgment, pre-trial, in Caseys' favor on all of these claims,[16] intimating that evidence presented thereon at trial was unnecessary and vexatious.[17]

Caseys likewise prevailed on one of their trespass claims at trial (CF, p. 1649)(VI.a.1(b)), but, in ruling on others in the FOJ, the court misapplied the law in stating that actual damages were necessary to prevail on such claims[18] or simply did

---

[16] FOJ, middle of page, # (3) (CF, p. 1650) ("Caseys proved that Walls has violated the county regulations by storage of his 'junk' and his failure to improperly obtain a building permit, both of which constitute a violation of the Conditions, but that issue was already resolved by the Court's pretrial dispositive motion as was the allegation that Amy Dean has violated animal control conditions of the Easement [sic]").

[17] *See* FOJ (CF, p. 1651(i)(1)- p. 1652) ("[Caseys prevailed on one trespass claim for a July 17, 2021 mowing incident, but] Literally every other issue presented at trial… was already resolved by dispositive pretrial orders….").

[18] *See,* CF, p. 1649 ((VI.a(1)(a) ("Walls and Amy Dean at times have intentionally entered on [Caseys' property]…but there is no evidence…[of] physical damage…").

not address evidence demonstrating other trespasses and the participation of all Plaintiffs in them.

However, the evidence showed that Amy Dean routinely let her dog run loose on Caseys' non-easement property.[19] Walls, too, had a history of trespassing on Caseys' non-easement property.[20] When he did so in November 2020, Stephanie Casey phoned the Sherriff and, after this, Walls agreed not to come onto Caseys' property again and agreed to not communicate with Caseys.[21] Amy Dean (and by inference, her husband, Donner) knew about this interaction because Walls texted Amy Dean immediately thereafter. **Exhibit 130**.[22]

Nevertheless, on July 17, 2021, under the guise of replacing a fence between the Caseys and (then neighbor) Russel (*see* diagram, **Exhibit 100**), Walls brought his tractor "well into [Caseys'] property" followed, in a golf cart, by Learned and an unknown male down the same route Walls had taken, and Donner Dean, though not entering Caseys' property, assisted Walls and Learned in their trespass. [23]

---

[19] *See, e.g.*, TR 2-1-2023, p. 143:14-25.

[20] *See, e.g.,* TR 2-2-2023, p. 222:25 – p. 223:19.

[21] TR 2-2-2023, p. 86:1-10.

[22] TR 2-2-2023, p. 87:2-11.

[23] TR 2-2-23, p. 215:16-24; *see also* TR 2-2-2023, p. 214:13 – p. 215:24.

Later that evening, on the pretext that it was necessary to 'maintain' the Easement on Caseys' property, Walls (on a tractor), Learned (in a golf cart), and Amy Dean (on horseback)[24] entered the Caseys' Easement and non-easement property, causing damage. *See* FOJ, (CF 1649(VI.a.(1)(b)) (awarding Caseys $800 for this damage against Walls, but disregarding Amy Dean and Learned's participation in this trespass).[25] (*See also* TR 2-2-2023, p. 232:12 – p. 233:13 (discussing damage from that trespass)).

After that trespass, Ms. Casey again phoned the Sheriff. By this point, and again, Plaintiffs had been repeatedly instructed by the Sheriffs to leave Caseys alone and that any disputes regarding the easements would need to be resolved through attorneys and handled in court.[26]

Nevertheless, Walls, proposing a scheme to provoke contact with Ms. Casey, on the morning of July 21, 2023 ("**Provocation Incident**"), sent a text to Amy Dean and Learned stating, in part:

---

[24] TR 2-1-2023, p. 108:5-10; TR 2-1-2023, p. 119:13-16.

[25] CF p. 1649 (VI.a.(1) (b)) ("There was also evidence however that Walls' scraping - which does not constitute maintaining the Equestrian Easement 'in a neat and attractive manner, with special attention given to the control of weeds' as allowed by the Conditions – caused damages to the Caseys in the amount of $800").

[26] TR 2-1-2023, p. 126:20 – p. 127:3; *see also* TR 2-1-2022 p. 86:10-16.

> This is my prediction I [sic] was going to happen in the next few days.
>
> 1. Woods the sheriffs [sic] deputy is going [sic] come out here… and try to make peace between all of us.
> 2. He's going to try to talk us into filing a lawsuit.
> 3. He is not going to arrest anyone.
>
> Legally Stephanie has not done anything wrong. * * *
>
> This is what I think we should do …
>
> 1. We meet at Merryl's [Learned's] house.
> 2. I go to Amy's house and pick her up and take her to Merryl's house. Hidden from view.
> 2. [sic] I go to the trail. while on the phone with Amy.
> 4. As soon as Stephanie takes off after me Woods goes to her house and drives around back toward me fast. I video everything she does.
> 5. Merryl and Amy follow behind a sheriff on Victor's land. We call Greg and Joyce to come also and AJ and Carol [i.e., other neighbors].
> 6. But all this shows is what she is doing on her.
> 7. If I am outside her property lines and she tries to stop or block me this could show she is overstepping her boundaries...
> 8. Then Woods can see how she is and talk to her.

Exhibit 165.

Seven minutes later, Walls and Amy Dean had a 34-minute phone call, though Ms. Dean testified she did not recall what they discussed.[27] Nevertheless, soon after, Walls blocked Ms. Casey on the community road with his tractor, heading against traffic, and preventing Ms. Casey from using the road.[28] When, later that morning,

---

[27] TR 2-3-2023 p. 147:3 – p. 149:6.

[28] TR 2-3-2023, p. 77:19 – p. 81:25.

Sheriffs again arrived, Walls lied and told them he had been hired by "the association" to perform maintenance.[29]

When Ms. Casey did not get arrested, the next day, July 22, 2021, Amy Dean filed an *ex parte* motion for civil protection order ("**MCPO**"), seeking to exclude Ms. Casey from use of her own property (*see* **Exhibit 187**, p. 4, #d). The MCPO was denied at a hearing on July 23, 2021, by Magistrate Ferro, who stated:

> I don't find the imminence of the threat to your life or health…. there's a dispute over property, but that's not what we address in this court.

Exhibit 192 (transcript of *ex parte* MCPO hearing).

Caseys' Invasion of Privacy and Conspiracy claims were based, as is appropriate, on the totality of the circumstances (*see e.g.*, CJI-Civ. 28:2, discussed *below*), including those incidents above, among others.

Additionally, a key part of Invasion of Privacy claim was based on conduct by Walls in repeatedly driving past Caseys' property (including driving on Caseys' neighbors' non-easement property adjacent to Caseys, and on a county road, effectively encircling Caseys' home[30]) and repeatedly stopping and staring at

[29] TR 2-2-2023, p. 98:12 - p. 99:3; *see also* TR 2-3-2023, p. 81:4-10.

[30] *See, e.g.,* TR 2-2-2-2023, p. 240:9- p. 241:1 (Walls watching and photographing Stephanie Casey from Russel non-easement property); TR 2-2-2023, p. 244:7-23 (Walls driving back and forth on Victor non-easement property immediately adjacent to Casey property); TR 2-2-2023, p. 243:23 – p. 244:6 (Walls driving past

Stephanie Casey or the Caseys' three young daughters[31] for extended periods of time, and related conduct, for no purpose other than to harass and annoy the Caseys. In reviewing photographic evidence of some of these instances, **<u>Exhibit 258</u>**, and admitting this exhibit on day 3 of trial,[32] the court stated:

> And I do, now, understand also that -- I'll note, one of the reason is, I went through and looked and Mrs. Casey recorded photographically 14 different -- although one pair was on the same day -- 14 different instances * * * in a period of *** ten months.
> * * * what these photos show is a regular contact in September of 2021 and October of 2021, and to some extent, November, for three months shortly after the lawsuit was filed. However, since then, not too much. But it's relevant and [Exhibit 258 is] admitted.

(TR 2-3-2023, p. 15:1-21). In fact, Ms. Casey stated that these types of incidents have continued, though not all are reflected in photographs.[33] As Ms. Casey testified, "We just want to be left alone." TR 2-3-2023, p. 94:1-3.

Caseys' repeatedly on community road with dead antelope from his tractor tongs and honking soon after Caseys were served in the Complaint in this lawsuit. TR 2-2-2023, p. 242:3-22 (day after Caseys served, Walls parading with rifle).

[31] *See, e.g.,* TR 2-3-2023, p. 58:2-13.

[32] When this evidence was offered on day 2 of trial (February 2, 2023), in initially excluding this evidence, the court noted "I'm a little concerned that driving by repeatedly, for no purpose, could start sounding like just harassment, even on a public road, but you didn't plead that. (TR 2-2-2023, p. 249:13-15). In fact, undersigned is aware of any civil claim for 'harassment', but harassment is the gravamen of the tort of invasion of privacy/seclusion. *See* below.

[33] TR 2-3-2023, p. 93:15–p. 94:3.

The evidence admitted at trial as described above and otherwise in the record shows that there were multiple instances of different types of misconduct to support all of the counterclaims. This evidence was, in fact, sufficient to support a judgment in favor of Caseys that was not entered. But there is no basis to support an award of attorney fees and the finding that the counterclaims were frivolous, groundless, or vexatious.

IV. Evidentiary Rulings On Invasion Of Privacy And Conspiracy

The FOJ is inconsistent with the court's findings at trial in numerous instances, but most clearly with respect to determinations as to admissibility of evidence on the Invasion of Privacy and Conspiracy claims. As merely an example, on the first day of trial ("**Day 1**"), Fermelia offered **Exhibit 165** to support the Invasion of Privacy and Conspiracy claims and made an offer of proof regarding the exhibit.[34]

At the time, the court ruled **Exhibit 165** inadmissible (TR 2-1-2023, p. 133-134), perceiving **Exhibit 165** as merely relating to Plaintiffs' desire to maintain the easements, which the court stated was lawful, and inquiring how an attempt to

[34] *See* TR 2-1-1023, p. 130:15-22; TR 2-1-2023, p. 132:19 – p. 133: 24 (explaining, before being cut off by the court, that the evidence was admissible to show that Plaintiffs were ignoring instructions from law enforcement to leave the Caseys alone and, in fact, were trying to engage in actions to provoke contact with Caseys to get Caseys in legal trouble).

provoke ‘an unlawful response’ “can support any claim for relief?” (TR 2-1-2023, p. 133:6-24). At close of trial on Day 1, the court stated:

> [A]s I've heard so far today, the claims for conspiracy, for instance, is based on the lawful acts of the Plaintiffs, they are not provable. Lawful acts would include such as was noted in that one inadmissible evidence about the text [*i.e.*, Exhibit 165], plans to be on the common easement in the presence of law enforcement.* * *You better be able to give me an offer of proof that's a lot thicker than that, because that's thin ice…and pretty soon, I'm going to hold -- start holding you in contempt for continuing to bring to the Court unsubstantiated claims.
>
> What I ask, as I already asked Mr. Fermelia, if you had any legal authority for his theory, and he conceded he did not. That is as close to a finding or concession of contempt as I can imagine… you keep going down this way, Counsel, and you're going to cross that line.

(TR 2-1-2023, p. 222:21 - p. 223:18).

The next day, Fermelia apologized to the court for anything it perceived as warranting a finding of contempt, and made a further offer of proof as to the admissibility of **Exhibit 165**, explaining:

> [W]hen somebody hears "contempt," I do want to apologize. Nothing I did yesterday was meant to disrespect the Court in any manner. I did want to elaborate on the issue of whether the claim of conspiracy was groundless or frivolous with respect to one -- Exhibit 165, and the Court's specific question, the -- that was addressed to me, was I aware of any law that says that trying to entrap somebody into committing a crime, essentially, was wrongful, and I answered "No" to that question.
>
> But our conspiracy claim in this case is based on -- you know, to show a conspiracy, all we have to show is some indicia of an agreement and a course of conduct to commit a tortious act. The tortious act in this

> case is -- the Caseys are alleging -- is the intentional invasion of their privacy by intrusion.

(TR 2-2-23, p. 6:23- p. 7:14) *and see* TR 2-2-2023, pp. 7:14 – p. 8:21) (elaborating why the conspiracy and invasion claims were factually and legally valid and citing authority).

By the third day of trial, despite its earlier threat to hold Fermelia in contempt for offering **Exhibit 165**, the court reversed its earlier ruling, and admitted **Exhibit 165** into evidence, stating:

> Now that I understand better the claims, which were kind of lost in those hundreds of paragraphs and in the briefing and questions that I've been constantly asking ever since, but I understand it now. Better late than never.
>
> I understand why Mr. Walls' text on July 20th of '21 that focused on Mrs. Casey's reaction if there was continued maintenance on the easement fits into a bigger picture, and I'm going to admit Exhibit 165, which I had previously -- previously denied because I did not understand the context.
>
> The text from Mr. Walls to six people, including Miss -- Mrs. Dean on July 20th, '21, in which he discussed, at some length, how he expected Mrs. Casey react if they went back on the easement on her property. That context is now clear.

(TR 2-3-2023, p. 14:4-14).[35] The court also admitted **Exhibit 258,** consisting of photographs showing, as the court stated, "invasive conduct by Mr. Walls."[36]

The determinations in the FOJ that the Invasion of Privacy and Conspiracy claims were groundless and frivolous are utterly and completely inconsistent with these and other rulings by the court at trial.

SUMMARY OF THE ARGUMENT

As a matter of law, Caseys' defenses and claims were not groundless, frivolous, or vexatious. All claims and defenses were based on evidence actually admitted at trial and legal authority. Caseys prevailed on several claims, and should have prevailed on others had the court not disregarded certain evidence, and had the court not erred in applying the law.

As to the Fee Award, all of the defenses that were actually raised (not the ones which the court mistakenly believed had been raised – abandonment, termination and adverse possession) were supported by documents and testimony actually admitted into evidence at trial, and they were validly asserted based on the legal elements.

---

[35] Fermelia had, in fact, explained the 'context' when initially offering **Exhibit 165** on Day 1 (*see* n. 34 above).

[36] TR 2-3-2023, p. 15:1-5; TR 2-3-2023 p. 13:23 - p. 14:3.

So were the counterclaims. Caseys had an absolute right to seek declaratory relief and, while the court was mistaken in stating in the FOJ that it had previously ruled in the Caseys' favor on the Breach of Conditions claim, ultimately, Caseys prevailed on that claim and were awarded injunctive and declaratory relief relating to those claims. Those claims cannot be considered 'frivolous' or 'groundless.'

Nor could the others. Abuse of Process was shown by the very transcript of the hearing on the MCPO, which showed that Amy Dean instigated that action not for its intended purpose (protection against imminent threat of bodily injury), but, instead, to obtain an improper advantage in the Gate dispute and/or to otherwise harass Stephanie Casey. Caseys proved multiple trespasses which the court incorrectly failed to recognize as wrongful merely for lack of actual damages (which is not an element of trespass) or simply did not address in the FOJ. Likewise, Invasion of Privacy was proved, but, in the FOJ, the court ignored its trial rulings, and precedent, in creating *de facto*, 'bright line' rules that such a claim could exist only with mechanical assistance and/or an accompanying trespass. Conspiracy was supported both by evidence of multiple unlawful acts (*e.g.,* multiple trespasses, the Breaches of the Conditions, *etc*.), but also by evidence of an unlawful goal (to harass the Caseys and invade their privacy).

Even if none of the above were true, Caseys' claims and defenses were based on evidence actually admitted (*i.e.*, by definition, 'credible evidence') and rational arguments either under existing law. To the extent it may be determined, if at all, that they were not supported under existing law, they at least support an assertion of a good-faith extension of existing law. Such conduct cannot be regarded as groundless or frivolous.

Additionally, pursuit of the defenses/claims cannot be considered vexatious. 'Credible evidence' means only 'admissible' evidence, and 'frivolous' means only that which cannot be supported by any rational legal argument. The courts' evidentiary rulings admitting evidence at trial are inconsistent with, and preclude, its later determination in the FOJ that the defenses/claims were vexatious. Moreover, the defenses/claims were not seriously questioned by either Plaintiffs or the court prior to trial, so pursuit of them at trial cannot constitute 'vexatious' litigation.

Finally, even if, *arguendo*, the above is ignored, the court erred in the manner and amount of the Fee Award. Merely awarding, *sua sponte*, 'half' the fees and all costs was arbitrary and unreasonable and failed to comply with statute and, in any event, no award of interest could be made on the Fee Award because it constitutes an award for 'costs', not 'damages.

ARGUMENT

I. Standard of Review and Preservation

As is stated in *State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12, 396 P.3d 651, 654:

> When a court enters a judgment following a bench trial, that judgment presents a mixed question of law and fact. [citations omitted]. We apply a bifurcated standard to such questions, reviewing the evidentiary factual findings for an abuse of discretion and the legal conclusions *de novo.* [citation omitted].

The issue of the award of attorney fees and costs in error was preserved for appeal. (*See, e.g.,* CF. 1832-1833 (n. 3)).[37] Moreover, the district court made the Fee Award *sua sponte* (CF, p. 1653), and "where, as here, the trial court rules *sua sponte* on an issue, the merits of its ruling are subject to review on appeal." *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 26.

---

[37] *See, e.g.*, TR 2-1-2023, p. 132:21– p. 133:24) (offer of proof regarding conspiracy/privacy claims); TR 2-2-23, p. 6:18- p. 8:22 (offer of proof regarding privacy and conspiracy); TR 2-3-2023, p. 5:14 -p. 10:21 (offer of proof regarding invasion/conspiracy claims); and *see also Caseys' Proposed Findings of Fact and Conclusions of Law* as follows-- CF, p. 1626-1627 (law and evidence to support defenses) and CF pp. 1619-1620 (addressing invasion of privacy); CF p. 1627-1636 (admitted evidence and law regarding Caseys' claims in general).

II. Defenses Actually Raised And Claims Were Not Groundless Or Frivolous

1. Legal Principles

A court abuses its discretion where its decision rests on a misunderstanding or misapplication of the law, *Genova v. Longs Peak Emergency Physicians*, P.C., 72 P.3d 454, 458 (Colo.App. 2003), or is manifestly arbitrary, unreasonable, or unfair. *E–470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230 (Colo.App. 2006).

Here, the court's conclusion that Caseys' asserted defenses and claims were 'improper litigation' should be reversed for any of several reasons.

2. Defenses Actually Raised Were Based On Evidence Admitted At Trial And Legal Authority

Though the FOJ states otherwise (CF, p. 1651), Defendants never raised "abandonment" or 'termination" of the Easement as defenses or any contention or argument that implicated 'adverse possession' as barring Plaintiffs' claims. *See Answer, Counterclaims*, *and Jury Demand* p. 8 (CF, p. 222).

The defenses which Caseys actually raised were proper based on the facts and the law. "Unclean hands" was properly invoked based on the Gate History, where Plaintiffs actually had used Gates, but then claimed Defendants' wanting to use them was not allowed, as it was "significantly" related to Plaintiffs' contentions in this case. *See, e.g., Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) stating:

> …one who seeks equity must do equity. Many different forms of improper conduct may bar a plaintiff's equitable claim, and the conduct need not be illegal… ["Unclean hands" is generally applied] when a plaintiff's improper conduct relates in some significant way to the claim he now asserts…. [T]he clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action may, as a result, lose entitlement to an equitable remedy.

(citations omitted). *See also Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 276 (Colo.App. 2000) ('unclean hands' merely means that "the court will not consider a request for equitable relief under circumstances where the litigant's own acts offend the sense of equity to which he or she appeals").

Estoppel and laches have essentially the same legal elements that include knowledge of the facts, unreasonable delay, and intervening reliance by and prejudice to another.[38] Again, the Gate History demonstrates these defenses were, at the very least, properly asserted.

Waiver was also, at the very least, supportable, based on the Gate History. "A waiver may be shown by a course of conduct." *Lease Fin., Inc. v. Burger*, 575 P.2d 857, 862 (Colo.App. 1977) (noting also that, where waiver involves a written document such as the Conditions here, parol evidence is admissible to show waiver); *Pastor v. San Juan Sch. Dist. No. 1*, 699 P.2d 418, 420 (Colo.App. 1985)

---

[38] *See, e.g., Barker v. Jeremiasen*, 676 P.2d 1259, 1262 (Colo.App. 1984) (elements of estoppel). *In re Marriage of Kann & Kann*, 2017 COA 94, ¶ 40 (elements of laches)

("Waiver may be shown by a course of conduct signifying a purpose not to stand on a right, leading one, by a reasonable inference, to the conclusion that the right in question will not be insisted upon").

Moreover, though the court stated otherwise, the 'defenses' which were raised were not precluded merely because the Easement 'ran with the land.' (TR 2-1-2023, p. 219:17-19)).[39]

Likewise, the court's conclusion that equitable defenses were "not applicable to the legal issues raised in this case" (CF, p. 1651) is not correct as a matter of law. First, Plaintiffs did not merely bring 'legal' claims, but also sought (and ultimately were awarded) declaratory and injunctive relief. Further, the Gate History was relevant to the legal issue of interpretation of the Conditions (*e.g.*, what constituted

---

[39] *See, e.g., First Hyland Greens Ass'n v. Griffith*, 618 P.2d 745, 747 (Colo.App. 1980) ("the doctrine of equitable estoppel may be applied to preclude enforcement . . . of a restrictive covenant which runs for the benefit of all lot owners in the subdivision"). *See also Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 76 (Colo. App. 1993) (waiver of restrictive covenant is basis for equitable defense of waiver, waiver was not met by showing of construction of only one allegedly non-conforming house) (citation omitted). *See also Woodmoor Imp. Ass'n v. Brenner*, 919 P.2d 928, 931–32 (Colo.App. 1996) ("equitable estoppel may be applied to preclude enforcement …of a restrictive covenant which inures to the benefit of all lot owners…. [A]pplication of the doctrine requires that the property owner reasonably rely on the actions or representations [of the party seeking to enforce covenant]").

keeping the easements clear for 'intended use'[40]), and/or whether Gates could be a trespass or nuisance.

The court erred as a matter of law in ruling that the defenses were categorially improper. *See, e.g. M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.,* 962 P.2d 335, 339 (Colo.App. 1998) ("attorney fee awards will be set aside if the record does not support a determination that the claim or defense was frivolous").

3. Counterclaims Were Based on Evidence Admitted At Trial and Legal Authority

A. Declaratory, Injunctive, and Breach of Conditions Claims

Caseys had an absolute right to seek declaratory relief as to the interpretation of the Conditions; whether Plaintiffs' conduct was a violation of the Conditions; and whether Plaintiffs' conduct was consistent with keeping the easements clear for their intended use. *See* C.R.S. § 13-51-109 (party may seek declaratory relief in any situation where "in which a judgment or decree will terminate the controversy or remove an uncertainty"); C.R.C.P 57 (e) (same).

Further, the Caseys prevailed in full on Breach of Conditions claim (either before or at trial) and obtained declaratory and injunctive relief prohibiting such

[40] *See, e.g., Blecker v. Kofoed*, 672 P.2d 526, 528 (Colo.1983) ("One of the most reliable indications of the true intent of the parties to a contract is their behavior and interpretation of the contract before a controversy arises").

violations by Plaintiffs. Those claims cannot be regarded as 'groundless' or 'frivolous'. Nor can any of the other of Caseys' claims.

B. MCPO/Abuse of Process

The proper purpose of a civil protection order is to "prevent assaults and threatened bodily harm." C.R.S. § 13-14-104.5(1)(a). On the basis of the transcript of the Magistrate's ruling denying Amy Dean's MCPO alone, without deference to the trial court[41], one can reasonably conclude that her invoking of that process was not for its legitimate purpose. *See* **<u>Exhibit 192</u>** (p. 4-5) (finding there was no evidence of "imminence of the threat to [Amy Dean's] life or health" and despite Ms. Dean's contentions, "a dispute over property…[is] not what we address in this court").

Moreover, the context of the MCPO, coming only a couple of days after the two July 2021 trespasses and the very day after the Provocation Incident, is further evidence (not that any is needed) to support the "improper purpose" element of

---

[41] *Deutsche Bank Tr. Co. Americas v. Samora*, 2013 COA 81, ¶ 37 ("facts are presented to the trial court by… uncontested documentary evidence ... an appellate court may draw its own conclusions" without deferral to the trial court).

'abuse of process.'[42] That reasonable inference is that the MCPO was filed to intimidate and/or harass Ms. Casey or obtain an advantage in the Gate dispute.[43]

C. Trespasses

Likewise, the evidence supported multiple trespasses by Plaintiffs, including but not limited to Walls' trespass in November 2020, the two trespasses by Walls, the Deans, and Learned in July 2021 (including the one for which the court awarded Caseys $800 in damages), and the various trespasses by Amy Dean. The court incorrectly applied the law in determining (at least with respect to the Caseys, though, oddly and inconsistently, not with respect to Walls[44]), that actual damages were an element of trespass. (*See, e.g.* CF, p. 1649 ("Walls and Amy Dean at times

---

[42] *See, e.g., Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo.App. 2006) ("The improper purpose is ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself and is a form of extortion in which a lawfully used process is perverted to an unlawful use"); *Yadon v. Lowry,* 126 P.3d 332, 337 (Colo.App. 2005) ("The essence of the tort of abuse of process is the use of a legal proceeding primarily to accomplish a purpose that the proceeding was not designed to achieve").

[43] In addition, non-economic damages are awardable for abuse of process (*see, e.g., Palmer v. Diaz*, 214 P.3d 546, 553 (Colo.App. 2009)), and Caseys also proved such damages. (TR 2-3-2023, p. 66:12 – p. 67:2).

[44] *See* CF, p. 1651 (b); CF, p. 1652(VIIc) (awarding Walls nominal damages, though none of the Plaintiffs ever requested damages). (*See* CF, p. 13).

have intentionally entered upon [the Caseys] property; but there is no evidence… [of] physical damage”)).

In reality, nominal damages are awardable for trespass.[45] Caseys were entitled to prevail on all of their trespass claims, but, at the very least, those claims cannot properly be concluded as groundless or frivolous. *See, e.g., Genova*, *supra*, 72 P.3d at 458 (court abuses its discretion where its decision rests on a misunderstanding or misapplication of the law).

D. Invasion Of Privacy

After initially being confused, the trial court specifically recognized at trial that the Invasion of Privacy and Conspiracy claims were supported by the evidence which the court deemed relevant and admissible (*see, e.g.,* **Exhibit 165** and **Exhibit 258**). In backtracking on these determinations in the FOJ, the court was simply wrong in its application of the law.

‘Invasion of privacy’ extends beyond merely ‘peeping tom’-type behavior to which the FOJ effectively limits the tort. (*See* CF, p. 1650(e)(2)). In fact, as the Restatement (Second) of Torts specifically directs against the limitations placed on

---

[45] *See, e.g., Burt v. Beautiful Savior Lutheran Church of Broomfield,* 809 P.2d 1064, 1067 (Colo.App. 1990) (defendant “is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other”). *See also* CJI-Civ. 18:4, n. 4 (nominal damages and damages for non-economic injury are awardable for trespass caused by the trespass).

the tort by the court, and specifies that 'mechanical aids' are unnecessary and the tort does not require an accompanying trespass. *See* Restatement (Second) of Torts § 652B cmt. a-c (invasion may occur "with or without mechanical aids"; and "Even in a public place"). *See also In re Marriage of Tigges*, 758 N.W.2d 824, 829, n. 3 (Iowa 2008) *citing* Restatement.

Indeed, such limitations are particularly improper because "The gist of the tort…is interference with the plaintiff's solitude, seclusion, or private affairs and concerns, and this can occur by . . . **repeated hounding and harassment**." CJI-Civ. 28:1, n. 4 (citing Restatement (Second) of Torts §652A, cmt. b.) 1 (underlining and emphasis added). *See also* CJI-Civ. 28:3 ("A defendant intends to invade the plaintiff's privacy when he means to invade the plaintiff's privacy, or knows that his conduct will almost certainly cause an invasion of privacy").

Indeed, at trial, the court recognized that Walls' "driving by repeatedly, for no purpose, could start sounding like just harassment, even on a public road,"[46] but the FOJ is completely inconsistent with that recognition.

As was stated in *Sanders v. Am. Broad. Companies, Inc.,* 20 Cal. 4th 907, 915–16 (1999):

[46] TR 2-2-2023, p. 249:13-15.

> [P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Although the intrusion tort is often defined in terms of "seclusion"… the seclusion referred to need not be absolute. "Like 'privacy,' the concept of 'seclusion' is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.

(citations omitted) (reversing appeals court decision that invasion of privacy/seclusion claim was barred as matter of law).

Several cases (brought to the court's attention at trial,[47] though oddly not addressed in the FOJ) demonstrate the true scope of the tort and the trial court is categorically incorrect in stating in the FOJ that "[not a] single case in the United States of America or its territories" supported the claim here. (CF, p. 1650.e.2). *See, e.g., Kidd v. Cigna Corp*., No. 3:10-0020, 2010 WL 4697986, at *9, 10 (M.D.Tenn. Nov. 12, 2010) (court declined to grant summary judgment in a defendant's favor in a breach of privacy case based on the defendants' argument that "one can have no reasonable expectation of privacy when he or she is videotaped performing activities in public" because "[privacy cases] are intensely fact-driven [and whether a given] intrusion would be offensive to persons of ordinary sensibilities is ordinarily a

[47] TR 2-3-2023, p. 5:14 – p. 10:21.

question for the fact-finder"); *Huskey v. National Broadcasting Co., Inc*., 632 F.Supp. 1282 (N.D.Ill.1986) (person's right of privacy can be invaded even where that person is in prison and was filmed without consent in a 'non-private' area); *Stessman v. Am. Black Hawk Broad. Co*., 416 N.W.2d 685, 687 (Iowa 1987) (dismissal of invasion of seclusion claim improper even though plaintiff was photographed in public because "the mere fact a person can be seen by others does not mean that person cannot legally be "secluded""). *See also Coombs v. J.B. Hunt Transp., Inc.*, 388 S.W.3d 456, 461 (Ark.App. 2012) ("a person's visibility to some does not necessarily strip him of the right to remain secluded from others") (citations omitted).

Moreover, the 'bright line' tests employed in the FOJ are contrary the Colorado Supreme Court's direction in *Rugg v. McCarty*, 476 P.2d 753, 755 (Colo. 1970), in which, in adopting the tort, the Court declined "to comprehensively define the right of privacy, nor to categorize the character of all invasions which may constitute a violation of such right."[48] Instead, all of the circumstances must be considered. *See* CJI-Civ. 28:2:

---

[48] *Sundheim v. Board of County Com'rs of Douglas County*, 904 P.2d 1337 (Colo.App. 1995), cited by Plaintiffs in their trial brief, is inapplicable. The case involved claim against a public entity and an investigator hired by the county. (904 P.2d at 1344). Before "an aggrieved party may object to a search by government agents, he or she must first demonstrate a legitimate expectation of privacy in the

> In determining whether an invasion is very offensive to a reasonable person, you should consider all of the evidence, including the degree of invasion, the circumstances surrounding the intrusion and the manner in which it occurred, the defendant's motives and objectives, the setting in which the intrusion occurs, and the plaintiff's expectations of privacy in that setting.* * *

At the very least, consideration of these factors makes the determination one for the trier of fact; not a categorical bar as the court determined in the FOJ. *See, e.g.*, *Evans v. Colorado Ute Elec. Association, Inc.*, 653 P.2d 63, 65 (Colo.App. 1982) (repeated trespasses outside of easement area alone constituted willful misconduct justifying award of punitive damages). *See also Remsburg v. Docusearch, Inc.,* 816 A.2d 1001, 1008 (N.H. 2003) ("Whether the intrusion would be offensive to persons of ordinary sensibilities is ordinarily a question for the fact-finder and only becomes a question of law if reasonable persons can draw only one conclusion from the evidence") (citation omitted).

---

areas searched." 904 P.2d 1350. It was on that basis that *Sundheim* was decided. *Sundheim* did not discuss any of the case-law or elements of invasion of privacy and the case it relied upon, *Hoffman v. People*, 780 P.2d 471 (Colo. 1989), was a *criminal law* case applying 4th Amendment search and seizure principles (not tort principles). *See Hoffman*, 780 P.2d 471, 474 (Colo. 1989) (prosecutor and defendant agree that "the officers' off-site observation of the marijuana plants did not constitute a search for fourth amendment purposes").

E. Conspiracy

Just as with Invasion of Privacy, the court recognized the relevance of evidence as to the Conspiracy claim and admitted that evidence at trial, but its ruling in the FOJ – that there was no "illegal act"—is legally incorrect.[49]

In the first instance, conspiracy can be shown not only by an "unlawful act" but also by a "lawful act" if done for an unlawful purpose or goal.[50] No Colorado decision provides a comprehensive definition of "unlawful means" or "unlawful goal,"[51] but cases cited in the pattern jury instructions indicate a variety of torts and breaches of duty qualify. *See* CJI-Civ. 27:1 (n. 5-6, 8); 27:2 (n. 1-2).

Here, the evidence admitted demonstrates, at the very least, an inference[52] of

---

[49] *See* CF, p. 1651 ("Caseys presented no evidence whatsoever that Plaintiffs harassed them… or any other illegal act alleged in the counterclaims").

[50] *Magin v. DVCO Fuel Sys., Inc.*, 981 P.2d 673, 674 (Colo.App. 1999) (" A conspiracy may be shown by "one or more unlawful acts which were performed to accomplish a lawful or unlawful goal, or one or more lawful acts which were performed to accomplish an unlawful goal."

[51] *see* CJI-Civ: 27:2 (n. 1), and CJI-Civ: 27:3.

[52] *See, e.g., Resol. Tr. Corp. v. Heiserman*, 898 P.2d 1049, 1056–57 (Colo. 1995) (*en banc*) ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances") (internal quotation omitted). *See also* Anstine *v. Alexander*, 128 P.3d 249, 256–57 (Colo.App. 2005*), rev'd on other grounds*, 152 P.3d 497 (Colo. 2007) ("Evidence of a course of conduct from which a tacit agreement to act in concert may be implied is a sufficient basis to impose joint liability") (bold and

both unlawful acts and an unlawful goal by Plaintiffs. The breaches of the Conditions, multiple trespasses, filing of the MCPO wrongfully, and Walls' lying to sheriffs in concocting the Provocation Incident, are all examples of unlawful acts, and, even if, *arguendo*, they were considered as not *per se* unlawful, they were done for the unlawful purpose of harassing Caseys and intruding upon their seclusion. Thus, again, the FOJ is wrong as a matter of law.

4. Credible Evidence And Rational Argument Supported Claims/Defenses

All of the above demonstrates that Caseys' claims/defenses were based on credible evidence and were consistent with existing law. However, to the extent, if at all, it is concluded that the claims/defenses were not viable under existing law, they support a good-faith argument for extension of existing law, precluding an award of attorney fees. *See* C.R.S §13–17–102(7) ("No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado"). *See also W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069-

---

underling added, citation omitted). *See also Saint John's Church v. Scott*, 194 P.3d 475 (Colo.App. 2008) (evidence of conspiracy to commit a public nuisance sufficient where two defendants were part of a small group with a long history of active demonstrations, both made plans to attend protest, both met with protest group about the demonstration, and one provided the other with signs for protest).

1070 (Colo. 1984) (same, and stating public policy of discouraging unnecessary and unwarranted litigation must be balanced against lawyers' duty of advocacy); *see also Stamp v. Vail Corp.*, 172 P.3d 437, 450 (Colo. 2007) ("A plaintiff should have an opportunity to test the merits of any claim for relief that is supported by the underlying facts of the case") (citation omitted).

III. Pursuit Of Claims/Defenses Was Not "Vexatious"

1. Trial Rulings Preclude The FOJ Conclusion

By definition, a 'groundless' claim is one which is supportable by no admissible evidence.[53] An argument is frivolous only if the "proponent can present no rational argument based on the evidence or law in support of that claim or defense." *W. United Realty, Inc,* 679 P.2d at 1069. Here, all the defenses and claims were based on evidence actually admitted, and after the court's assessment that the evidence was legally relevant under the applicable legal theories.

The court itself inquired about the Gate History and elicited testimony about it.[54] Additionally, evidence of the trespasses and Breach of Conditions was admitted.

---

[53] *See, e.g., In re Est. of Shimizu,* 2016 COA 163, ¶ 22, 411 P.3d 211, 216–17 (citing various cases that claim/defense is groundless only when it "lacks admissible evidence to support" it, and a claim/defense is not groundless where "evidence, while not perhaps persuasive to the trial court, was clearly sufficient to support a reasonable inference that defendants [did something wrong]....").

[54] TR 2-1-2023, p. 32:3– p. 34:19.

Plaintiffs themselves, without objection, admitted the MCPO hearing transcript (**Exhibit 192**) and did not object when Amy Deans' MCPO itself (**Exhibit 187**)[55], was admitted. The court also was clear, in admitting evidence on the Invasion of Privacy and Conspiracy claims, that it was doing so based on (at the very least) rational arguments about the law.[56]

Thus, at trial, the claims were supported by 'credible' evidence and rational argument. Those determinations effectively preclude the later finding in the FOJ that the claims/defenses were groundless and/or frivolous, and their pursuit cannot properly be deemed 'vexatious.'

2. Claims Were Not Vexatious Where No Pre-Trial Challenge Existed

Additionally, a finding that a claim or defense was 'vexatious' presupposes that a party pursued a claim or defense when it knew or should have known that the claim was groundless or frivolous.[57] Here, the claims and defenses were not so, and there was no indication before trial that Plaintiffs or the court believed otherwise.

---

[55] TR 2-1-2023, p. 136:9-15.

[56] *See, e.g.*, TR 2-3-2023, p. 14:3 –p. 15:21.

[57] *See, e.g., W. United Realty, Inc*, 679 P.2d at 1068–69 (vexatious claim is one where plaintiff "continues to litigate" after action has become groundless or frivolous).

In their trial brief, Plaintiffs did not contend that any defense or claim by Caseys was frivolous, groundless, or vexatious. (*See* CF, pp. 1394-1404). In their portions of the TMO, Plaintiffs alleged, only in boilerplate fashion, that "Caseys' Counterclaims are groundless or frivolous or were filed for a vexatious purpose" with no elaboration as to any particular claim or basis for this contention. (CF, p. 1436 (#16)).[58]

Further, at the Trial Management Conference, there was not any discussion of any defenses, and, as to the counterclaims, the court, having not read the Caseys' trial brief[59] inquired about the 'unlawful acts' supporting Conspiracy and other bases for Caseys' claims, stating, after Fermelia explained Caseys' theories,[60] not that the claims were groundless or frivolous, but, instead, that the court "understood that generally."[61] The court also observed that the scope of Caseys' claims was "pretty

---

[58] The fact that Caseys prevailed on a number of counterclaims demonstrated that this 'boilerplate' was, itself, baseless. *See, e.g., Pedlow v. Stamp*, 819 P.2d 1110, 1112-14 (Colo.App. 1991) ("a high percentage of claims for attorney fees are without a legitimate and substantial basis") (Dubofsky, J., specially concurring).

[59] TR 1-20-2023, p. 29:24.

[60] TR 1-20-2023 p. 29:1- p. 32:12.

[61] TR 1-20-2023, p. 31:11.

broad" and that "many of these claims that Mr. Fermelia was just describing relating to the civil conspiracy take some time to flush out."[62]

In short, there is no evidence that Fermelia pursued any claim/defense at a point where there was any reasonable question as to the grounds/legal authority supporting the claims/defense. Pursuit of the claims/defenses cannot be vexatious. *See, W. United Realty, Inc.*, 679 P.2d at 1068–69.

IV. The Court Erred In The Manner And Substance of The Fee Award

1. Fee Award Was Arbitrary And Violated Statute

Even if one was to ignore all of the above analysis which, without more, compels that the Fee Award should be vacated and reversed, the Fee Award was also improper because it was arbitrary and did not comply with statute.

"An award of attorney fees must be reasonable." *Tisch v. Tisch*, 2019 COA 41, ¶ 84. Here, in issuing the Fee Award *sua sponte* in the FOJ for 'one half' of fees and ordering Plaintiffs to file a motion and bill of costs (CF, p. 1653), the district court had no information before it at all to assess why particular fees were incurred and, in particular, which were attributable to so-called 'improper' claims/defenses. *See, Farmers Reservoir & Irr. Co. v. City of Golden*, 113 P.3d 119, 126 (Colo. 2005) (party awarded fees must "establish a reasonable proration of attorney fees incurred

[62] TR 1-20-2023, p. 32:13-18.

relative to the defense of a frivolous or groundless claim") (citation omitted). *See also Fountain v. Mojo*, 687 P.2d 496, 502 (Colo.App. 1984) (district court properly denied fees for improper litigation where party awarded fees "failed to present evidence sufficient to enable [the district court] it to apportion" fees). *See also Harrison v. Smith*, 821 P.2d 832, 835 (Colo.App. 1991) (remand for allocation of fee award before it became groundless and after it did so).

Awarding one-half of fees from case inception does not rationally relate to the court's apparent concern that it "spent hours at a Trial Management Conference and then days at trial for no legitimate purpose" (CF, p. 1652(2)), and such a ruling is unreasonable. *See, e.g., Medina v. Conseco Annuity Assur. Co*., 121 P.3d 345, 347 (Colo.App. 2005) ("trial court acts arbitrarily when it relies on factual assertions that are not supported by the record").

Additionally, when awarding fees pursuant to C.R.S. § 13-17-102, the court "shall consider" the factors set forth in C.R.S. § 13-17-103 in assessing the amount of fees. Here, the district court failed to conduct any such analysis, and, further, failed to conduct a hearing by which it could make such an analysis.[63]

---

[63] While there are cases stating that a hearing is waived if not requested, here, in the *sua sponte* Fee Award in the FOJ, the court had already predetermined that Plaintiffs were entitled to one-half of their fees since case inception. Fermelia, Cohen, and Defendants were entitled to a hearing *before* the court ruled that Plaintiffs were entitled to 'half' the fees.

Accordingly, if not reversed, the Fee Award must, at the very least, be vacated and the matter remanded for consideration and application of the statutory factors before any valid fee award could be made. *See, e.g., Pedlow v. Stamp*, 776 P.2d 382, 386 (Colo. 1989) (fee award reversed where statutory factors were "not addressed in the court's order" and court held no hearing such that the "district court's conclusory award of attorney fees therefore constituted an abuse of discretion")*;* *Padilla v. Ghuman,* 183 P.3d 653, 662 (Colo.App. 2007) ("Where the trial court awards attorney fees without holding a hearing and without making specific findings pursuant to section 13–17–103(1), C.R.S. 2007, the court abuses its discretion") (citation omitted). *Consumer Crusade, Inc. v. Clarion Mortg. Cap., Inc.*, 197 P.3d 285, 289 (Colo.App. 2008) (the trial court "must, regardless of the opposing party's failure to respond, analyze the fee request under the statute") (citation omitted).

2. The Fee Award Improperly Awarded Interest

Additionally, if the Fee Award is not reversed, the trial court at least erred in awarding "8%" interest on it. (*See* CF, p. 1852-1853). An attorney fee and litigation costs award pursuant to C.R.S. §13-17-101 *et seq.* is regarded as an award of 'costs,' not 'damages,' and interest may not be awarded on such an award. *Farmers Reservoir & Irr. Co. v. City of Golden*, 113 P.3d 119, 133-34 and 135 (Colo. 2005) (costs of litigation are not "damages", nor is fee award under C.R.S. 13-17-102, so

award of interest on such awards is error). *See also Amtel Corp. v. Vitesse Semiconductor Corp.,* 160 P.3d 347, 350 (Colo.App. 2007) ("a party may not be ordered to pay prejudgment interest on attorney fees that are awarded as costs of litigation") (citations omitted).

CONCLUSION

For the reasons set forth above, Fermelia requests that the Fee Award be reversed and that the mandate direct that the district court release the Bond to him. If the Fee Award is not fully reversed and vacated, the award of interest, at least, must be vacated, and the matter remanded for proper apportionment and application of the statutory factors and apportionment of the Fee Award.

Respectfully submitted, this 13th day of November 2023.

MORITZ LAW, LLC

/s/ Stephen A. Fermelia

Stephen A. Fermelia
Attorneys for Defendant-Appellants
Stephanie Casey and Trevor Casey,
and Attorney-Appellant
Stephen A. Fermelia

CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of November 2023, a true and correct copy of the foregoing was electronically served *via* Colorado Courts E-Filing System upon the following:

Neal K. Dunning
Scott W. Drusch
BROWN DUNNING WALKER
FEIN DRUSCH PC
7995 E. Prentice Ave, Suite 101E
Greenwood Village, CO 80111
Attorneys for Plaintiffs-Appellees
Amy F. Dean,
Donner E. Dean, Jr., Merryl
Learned, and John R. Walls, Jr.

Mark Cohen
Mark Cohen, J.D., LL.M.
P.O. Box 19192
Boulder, CO 80308
Attorney for Defendant-
Appellants
Wendy Brockman and Clifton M.
Brockman, Jr.

Bradley A. Levin
Nelson A. Waneka
LEVIN SITCOFF WANEKA PC
455 Sherman Street, Suite 490
Denver, CO 80203
brad@lsw-legal.com;
nelson@lsw-legal.com
Attorneys for Defendants-Appellants
Stephanie And Trevor Casey and
Wendy and Clifton Brockman

Andrew J. Felser
GLADE VOOGT LOPEZ SMITH
FELSER, PC
1800 Gaylord Street
Denver, CO 80206
Attorney for Mark Cohen
and Mark Cohen, J.D., LL.M

/s/ Stephen A. Fermelia
Stephen A. Fermelia