14CA1810 Meadow Lake v Johnston Enters 12-03-2015

COLORADO COURT OF APPEALS

DATE FILED
December 3, 2015
CASE NUMBER: 2014CA1810

Court of Appeals No. 14CA1810
El Paso County District Court No. 11CV5018
Honorable Barbara L. Hughes, Judge

Meadow Lake Airport Association,

Plaintiff-Appellee,

v.

Johnston Enterprises of Colorado Springs, LLC,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE BERGER
Webb and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced December 3, 2015

Hanes & Bartels LLC, Richard W. Hanes, Colorado Springs, Colorado, for Plaintiff-Appellee

Donley Law, P.C., Jack E. Donley, Colorado Springs, Colorado, for Defendant-Appellant

In this dispute over an avigation easement, defendant, Johnston Enterprises of Colorado Springs, LLC (Johnston), appeals the judgment entered on remand permanently enjoining it from interfering with the passage of aircraft to and from Meadow Lake Airport, which is owned and operated by plaintiff, Meadow Lake Airport Association (MLAA).[1]

Johnston argues that the trial court failed to follow this court's remand order in determining the intent of the parties to the easement in relation to expansion of the airport. We agree. Because we further conclude that the record does not support the trial court's determination that MLAA met its burden to establish that Johnston violated the easement, we reverse the judgment and remand the case to the trial court with directions to vacate the injunction and dismiss the complaint with prejudice.

I. Facts and Procedural History

In 1969, the parties' predecessor in interest, who owned both Johnston's and MLAA's current properties, granted and recorded an avigation easement. The easement protected the airspace the

[1] An "avigation easement" is "[a]n easement permitting unimpeded aircraft flights over the servient estate." Black's Law Dictionary (10th ed. 2014).

airport needed to operate its aircraft and prevented surrounding properties from interfering with the passage of aircraft in the airspace above their properties:

> [T]he Grantor . . . does hereby grant, bargain, sell and convey unto the Meadow Lake Airport . . . for the use and benefit of the public, an easement and right of way, appurtenant to the Meadow Lake Airport, for the passage of all aircraft ("aircraft" being defined for the purposes of this instrument as any device now known or hereafter invented, used, or designed for navigation of or flight in the air) . . . in the airspace above the surface of Grantor's property to an infinite height above said Grantor's property, together with the right to cause in said airspace such noise, vibration, and all other effects that may be caused by the operation of aircraft landing at or taking off from or operating at or on said Meadow Lake Airport not inconsistent with State or local law.

The property was later platted and the plat was recorded in 1970. The lots surrounding the airport were platted for residences, hangars, and airport maintenance and tie-down facilities. After the filing of the plat, the platted lots were sold to private individuals and entities. Thus, although MLAA, a nonprofit corporation established in 1971, owns the airport property and operates the airport, all of the hangar areas surrounding the airport are now owned by private parties.

It is uncontested that at the time of the easement grant and the plat filing, the airport had only two runways. In the mid-1980s, glider aircraft began to operate on a strip of land that borders what is now Johnston's property. In the 1990s, the glider strip was paved.

In 2005, Johnston bought the property bordering the glider strip. Several years later, Johnston erected four fence posts at the corners of its property to mark the property's boundaries. It also erected a "For Sale" sign on its property. Some of the posts and the sign interfered with the operation of gliders on the glider strip.[2]

MLAA filed a complaint against Johnston for violation of the avigation easement. MLAA requested that Johnston be "permanently enjoined and restrained from interfering with aircraft operations at Meadow Lake Airport," and specifically "from interfering with aircraft and glider operations at Meadow Lake Airport by the erection or maintenance of any structure that interferes, or has the potential to interfere, with the movement of aircraft or gliders, either on the ground or in the air." MLAA also

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[2] There is no allegation that the posts or sign interfered with aircraft operations on the runways that initially comprised the airport, either as originally designed or later improved.

requested a mandatory injunction ordering Johnston to remove the fence posts.

After a bench trial, the trial court determined that Johnston had notice of the avigation easement, the glider strip, and glider operations affecting the property when it purchased it. The court further found that the fence posts and the sign interfered with "aircraft on the airstrip," thus violating the easement. It entered a permanent injunction enjoining Johnston from erecting any structure that "interferes with the passage of aircraft or gliders on the glider strip." (Emphasis omitted.) Johnston appealed to this court.

This court reversed the judgment, concluding that "the trial court erred in failing to consider the circumstances surrounding the grant of the avigation easement and extrinsic evidence concerning the intentions of the parties, because the grant is silent as to the parties' intentions regarding airport expansion and development." *Meadow Lake Airport Ass'n v. Johnston Enters. of Colorado Springs, LLC*, slip op. at 13 (Colo. App. No. 12CA2189, Sept. 26, 2013) (not published pursuant to C.A.R. 35(f)). We remanded the case for reconsideration of the scope and use of the easement, specifically

holding that the trial court's determination that Johnston was on notice of the avigation easement and the use being made of the easement was not relevant to the analysis. *Id.* at 6, 17.

Although this court acknowledged the trial court's discretion to take additional evidence on remand, *id.* at 16, the parties stipulated that no further evidence would be presented. Based on the existing record and the parties' post-remand briefs, the trial court concluded that the parties to the easement intended that the easement would cover all of the "Grantor's property including the expansion of the airport within the boundaries" of the property platted in 1970. Because the glider strip was located within the boundaries of that property, it was subject to the avigation easement. Thus, according to the trial court, Johnston's interference with the passage of aircraft on the glider strip "was an interference with the passage of aircraft on Grantor's property and therefore a violation" of the easement. The court ordered Johnston "enjoined from acts or omissions that interfere with the passage of aircraft on the [platted] property."

II. The Case is Not Moot

MLAA argues that this appeal should be dismissed because the issue presented on appeal is moot. MLAA asserts that the glider strip was abandoned in the summer of 2013 and glider aircraft operations at the airport have been permanently moved to a new runway nonadjacent to Johnston's property. Thus, according to MLAA, because the glider strip no longer impacts Johnston's property, any relief granted to Johnston on appeal would have no practical legal effect on the controversy. *See Campbell v. Meyer*, 883 P.2d 617, 618 (Colo. App. 1994) (explaining when a case is moot). We reject MLAA's argument for two reasons.

First, as an appellate court, "we are bound by the record presented and may consider only arguments and assertions supported by the evidence in the record." *McCall v. Meyers*, 94 P.3d 1271, 1272 (Colo. App. 2004). Nothing in the record indicates that the glider strip has been vacated.

Second, even if the record were to support MLAA's assertion that the glider strip has been vacated, the case would not be moot. The trial court issued a broad injunction that has a detrimental effect on Johnston's ownership rights regardless of the status of the

glider strip. As conceded in MLAA's president's trial testimony, nothing prohibits MLAA from using the glider strip as a runway in the future or from using that land for some other purpose. Consequently, the injunction still may prohibit Johnston from developing its property in the future or from selling the property for the same price as it could obtain without the injunction; no reasonable purchaser would pay the same amount for the property knowing that it could be rendered substantially unbuildable if MLAA decides to use the now vacated glider strip for other aviation related purposes.

Accordingly, we conclude that the issue presented on appeal is not moot.

III. The Trial Court Did Not Follow the Law of the Case

Johnston argues that, on remand, the trial court failed to follow this court's directions to determine the intentions of the parties to the easement regarding airport expansion. We agree.

"Conclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case." *Super Valu Stores, Inc. v. Dist. Court*, 906 P.2d 72, 79 (Colo. 1995). In subsequent proceedings, a trial

court must follow the law of the case as established by the appellate court. *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009). We review de novo whether a trial court's ruling complies with the law of the case. *Id.*

This court directed the trial court on remand to "determine[] the intentions of the parties as [they] related to expansion and the effect of additional runways on the extent of the avigation easement." *Meadow Lake*, No. 12CA2189, slip op. at 14. The trial court was also "directed to consider whether the easement is ambiguous, as Johnston contends." *Id.* at 15.

Johnston had argued at trial that "the avigation easement could only have applied to the airport as it existed and was contemplated" in the plat — "namely, an airport with only two runways." *Id.* at 13. Johnston also argued that the plat itself indicated the intent of the easement grantor to sell and develop the land around the airport, and thus the easement, which was created almost contemporaneously with the filing of the plat, could not have been intended to apply to later-added runways that would prevent development on lots that were to be sold and developed. *Id.* at 14. This court directed the trial court to address "Johnston's assertion

that the easement's description of the 'Meadow Lake Airport' [that the easement] was intended to benefit was the airport depicted [in the filed plat], having only two runways." *Id.* at 15.

To determine the intention of the parties and resolve any ambiguity, this court further directed the trial court on remand to address the factors and follow the procedures outlined in *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998), and the Restatement (Third) of Property: Servitudes section 4.1 (2000), and also to consider the comments and illustrations provided by the Restatement (First) of Property section 484 (1944), on the issue of changes in the use of the dominant estate. *Meadow Lake*, No. 12CA2189, slip op. at 15.

Lazy Dog Ranch, 965 P.2d at 1237, holds that in determining the intent of the parties to an express easement, courts may consider extrinsic evidence regarding the circumstances of the easement's creation:

> Circumstances relevant to interpreting the language of [an easement] include the location and character of the properties burdened and benefited by the [easement], the use made of the properties before and after creation of the [easement], the character of the surrounding area, the existence and contours of any general

> plan of development for the area, and consideration paid for the [easement].

Id. (citation omitted). These factors are derived from the Restatement (Third) of Property: Servitudes section 4.1 comment d (2000), which provides that the intent of the parties to an easement is "ascertained from the [easement's] language interpreted in light of all the circumstances."

In its order on remand, the trial court did not address any of the *Lazy Dog Ranch* factors, or indeed any factors, relating to the circumstances of the easement's creation. Rather, the court merely stated that "the language of the easement grant is clear and unambiguous as to the intent of the Grantor" and the "[i]ntention of the parties is that the easement and right of way for passage of aircraft would cover and be applicable to the whole of Grantor's property including the expansion of the airport within the boundaries defined" in the filed plat.

This determination is inconsistent with this court's conclusion that "the avigation easement is silent concerning airport expansion, the addition of new runways, and the placement of runways on the borders between the airport and neighboring land." *Meadow Lake,*

No. 12CA2189, slip op. at 15; *see also id.* at 13 ("[T]he grant is silent as to the parties' intentions regarding airport expansion and development."); *id.* at 15 ("[T]he easement is silent as to the development of the dominant estate.").

The trial court also based its conclusion ostensibly on "all the evidence": "[h]aving reviewed all the evidence the Court finds the parties[']] intent regarding the expansion of the airport including additional runways was that the easement and right of way for passage of aircraft would cover and be applicable to the whole of Grantor's property including the expansion of the airport." But the court did not indicate which evidence supported this determination. In fact, nowhere in its order did the court address any evidence in the record other than the language of the easement and the plat, which the court referenced to indicate which properties were covered by the easement.

The trial court concluded its order by stating:

> The presence of the glider aircraft on the surface of and in the air above Meadow Lake Airport is not a new, additional or different use of the servient estate from that intended in 1969 and does not constitute a change in the character of the use of the dominant tenement

> from 1970 that effects [sic] the coverage and application of the Avigation Easement.

This statement appears to constitute a determination that it is unnecessary to analyze the issue under the Restatement (First) of Property section 484 (1944), which provides:

> In ascertaining, in the case of an easement appurtenant created by conveyance, *whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted*, the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement.

(Emphasis added.) A comment to this section explains that "[i]n the absence of language specifically negativing it, it will be assumed that the parties contemplated changes in the use of the servient tenement made necessary by the normal development in the use of the dominant tenement." Restatement (First) of Property § 484 cmt. a (1944).[3]

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[3] It is unclear whether this assumption functions as a presumption under the Colorado Rules of Evidence. *See* CRE 301 ("In all civil actions . . . , a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally

We disagree that the use of the glider strip was not a "change in the character of the use of the dominant tenement." Nothing in the record indicates that the use of a third runway for gliders was contemplated by the parties to the easement, a fact confirmed by MLAA's president. He testified that, when it was granted, the easement applied to the airport that is shown in the plat, which included only two runways. Consequently, the trial court should have determined whether the use of Johnston's property for glider strip operations is permitted under the principles of the Restatement (First) of Property section 484 (1944). Such a determination would have been consistent with this court's directions to the trial court, which were to assume that the parties contemplated normal development of the use of the easement by the dominant estate, but that "[t]hat assumption . . . does not prevent a

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cast."). However, we need not decide this issue because even if we were to assume that the Restatement (First) of Property section 484 (1944) creates a presumption that the parties to the easement contemplated normal development, the outcome of this case would not change. As emphasized by Johnston at trial and on appeal, the circumstances surrounding the grant of the easement, especially the fact that the lots surrounding the airport were platted for private development, would be sufficient to rebut the presumption.

contrary determination, depending upon the facts." *Meadow Lake*, No. 12CA2189, slip op. at 15-16.

This court also directed the trial court on remand to "consider the delicate balance between MLAA's right to use, and benefit from, the easement, and Johnston's right to enjoyment of the burdened property." *Id.* at 16. Under *Lazy Dog Ranch*, 965 P.2d at 1238, because this court concluded that the easement is silent as to the development of the dominant estate, "the interests of both parties must be balanced in order to achieve due and reasonable enjoyment of both the easement and the servient estate." Nevertheless, the trial court did not address whether its determination that the parties to the easement intended that it would cover all of the property shown in the 1970 plat filing, including expansion of the airport, achieved such a balance.

Accordingly, we conclude that the trial court's order on remand did not comply with the law of the case as established by this court's prior opinion.

IV. MLAA Did Not Meet its Burden of Proof

Ordinarily, when a trial court fails to comply with an appellate mandate, the disposition is to remand to the trial court for

compliance. We do not do so here because, despite two opportunities to do so, MLAA failed to meet its burden of proof.

"In civil actions the plaintiff typically bears the burden of proving the allegations of the complaint by a preponderance of the evidence." *Littlehorn v. Stratford*, 653 P.2d 1139, 1142 (Colo. 1982). To establish that Johnston violated the easement, MLAA had the burden to prove that the easement was intended to protect airspace beyond what the airport used in 1969 or 1970. By stipulating that no further evidence would be presented on remand, MLAA limited the basis of this determination to the evidence presented at trial.

In its post-remand brief, MLAA argued that the language of the easement grant is clear and unambiguous as to the intent of the grantor and accordingly there was no need to look to the surrounding circumstances of the grant. Consequently, MLAA did not identify any evidence in the record, other than the easement and the filed plat, that supported its claim that the easement applied to restrain Johnston from erecting structures that interfered with aircraft operations on the glider strip.

Regarding the plat, MLAA argued that "[i]t is clear from the content of the [plat] that normal airport . . . development was

contemplated" because "[o]ver 45 lots were designed for hangars and tie-down facilities" and two "[t]racts were destined for aircraft maintenance facilities." Johnston argued, on the other hand, that the plat shows exactly the opposite: that the parties intended to reserve the right to improve and build upon those lots, and thus the parties to the easement did not intend that the easement would protect the airspace of new runways to the point of impairing the development rights of the platted lots.

Even assuming that the inference that MLAA asked the court to draw from the plat was reasonable, MLAA does not point to any evidence in the record that makes its interpretation of the significance of the plat more plausible than Johnston's. Consequently, even if the inference advocated by MLAA is equally as plausible as the inference advocated by Johnston, MLAA failed to prove its case by a preponderance of the evidence.

Moreover, after reviewing the record, including the trial transcript and exhibits, we have found no other evidence that supports MLAA's claim that the parties to the easement intended the easement to prohibit interference with the passage of aircraft through airspace above the airport's surrounding properties that

the airport did not use in 1969 or 1970. This court's prior opinion makes clear that because the easement is silent as to the parties' intentions regarding airport expansion and development, the circumstances surrounding the easement's grant and extrinsic evidence concerning the parties' intentions was necessary to inform the trial court's resolution of this issue on remand. *See Meadow Lake*, No. 12CA2189, slip op. at 13. Because MLAA stipulated that no further evidence would be presented on remand, it failed to present the evidence necessary to prove its case under the remand order.

Accordingly, MLAA has failed to meet its burden of proof to establish that Johnston violated the easement by obstructing the passage of aircraft through airspace covered by the easement, and a further remand is unnecessary.[4]

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[4] Johnston argues that we should conclude, as a matter of law, that the parties to the easement did not intend for the easement to protect the airspace of additional runways. We decline to do so. Johnston did not file a counterclaim seeking a declaratory judgment regarding the extent of the easement. Accordingly, the only issue properly before us is whether Johnston's erection of the posts and sign violated the easement. Because we conclude that MLAA did not prove that Johnston violated the easement, it is unnecessary for us to determine the full extent of the easement to resolve the issue presented. Similarly, it is unnecessary for us to resolve the parties'

V. Attorney Fees

Both parties request an award of appellate attorney fees under C.A.R. 38(d) and section 13-17-102(4), C.R.S. 2015. MLAA argues that Johnston's appeal is frivolous. Given our disposition, we reject this argument. Johnston argues that MLAA's motion to dismiss the appeal as moot is frivolous, and thus Johnston should be awarded the attorney fees it incurred in responding to the motion. An appeal is frivolous "if the proponent can present no rational argument based on the evidence or law in support of a proponent's claim or defense." *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 934 (Colo. 1993). Although we have determined that the case is not moot, MLAA presented a rational argument in support of its claim. Accordingly, we deny Johnston's request for an award of attorney fees.

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disagreement whether the easement must be read in conjunction with Federal Aviation Administration (FAA) regulations, specifically 14 C.F.R. Part 77 (2015), to determine what airspace it protects. We do not rely on Part 77, nor express any opinion regarding the applicability of Part 77 or any other FAA regulations to the easement, in this opinion.

VI. Conclusion

The judgment is reversed, and the case is remanded to the trial court with directions to vacate the injunction and dismiss the complaint with prejudice.

JUDGE WEBB and JUDGE FOX concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 8, 2015

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/index.cfm/ID/21607.*

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED December 3, 2015 6:37 AM CASE NUMBER: 2014CA1810
El Paso County 2011CV5018	
Plaintiff-Appellee: Meadow Lake Airport Association, v. Defendant-Appellant: Johnston Enterprises Of Colorado Springs, LLC.	⚠ COURT USE ONLY ⚠ Case Number: 2014CA1810
Order	

DENIED.

All concur.

Webb, J.
Fox, J.
Berger, J.

Issue Date: 12/3/2015
BY THE COURT

Colorado Court of Appeals State of Colorado 101 West Colfax Avenue, Suite 800 Denver, CO 80202 Telephone No.: 303-837-3785	
Appeal From the District Court El Paso County District Court Judge Barbara Hughes Civil Action No. 2011CV5018, Division 13	▲ **COURT USE ONLY** ▲
Defendant-Appellant: Johnston Enterprises of Colorado Springs, LLC vs. Plaintiff-Appellee: Meadow Lake Airport Association	Court of Appeals Case No: 2014CA1810
Attorneys for Plaintiff-Appellee: HANES & BARTELS LLC Richard W. Hanes, #1206 102 South Tejon Street, Suite 800 Colorado Springs, CO 80903-2239 Telephone: 719-260-7900 Facsimile: 719-260-7904 e-mail: rwh@hhbcolorado.com	
PLAINTIFF/APPELLEE'S MOTION TO DISMISS APPEAL	

Plaintiff/Appellee, Meadow Lake Airport Association, by the through its undersigned counsel, Hanes & Bartels LLC, moves the Court to dismiss the above captioned appeal as moot.

AS GROUNDS, Plaintiff/Appellee shows as follows:

Background

This case was tried in the El Paso County District Court in August 2012. The trial court issued its Findings, Conclusions and Oder on September 4, 2012. Defendant appealed the decision and on September 26, 2013, this Court affirmed the trial court's judgment in part, reversed it in part and remanded. On March 18, 2014 the trial court issued modified findings and its order based on instructions of this Court in its order of remand.

Undisputed Subsequent Event

In the summer of 2013 the *Glider Strip* that is described on pages 14 and 15 of Defendant/Appellant's Opening Brief, and which is the subject matter of the appeal (hereinafter "Glider Strip"), was taken out of operation and no longer exists as a location of aircraft operations. The paved surface of the Glider Strip has been painted with large yellow "X"s to signify that it is not to be used (in accordance with standard airport procedures), and the pavement will be physically removed with the coming runway resurfacing project. Simultaneously with the closing of the Glider Strip, Glider operations on Meadow Lake Airport were permanently moved to a new turf runway located far south of the Glider Strip and very distant from Appellant's Lot 1. The Glider Strip that is the subject of Appellant's appeal does not exist, as

such, and has not existed since the summer of 2013. Appellant and its attorney have known of this subsequent event since it happened.

The Relief Requested by Defendant/Appellant in this Appeal

"Johnston moves this Court to find, as a matter of law, that the Avigation Easement does not protect the airspace of the Glider Strip to the extent that airspace imposes a greater burden upon the Johnston property than the burden imposed by the runways platted in Filing No. 1." (Opening Brief, pg. 39-40)

"It further moves this Court to reverse the Trial Court's Order of March 18, 2014, and to remand this matter back to the Trial Court with instructions to enter judgment in favor of Johnston and against the MLAA on the Avigation Easement issue."[1] (Opening Brief, pg. 40).

Argument

As stated above, in the summer of 2013, subsequent to the trial, the Glider Strip was taken out of operation. The complete disappearance of the

[1] The Trial Court's March 18, 2014 order stated, inter alia, "Defendant is enjoined from acts or omissions that interfere with the passage of aircraft on the property described in Exhibit A to the Avigation Easement." (Exhibit A describes the entire airport property and nearby areas proximate to the airport property.

sine qua non of this appeal renders the appeal moot because the requested relief, if granted, would have no practical legal effect on the controversy. *Gresh v. Balink,* 148 P.3d 419, 421 (Colo. App. 2006) (citing *Crowe v. Wheeler,* 165 Colo. 289, 295, 439 P.2d 50, 53 (1968)). When subsequent events render an issue presented in litigation moot, an appellate court will decline to render an opinion on the merits. *USAA v. Parker,* 200 P.3d 350, 356 (Colo.2009) (citing *Van Schaack Holdings, Ltd. v. Fulenwider,* 798 P.2d 424, 426–27 (Colo.1990)). *Hansen v. American Family Mutual Insurance Company* --- P.3d ----, 2013 WL 6673066 (Colo. App. 2013).

This appeal is for the sole purpose of soliciting this Court to validate Appellant's now irrelevant and immaterial theories of the law, since the Glider Strip, as such, has vanished and no longer has any effect on Appellant's property. Appellant's theory about how the Avigation Easement's application to the adjacent Glider Strip adversely effects Appellant's development rights is moot because there hasn't been a Glider Strip adjacent to Appellant's property since the summer of 2013. The Court of Appeals is being asked to spend its time and resources making findings and declarations that are completely moot and will be meaningless for the Appellant and its property.

Plaintiff/Appellee disagrees dramatically with the arguments advanced in the Opening Brief, however, even if all the relief requested by Appellant

was granted, nothing would change except that Appellant's principal, Johnston, could boast that he finally "won" his battle with Meadow Lake. That is all this Appeal is about. The Glider Strip that was adjacent to Johnston's property is no longer there and Appellant's request that this Court find, as a matter of law, that the "Avigation Easement does not protect the airspace of the Glider Strip" is a request that this Court indulge in an act of futility. With the removal of the Glider Strip, Appellant's property is in the identical condition it was in when he purchased it in 2005.

The Trial Court's March 18, 2014 injunction against Defendant/Appellant's interference with aircraft operations at Meadow Lake Airport has also been rendered moot because the injunction is now meaningless, unless Appellant has plans to actively interfere with aircraft operations in a different manner than when fence corners and a sign were erected by Appellant to intentionally obstruct aircraft operations on the Glider Strip, when it was adjacent to Appellant's property.

Conclusion

This Court has long recognized the waste of judicial resources in making determinations and rulings that have become moot by a change of circumstances. *Id.* Proceeding with this appeal to determine whether the trial

court properly followed this Court's remand instructions and to further determine the Avigation Easement's application to the now extinct Glider Strip would be the quintessential waste of time and judicial resources. If Appellant's requests were granted, the relief would have no effect whatever on Appellant's property or Appellant's so-called development rights.

WHEREFORE, The Court is respectfully requested to dismiss this appeal as moot and extend the time for the filing of Appellee's Answer Brief in the event this motion is denied.

Respectfully submitted this 3rd day of February, 2015.

HANES & BARTELS LLC

Original Signature on File at the Office of Hanes & Bartels LLC

/s/Richard W. Hanes
Richard W. Hanes, #1206
Brenda L. Bartels, #17117

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2015, a true and correct copy of the foregoing **PLAINTIFF/APPELLEE'S MOTION TO DISMISS APPEAL** was filed and served electronically via ICCES, to the following:

Jack E. Donley, Esq.
24 South Weber, Suite 300
Colorado Springs, CO 80903

The duly signed original is on file in the office of Hanes & Bartels LLC

/s/ Lynne R. Krause
Lynne R. Krause

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 South Tejon Colorado Springs, Colorado 80903	DATE FILED March 18, 2014 CASE NUMBER: 2011CV5018
Plaintiff: MEADOW LAKE AIRPORT ASSOCIATION Vs. Defendant: JOHNSTON ENTERPRISES OF COLORADO SPRINGS, LLC.	**COURT USE ONLY** Case Number: 11CV5018 Division: 13 Courtroom: S404
ORDER	

THIS MATTER comes before the Court on remand from the Colorado Court of Appeals. The Court FINDS and ORDERS as follows:

I. INGRESS-EGRESS-UTILITY EASEMENT:

The terms of the ingress-egress utility easement are solely those set forth in the dedication and notes of the map of Filing No. 9. The South Tract is the dominant estate for the ingress-egress easement on Lot 1. Again, the ingress-egress-utility easement is for the benefit of the South Tract and the South tract only. However, under Restatement (Third) of Property (Servitudes) the dominant estate is not entitled to use the easement to serve land that is subsequently acquired even if no additional use of, or burden on, the servient estate ensues. Restatement (Third)) of Property (Servitudes) sec. 4.11, cmt.b. In its reversal, the Colorado Court of Appeals noted that "If *any* evidence is presented that the dominant estate is using the easement to benefit property other than the dominant estate, the terms of the easement have been violated."(italics in original). The taking of "additional evidence" by the trial court, as expressed in the opinion, appears to be one of subscription not prescription. However, given the issue, as framed in the opinion of the Colorado Court of Appeals, the Court finds it must take additional evidence. At the status conference after remand, the parties stipulated that the Court could address the remand without taking additional evidence. Counsel for Defendant later retreated from that position and the Court denied same based upon the stipulation. However, the Court reviewed the entire record including, acutely, the transcript finds that it simply does not have sufficient evidence to answer "whether the employee's use of the [ingress-egress-utility easement] 'to get over to' the airport was a violation of the easement in that the easement was being used to access land other than the dominate estate." Therefore, counsel for Defendant shall file a forthwith Notice to Set for evidentiary hearing on this discreet issue.

II. AVIGATION EASEMENT:

Intention of the parties regarding the application of the avigation easement in relation to airport expansion and new runways: An avigation easement is "[a]n easement permitting unimpeded aircraft flights over the servient estate." In its remand, the Colorado Court of Appeals held, *inter alia*, that the trial court did not err in analyzing the language of the grant. However, it also held that the trial court did err "in failing to consider the circumstances surrounding the grant of the avigation easement and extrinsic evidence concerning the intentions of the parties, *because the grant is silent as to the parties' intentions regarding airport expansion and development*...the "trial court must reconsider the scope and use of the easement." (underline supplied) The Court of Appeals acknowledged the "four corners approach to document interpretation, but also held that "our courts have not always applied a rigid 'four corners' approach to interpretation." The Court of Appeals noted that the Restatement (*Third*) of Property (Servitudes) sec. 4.1 which was cited with approval in *Lazy Dog Ranch v. Telluray Ranch Corp.,* 965 P.2d 1229. "Circumstances surrounding the grant may be relevant to interpret the language of the grant." Id. "The intention of the parties to an expressly created servitude is ascertained from the servitude's language *interpreted in light of all the circumstances*." (italics in original).

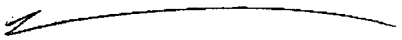
In addition to considering the intention of the parties as framed by the factors under *Lazy Dog,* the trial court was instructed to consider the comments and illustrations provided by the Restatement (First) of Property sec. 484 on the issue of changes in the use of the dominant estate. Relying on Restatement (*First*) of Property sec. 433 (1944), comment a, the Court of Appeals noted that "<u>in the absence of express language</u> *indicating that normal development was <u>not</u> considered by the parties,* the court may *assume* that the parties contemplated normal development by the use of the dominant estate." (emphasis supplied). Conversely, the Court of Appeals noted that such an assumption was not compelled holding that "that assumption of [normal development] <u>does not prevent a contrary determination</u> depending upon the facts." (underline added).The Court considered the factors in Lazey Dog and Restatement (Third) of Property (Servitudes) sec. 4.1.

The Court finds the language of the easement grant is clear and unambiguous as to the intent of the Grantor and the easement applies to all of the Grantor's property as delineated in Exhibit A. The intention of the parties is that the easement and right of way for passage of aircraft would cover and be applicable to the whole of Grantor's property including the expansion of the airport within the boundaries defined in Exhibit A. The glider runway (N/S) is property within the boundaries of the property described in Exhibit A as the Grantor's property and is therefore subject to the Avigation Easement. As such, Johnston's interference (by erecting and maintaining fence corners and a 'For Sale Sign') with the passage of aircraft on the glider runway was an interference with the passage of aircraft on Grantor's property and therefore a violation of the Avigation Easement. The easement does not restrict the grant of passage of all aircraft to passage of an aircraft on a runway or taxiway or any other specific location on the Grantor's property. Having reviewed all the evidence the Court finds the parties intent regarding the

expansion of the airport including additional runways was that the easement and right of way for passage of aircraft would cover and be applicable to the whole of Grantor's property including expansion of the airport. The Court reject's Defendant's argument that Airport Filing No. 1 did not contemplate the existence of the glider runway. The glider runway is not exempt from the Avigation Easement. The presence of glider aircraft on the surface of and in the air above Meadow Lake Airport is not a new, additional or different use of the servient estate from that intended in 1969 and does not constitute a change in the character of the use of the dominant tenement from 1970 that effects the coverage and application of the Avigation Easement. In conclusion, Defendant is enjoined from acts or omissions that interfere with the passage of aircraft on the property described in Exhibit A to the Avigation Easement.

DONE THIS 18th DAY OF MARCH, 2014

BY THE COURT:



Honorable Barbara L. Hughes
District Court Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of this Order was placed in the US mail or e-filed to both Petitioner and Respondent this 18th day of March, 2014.

/s/ S.Pfeifer
Deputy Clerk

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED December 31, 2015 CASE NUMBER: 2014CA1810
El Paso County 2011CV5018	
Plaintiff-Appellee: Meadow Lake Airport Association, **v.** **Defendant-Appellant:** Johnston Enterprises Of Colorado Springs, LLC.	Court of Appeals Case Number: 2014CA1810
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:
Richard Wayman Hanes, AttorneyMeadow Lake Airport Association, Plaintiff-Appellee

is **DENIED**.

Issuance of the Mandate is stayed until: January 29, 2016.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: DECEMBER 31, 2015

BY THE COURT:

Judge Berger
Judge Webb
Judge Fox