COLORADO COURT OF APPEALS Court Address: 101 East Colfax, Suite 800 Denver, Colorado 80202 APPEAL FROM THE DISTRICT COURT IN AND FOR DENVER COUNTY, COLORADO CASE NO. 2009 CV 11786 Hon. Brian R. Whitney, Trial Judge **APPELLANTS:** ZEKE COFFEE, INC., a Colorado corporation, DARREN SPREEUW v. **APPELLEE:** PAPPAS-ALSTAD PARTNERSHIP, a Colorado partnership	▲ COURT USE ONLY▲ Case No.: 11-CA-0744
Attorney for Appellants: Name: Daniel J. Culhane, #22196 Address: DANIEL J. CULHANE LLC 1600 Broadway, Suite 1400 Denver, Colorado 80202 Phone Number: 303-945-2070 Fax Number: 720-420-5998 email: Dan@CulhaneLaw.com	
APPELLANTS' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Appellants' Opening Brief is submitted in 14-point type, and, in accordance with CAR 28(g), contains 9,379 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, signature block and the appendix hereto (which consists of the lease at issue in this case and Order being appealed).

Daniel J. Culhane
Attorney for Plaintiffs-Appellants Zeke Coffee, Inc. and Darren Spreeuw

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

!

Plaintiffs-Appellants Zeke Coffee, Inc. ("Tenant") and Darren Spreeuw respectfully submit this Appellants Opening Brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether a landlord may evict a tenant under Colorado's FED statute, CRS §13-40-101 *et seq.*, without complying with the requirements of that statute?

2. Whether contractual penalty clauses are enforceable in Colorado?

3. Whether a landlord may "reject" a tenant's exercise of an option to extend the term of a lease on the basis of allegations of defaults under the lease when the lease contains no conditions to the exercise of the option?

4. Whether a district court may interpret a contract so as to (a) rely on a general provision while ignoring a more specific provision, or (b) enforce a contract as it could have been written instead of as it was actually written?

STATEMENT OF THE CASE

This landlord-tenant dispute arises from a 2004 lease between plaintiff-appellant Zeke Coffee, Inc., dba Perk Hill Café (hereafter, "Tenant"), and Pappas-Alstad Partnership ("Landlord"). *See* Lease, **Exh.1**; attached hereto as **Appendix 1** (hereafter, "**App.1**"). Darren Spreeuw was joined as an involuntary plaintiff shortly after the lawsuit began. **27845829**.

In 2007, Tenant placed a children's play set in the public right-of-way in front of the leased premises. In October, 2007, Landlord wrote a letter claiming that the play set violated various provisions of the lease relating to "construction of improvements in the Shopping Center," but never took action to terminate or legally enforce the lease. In August, 2008, when Tenant exercised its option to extend the lease for an additional five-year term, Landlord wrote another letter claiming that Tenant was in breach of the lease for the play set (which Tenant had removed a year earlier) and demanding money and other concessions. When Tenant refused, Landlord sent a letter asserting that Tenant had forfeited its legal tenancy and option to extend. However, Landlord made no effort to initiate legal process or to lawfully terminate the lease. Landlord accepted rent from Tenant every month throughout the duration of the tenancy.

Under continual threat by its landlord, to protect its rights under the lease, its investment in its business, its livelihood, and the jobs of its employees, Tenant brought suit in December, 2009, seeking a declaratory judgment that the lease remained in effect. Tenant also asserted claims for breaches of the lease by Landlord, including (a) improper charges of rent and common area maintenance (CAM) expenses and (b) violation of a provision in the lease that Tenant would be the only coffeehouse in the Shopping Center.

Landlord filed an answer and counterclaims seeking Tenant's eviction under Colorado's forcible entry and detainer (FED) statute, CRS §13-40-101 *et seq.* and for damages consisting of unpaid attorneys' fees allegedly due under the lease. Landlord's counterclaims did not comply with the requirements of the FED statute in several material respects, including Landlord's failure to serve or post a "three-day notice" under CRS §13-40-104. Landlord amended its answer and counterclaims on four separate occasions; on three of those occasions, Landlord alleged supplemental counterclaims seeking Tenant's eviction and an award of attorneys' fees under the FED statute. Each supplemental counterclaim also failed to comply with the requirements of the FED statute in several material respects.

Following a five-day bench trial, on April 29, 2011, the district court entered an order (**37318924**; attached as **Appendix 2**) ruling in favor of Landlord as to its Counterclaim H, finding that Tenant had failed to pay $250 penalty due under the lease because Tenant was nine days late in the payment of $451 of disputed common area maintenance (CAM) charges. The district court also found that Landlord had properly "rejected" Tenant's option exercise notice, and that the tenancy for years was converted to a month-to-month tenancy at the expiration of the original five-year term. The court awarded a writ of restitution and attorneys' fees against Plaintiffs under the FED statute in its order.

Plaintiffs filed their notice of appeal on May 2, 2011, the first business day after the district court entered its Order. Also on May 2, 2011, the court issued a writ of restitution. The trial court denied Plaintiffs' motion for a stay of execution pending appeal, reasoning that such a stay was "discretionary." Tenant was evicted on May 18, 2011, which permanently put Tenant out of business and destroyed Plaintiff Spreeuw's livelihood, the loss of his investment, and the loss of his employees' jobs.

Plaintiffs-Appellants request this court to reverse the district court's order awarding possession to Landlord. As demonstrated below, and as amplified in the Brief of *Amicus Curiae* filed in support of Plaintiffs-Appellants by Colorado Legal Services, (a) Landlord's eviction action was unlawful because Landlord did not comply with the FED statute, and (b) the provision of the lease that Tenant "breached" is unenforceable under Colorado law. Because the eviction was improper, the writ of restitution and the award of attorneys' fees in favor of Landlord must be vacated.

Next, Plaintiffs-Appellants seek the reversal of the district court's ruling that Landlord may "reject" Tenant's exercise of an unconditional option, and enter a judgment that Tenant's leasehold validly extended the lease for five years following the initial term.

Next, Tenant establishes that the lease was in full force and effect as of the date of judgment. Plaintiffs-Appellant accordingly request that this Court enter declaratory judgment in Tenant's favor.

Further, Plaintiffs-Appellants request that this Court reinterpret the lease under established principles, which require judgment in Tenant's favor for (a) excessive charges for rent, CAMs, taxes and insurance, and (b) for Landlord's violation of an exclusive use clause prohibiting Landlord from leasing any other space in the Shopping Center to another coffeehouse. Plaintiffs-Appellants request this Court to vacate the balance of the district court's award, and remand the case for further proceedings on Plaintiffs-Appellants' remaining claims.

And finally, Plaintiffs request this Court to award them their attorneys' fees and costs incurred in the district court litigation and in connection with this appeal, in accordance with the lease and applicable law.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

In 2004, Zeke Coffee, Inc. signed a lease with Pappas-Alstad Partnership for a unit in the Kearney Street Shopping Center in the Park Hill neighborhood of Denver. **App.1.** Despite repeated efforts to negotiate specific terms of the lease, Tenant was only able to negotiate three provisions that deviated from Landlord's

standard lease in use with all the tenants in the Shopping Center: (1) "Tenant shall have Two 5-year Options, Rent will be at Market Rate at the time of exercise of each option, however, the Option rents shall not be less than the Tenants previous years rent. Market rate will be equal to the current years rate of the most recent Kearney Shopping Center lease signed by Tenant other than the corner Tenant" (**App.1:§1.07**); (2) "Landlord shall permit Tenant to use patio seating in front of the Premises after obtaining a sidewalk-use permit from the City and add skylights and tempered glass garage door with approved Contractor and City permits" (**App.1:Art.II**); and (3) "Perk Hill Coffee shall be the only coffee house in the Shopping Center." **App.1:§24.04**. The entire lease, including the quoted provisions, were drafted by the landlord. **Tr.(2/22/11):82:5-83:17**; *compare* **App.1** (Perk Hill Lease) *with* **Exh.70** (lease between Landlord and another tenant in the Shopping Center using same form of lease).

Tenant opened for business in the June, 2004, and immediately became a popular and successful neighborhood coffeehouse. In June, 2005, Tenant applied for, and received, a permit from the City of Denver for the placement of tables, chairs and a children's play set in the public right-of-way. **Exh.84,85**.

In May, 2007, Tenant's small play set in the right-of-way was stolen and Tenant replaced it with a larger, wooden play set. For various reasons, Landlord

objected to this play set, and after a series of meetings among Tenant, Landlord, representatives of the City, and community members, Tenant removed the wooden play set in October, 2007. **Exh.DD:2**. Nevertheless, Landlord's principals remained angry and unhappy with Tenant, and took steps to undermine Tenant in its business and under the lease.

On August 29, 2008, Tenant notified Landlord of the exercise of its option to extend the lease for an additional five-year period as provided in the lease. **Exh.2**. In response to Tenant's exercise notice, Landlord asserted, for the first time, that the events that had occurred a year earlier constituted a breach of the lease. Landlord claimed that the "breach" consisted of Tenant's use of the public right-of-way, and demanded that Tenant "cure" this breach by removing the tables and chairs, removing wood chips placed in the area, and restoring grass that used to be in the public right-of-way. **Exh.8**. In addition, Landlord demanded payment of "2,000.00(?)" [sic] of legal fees landlord incurred to "enforce[] the lease to force the removal of the play structure." *Id.* Landlord asserted that unless Tenant complied with its demands, Landlord would "reject" the exercise of the option and would "void" the lease. *Id.; see also* **Exhs.10,11**. When Tenant refused to accede to these demands, Landlord sent a letter asserting that Tenant had "fatally and permanently defaulted on its lease," that "consequently it has no lease and no

option," and that Tenant "has now been converted by operation of law to a month-to-month tenant, effective December 1, 2008." **Exh.12**. Landlord also stated that "the landlord will decide at its sole discretion when and how to take legal action effecting [sic] rent and occupancy." *Id.*

Landlord continued to assert that the tenancy for years had been converted "by operation of law" to a month-to-month lease, that Tenant's exercise of the option was invalid, and that Landlord would evict Tenant if and when it decided to do so—in letters from Landlord's lawyer over the next 16 months. **Exhs.13,17,18**. In addition, during the same period Landlord sent out several "default" notices for other "breaches," each of which repeated that Tenant "had no lease, but was nevertheless subject to the terms of the lease" and was subject to eviction at Landlord's whim. **Exhs.13,17,18**.

Yet Landlord continued to accept rent from Tenant without taking any legal action to enforce the lease, with one short-lived exception. In June, 2009, Landlord served a demand for compliance or possession on Tenant alleging a shortfall in the rent due, demanding a penalty of $250 for the late payment of the allegedly insufficient rent, and alleging construction of a patio rail in violation of a covenant of the lease. **Exh.29**. Tenant paid the disputed rent and penalty under protest and removed the patio rail four days after receipt of the notice. Landlord accepted

Tenant's cures, and never brought any action to terminate the lease on the basis of the June, 2009 demand for compliance or possession. That demand is therefore irrelevant to this litigation. From and after June, 2009, Landlord continued to accept rent every month, but also continued to threaten legal action and write letters denying Tenant's rights under the lease.

In the meantime, Landlord rented another unit in the ten-unit shopping center to a business called Cake Crumbs. **Exhs.51,52**. Cake Crumbs contends it is a "specialty bakery" whose main business is custom wedding cakes and other baked goods. **Tr.(2/23/11):106:17-109:9**. However, soon after moving into the Shopping Center, Cake Crumbs began to operate as a coffeehouse. Specifically, Cake Crumbs opens at 7:00 am, serves coffee and morning pastry for consumption on-premises or for take-out in Starbuck's-style cups and paper bags, provides comfortable seating and free wireless internet access for its customers, provides outdoor patio seating, serves as a community gathering place, offers a community bulletin board, and provides a place to sit and talk, work, read, or otherwise relax. Testimony of Sean Moore, owner of Cake Crumbs, **Tr.(2/23/11):119:10-124:7**. Because these are all "coffeehouse" amenities, [Testimony of Coffeehouse Expert Dan Oltersdorf, **Tr.(1/27/11):281:1-285:21**], and because competition from Cake Crumbs materially eroded the revenues and profitability of Tenant's business

(**Exh.99; Tr.(2/22/11):59:14-69:13**), Landlord's lease of a unit in the Shopping Center to Cake Crumbs directly violates the exclusive use clause negotiated by Landlord and Tenant—that Tenant would be the only coffeehouse in the Shopping Center. *See* **App.1:§24.03**.

Further, Tenant measured the premises using the method for determining the square footage required by the lease and discovered that the actual square footage was substantially lower than the figure Landlord used to determine rent and prorate common area maintenance (CAM) charges, insurance and taxes, and became aware of improper expenses charged to Tenant as CAM charges that were not permitted under the lease. **Exh.99; Tr.(1/27/11):85:10-87:25**.

Landlord continued to send letters claiming that Tenant had no further rights under the lease and was converted "by operation of law" to a "month-to-month tenant," and that Tenant's exercise of the option was "void" because of the alleged "uncured defaults" from 2007. As a going concern whose business and livelihood depended on continuing operations in the leased premises, Tenant could not continue to operate under legal threats to the lease, and filed a declaratory judgment action to affirm the continued existence and validity of the lease and the proper and valid exercise of the option, and also asserted claims for Landlord's breach of the exclusive use clause and overcharges for rent and CAMs.

B. PROCEDURAL HISTORY.

Tenant initiated the district court action in December, 2009. **26491523**. Landlord filed an answer and counterclaims in January, 2010. **26940898**. The counterclaims (which were refiled in February, 2010 [**27951802**]) included six claims seeking to evict Tenant under the FED statute (Counterclaims A-F), plus an additional "counterclaim" for damages (Counterclaim G). Counterclaims A, B, D, and E related to the playset in the public right-of-way, which had been removed in October, 2007, more than two years earlier. Counterclaim C related to a patio rail that Tenant had installed in the spring of 2009, but had removed in June, 2009. Counterclaim F alleged that Tenant had forfeited its tenancy for years and its option to renew the lease and was therefore a month-to-month tenant subject to eviction at the election of Landlord. *See generally* Revised Answer and Counterclaims, **27951802**.

Eviction actions in Colorado are governed by Colorado's Forcible Entry and Detainer (FED) statute, CRS §§13-40-101 *et seq.*, which contains several specific requirements for a Landlord to invoke the court's jurisdiction and terminate a tenancy. Landlord failed to comply with many of those requirements. For example, at no time prior to filing its FED counterclaims did Landlord serve a demand for compliance or possession on Tenant pursuant to CRS §13-40-104. Rather,

simultaneously with its answer and counterclaims, Landlord filed with the court a "notice to quit," purportedly pursuant to CRS §13-40-107, and served this on Tenant's attorney using the Lexis/Nexis e-filing system. **26940862**. No notice pursuant to the FED statute was ever personally served on Tenant or posted on the premises to initiate the FED action.

In July, 2010, Landlord moved to amend its answer and counterclaims [**31985914**] to add Counterclaim H, which sought to evict Tenant for the failure to pay a $250 penalty demanded by landlord because Tenant was nine days late in paying $451 in disputed CAM charges that were due around July 1, 2010, *i.e.,* months after the commencement of the litigation. *See* Second Revised Answer and Counterclaims [**31986718:¶¶92-98**]. Landlord served no demand for compliance or possession or any other notice under CRS §13-40-104 or 107 on Tenant prior to filing Counterclaim H. Rather, Landlord relied on the "notice to quit" that it had served on Tenant's attorney six months previously via e-filing.

In response, Plaintiffs filed a motion under CRCP 12(b)(5) to dismiss all FED counterclaims filed to date, *i.e.,* Counterclaims A-F and H. Plaintiffs argued, among other things, that Landlord had waived counterclaims A-F by accepting rent and otherwise recognizing the continued existence of the lease despite its knowledge of the alleged violations. **33245812** at Argument §B. Tenant further

argued Landlord's Counterclaim H was defective because Landlord had not complied with the FED statute. *Id.* at Argument §A. The district court denied this motion, and ruled that:

> The Court notes that the violations of the covenants alleged are not only concerning non-payment of rent. The FED portion of this matter was continued by the court over objection. Thus it was the court's intent to relate any amendments back to the original filings. The landlord cannot be considered to have waived any rights when his waiver is caused by the court continuing the FED portion over his objection. **The notice to quit was the proper notice for the type of allegations raised and the service was correct because the landlord is the Defendant in this matter, not the plaintiff in an FED action as is contemplated by the authority cited. As all FED like claims of the amendment relate back to the notice to quit, the motion is denied.**

33731947:comments (emphasis added).

Plaintiffs filed a motion for reconsideration (**34004277**), which the district court also denied. **34738868**.

Defendants were granted leave to amend their counterclaims on two subsequent occasions, and asserted violations of the lease for failure to carry insurance (Counterclaims I and J). **34861728**.

During discovery, Tenant served written discovery requests and interrogatories that Landlord refused to answer. In addition, Plaintiffs sought to depose Landlord's two managing agents, Christina Pappas and Eric Alstad, both of whom were named in defendant's Rule 26(a) disclosures. **29097688**. Defendant's

attorney refused Plaintiffs' notice of deposition, maintaining that a partnership may only be deposed under Rule 30(b)(6) and claiming he did not represent the deponents in their individual capacity, but only in their capacity as agents for the partnership. *See* **34315850:10**. In response, Plaintiffs served Pappas and Alstad with *subpoenae duces tecum*. **34691893:Exhs.A,B**. Both Pappas and Alstad refused to appear for deposition pursuant to those *subpoenae*. *Id.*

Plaintiffs moved to compel the production of the documents and interrogatory responses, and moved for discovery sanctions for the failure of defendant's principals to appear for deposition. **34315850**. In addition, Plaintiffs moved for contempt proceedings against Pappas and Alstad. **34691893**. The district court denied all of these motions, depriving Tenant of basic discovery. **36112505; 36116046**. With respect to the motion to compel, the district court ruled that "The parties are reminded that this is a trial to the Court. All remedies requested are available at trial including exclusion for non-production and all inferences to be taken from avoidance of discovery, if found. Therefore, the motion is denied while preserving any future right of the Plaintiffs to object to or cross examine upon any of the information purportedly withheld." **36112505**. The district court also denied Plaintiffs' motion for contempt citations, ruling that "Both issues of contempt will be taken up after the trial and after the individuals

have opportunity to appear and respond if they so choose. At this time, the court is unaware if the individuals are represented, have 'cause,' or if their failure to be deposed will influence evidentiary concerns for trial." **36116046**. The trial court never took up the issue of contempt after trial or at any other time.

Finally, despite Plaintiffs' timely motion to amend its complaint (**34791918)**, the court did not rule on it until the morning of trial. **Tr.(1/27/11):11:22-12:19**. Among other things, Plaintiffs had sought to join the partners of Pappas-Alstad Partnership as defendants. **Tr.(1/27/11):2:11-3:17**. But the district court's failure to timely rule on the motion presented Plaintiffs with a Hobson's choice—either to vacate the long-awaited trial date, or to proceed without joining the additional defendants. Plaintiffs elected to proceed to trial, and the parties stipulated to some, but not all, of the claims Plaintiffs sought to add. **Tr.(1/27/11):29:2-31:19**.

C. TRIAL AND DISPOSITION

The district court conducted a five-day bench trial beginning in January, 2011. On the last day of trial, the court took brief closing statements from the parties, but also ordered the parties to submit proposed findings of fact and conclusions of law, which would also serve as closing arguments (**Tr.(3/8/11:236:15-19)**. The parties complied. **Docs. 37750294; 37752449**.

On April 29, 2011, the district court issued its Order. **App.2**. The court ruled against Plaintiffs on every claim. The court also ruled that Counterclaims A, B, C, D, E, G, I, and J were not viable. **App.2:fn.2**,**p.13**. However, the district court ruled that defendants prevailed on Counterclaim F, which asserted that defendant had properly rejected Tenant's "request" to exercise its option to extend the term of the lease, and that the Tenant's tenancy was consequently converted to month-to-month upon the expiration of the initial term of the lease. **App.2:12**. In addition, the court found that Tenant's failure to pay the $250 penalty, as asserted in Counterclaim H, constituted a breach of the lease "sufficient to invoke [Landlord's] right to retake the property." **App.2:12-13**. The district court grounded its order in Colorado's FED statute, CRS §§13-40-101 *et seq.* **App.2:11-14**.

In its Order, the court also made various relevant findings and conclusions. Among other things, the court explicitly found that the lease does not govern the use of the right-of-way. Specifically, the court held that "The Lease commits the parties to the Premises and the common areas. It does not address public rights of way. Nor are the public rights of way 'adjacent lands' of the landlord." **App.2:8**. Tenant agrees with this determination, and does not challenge it in this appeal.

At the conclusion of its Order, the district court ruled that "the Court finds that Defendant has demonstrated both that the Plaintiffs are month-to-month tenants at this time and that Plaintiffs are guilty of an unlawful detention of the property in question and therefore ORDERS (1) that a Writ of Restitution issue giving possession of the property to the Defendant; and (2) a statutory award of attorney fees and costs is required by CRS §13-40-115." **App.2:13**.

Plaintiffs filed their timely notice of appeal on May 2, 2011. On the same day, the district court issued a writ of restitution. **38951011**. Plaintiffs sought a stay of execution pending appeal from the district court under CRCP 62(d). **38952495**. Following a hearing on May 5, 2011, the district court denied Plaintiffs' motion, ruling from the bench that such a stay is within the discretion of the trial court, and that the landlord's interest in obtaining the prompt return of the premises outweighs the irreparable loss that Plaintiffs would face, namely, the loss of Tenant's business and Darren Spreeuw's loss of his investment and livelihood. **Tr.(5/5/11):17:7-22:5**. The district court refused to accept any conditions or permit a *supersedeas* bond in any amount so as to order a stay of execution. *Id.* Tenant was evicted from the leased premises on May 18, 2011, and was permanently put out of business.

SUMMARY OF THE ARGUMENT

1. The district court erred in granting relief under the FED statute, CRS §13-40-101 *et seq.*, because Landlord failed to comply with the statutory requirements for a claim under the statute. Indeed, the district court lacked jurisdiction over the FED counterclaims, because Landlord's claims were not "brought in any of said courts *in the manner provided by this article*." CRS §13-40-109 (emphasis added).

2. Contractual penalties are unenforceable in Colorado. The district court erred by ruling that Tenant breached the lease by refusing to pay a "penalty" of $250 arising from the untimely payment of disputed CAM charges of $451. Even if the contractual "penalty" clause is construed as a liquidated damages provision, the clause is still unenforceable because the liquidated damages amount is unreasonably large in proportion to the amount overdue, and because Landlord failed to establish that it would incur actual damages in an amount difficult to ascertain at the time of contracting.

3. The district court improperly failed to enforce Tenant's exercise of an unconditional option to extend the lease. Because the option was independent of the other covenants in the lease, no basis exists for denying Tenant's right to extend the lease. Moreover, the alleged "breaches" cited by the district court as the

basis for negating Tenant's option—which all arose from Tenant's use of the public right-of-way—were not breaches of the lease at all, even under the district court's own reasoning.

4. The district court erred by failing to grant declaratory judgment in Tenant's favor because (a) Landlord never terminated the tenancy, (b) no Tenant default existed, and (c) because the lease was in full force and effect at the time of judgment.

5. The district court misconstrued provisions of the lease under well-established principles of contractual interpretation. The district court ignored a specific provision for the measurement of floor area for prorating CAMs, taxes and insurance in favor of a general statement that the leasehold consists of "approximately 820 square feet." Further, the district court failed to enforce the exclusive use clause prohibiting any other coffeehouse in the Shopping Center broadly as written, and instead added limitations and qualifications benefitting the Landlord that could have been made part of the lease, but were not.

ARGUMENT

A. STANDARD OF REVIEW.

An appellate court reviews questions of law and the application and construction of statutes *de novo*. *Matoush v. Lovingood*, 177 P.3d 1262, 1269

(Colo. 2008). The appellate court does not reverse a trial court's findings of fact unless they are clearly erroneous, *id.* However this standard does not apply to any aspect of this appeal, as Plaintiffs challenge the district court's erroneous legal conclusions, not its findings of fact.

This court also reviews the district court's interpretation of a contract *de novo*, with no deference to the district court's interpretation of the contract. *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1190 (Colo.App.2009). The determination of whether or not a contract is ambiguous is also a question of law, *People v. Johnson*, 618 P.2d 262, 266 (Colo. 1980), and is therefore reviewed *de novo.*

B. THE DISTRICT COURT ERRED IN TERMINATING TENANT'S LEASE AND AWARDING POSSESSION AND ATTORNEYS' FEES TO LANDLORD.

1. A Landlord Who Fails to Comply with the FED Statute May Not Obtain Relief Under That Statute.

Landlord failed to comply with numerous provisions of Colorado's forcible entry and detainer (FED) statute, CRS §13-40-101 *et seq.*, with respect to the single FED counterclaim relevant to this appeal, as well as the remaining FED claims that are not at issue since they were rejected in the trial court.

The district court undertook "extensive research concerning the FED statute and [found] no authority allowing it to be used as a counterclaim well after the fact

of the alleged breach or breaches." **App.2:11**. Nevertheless, the district court invented and applied a brand-new standard to permit Landlord's FED counterclaims to proceed, in derogation of the well-established controlling authority to the contrary:

> Not specifically ruling on the [Landlord's] actions as being waived or the legitimacy of [Tenant's] argument concerning the sufficiency of the notice, the Court finds that, under the facts of the case, FED counterclaims are inappropriate to be raised so belatedly unless it can be demonstrated that one of the allegations of breach continues up to the date of trial (or at least up to the date of the Notice to Quit, filed January 15, 2010). In essence, if the damages from the breach have never been cured but could have been, they can be considered repeat violations and the Court can consider that a pending reason to effectuate the FED statute.

App.2:11-12).

No authority exists for the district court's approach, and district courts are not permitted to invent new law. Nor are they permitted to disregard defenses that have been properly asserted, such as the waiver of the FED claims and the Landlord's noncompliance with the FED statute. More to the point, the district court's new twist on landlord-tenant law runs afoul of several provisions of the FED statute itself as well as numerous controlling cases, and must be reversed.

Landlord's fatal deviations from the statute include the following:

- Landlord failed to serve a "three-day notice" demanding, in the alternative, payment of the disputed $250 or delivery of possession of the premises, as required by CRS §13-40-104(1)(d). The failure to

provide the notice and statutory right to cure is fatal to any claim under the FED statute. *Doss v. Craig*, 1 Colo. 177 (Colo. Terr. 1869); *Miller v. Sparks*, 4 Colo. 303 (1878); *Hix v. Roy*, 350 P.2d 439 (Colo. 1959) (citing *Doss v. Craig*); *Miles v. Fleming*, 214 P.3d 1054, 1056-57 (Colo. 2009); *Tumbarello v. Byers*, 543 P.2d 1278, 1282 (Colo.App.1975) (even where notice served, FED action may not be maintained unless notice demands *in the alternative*, a demand for payment within three days *or* possession of the premises); *Clark v. Morris*, 710 P.2d 1130, 1133 (Colo.App.1985) (when statute requires actual notice via prescribed method, "constructive notice" insufficient to enable FED claim); *Magliocco v. Olson*, 762 P.2d 681, 685 (Colo.App.1988); *Duran v. Denver Housing Authority*, 671 P.2d 180, 182-3 (Colo. 1988); *Aigner v. Cowell Sales Co.,* 660 P.2d 907, 908 (Colo. 1983) (same); *Barlow v. Hoffman,* 86 P.2d 239, 240 (Colo. 1938) (same).

- Landlord failed to serve any eviction notice by personal service or by posting on the premises, as required by CRS §13-40-108. Both the method of service and the timing of the service are vital to a landlord's ability to evict a tenant under the FED statute and to the court's jurisdiction under the statute. Indeed, this court has specifically ruled that what Landlord did here—"served" a notice simultaneously with the complaint instead of personally serving or posting three days before initiating the action—is fatal to an FED claim. *Rocky Mountain Properties v. Purified H2O To Go Co.*, 3 P.3d 485, 487 (Colo.App.2000) ("We agree with tenant that appending a copy of the three-day notice to the complaint is insufficient to satisfy the requirements for commencing a forcible entry and detainer action") (citing *Doss v. Craig*, *supra*); CRS §13-40-104(1)(d)).

- The complaint did not properly plead an unlawful detainer, or even cite the FED statute, in violation of CRS §13-40-110(1). If an FED claim is not clearly pleaded and proved, including specific allegations and proof of service of the mandatory three-day notice, the FED claim fails. *Hix v. Roy, supra*; *Miller v. Sparks, supra*.

- Landlord brought its action as a counterclaim, instead of "filing with the court a complaint" as required by the statute. CRS §13-40-110(1). No provision permits a landlord to evict a tenant in a counterclaim.

Any one of these failures to comply with the statute is fatal to Landlord's Counterclaim H. Moreover, Plaintiffs timely moved to dismiss Counterclaim H (along with the previously-filed FED counterclaims) pursuant to CRCP 12(b)(5). **33245812**. In that motion, Plaintiffs correctly noted that defendant's failure to serve or post a notice was fatal to the FED claim. The district court denied that motion, ruling that:

> The Court notes that the violations of covenants alleged are not only concerning non-payment of rent. The FED portion of this matter was continued by the court over objection. Thus it was the court's intent to relate any amendments back to the original filings. … The notice to quit was the proper notice for the type of allegations raised *and the service was correct because the landlord is the Defendant in this matter, not the plaintiff in an FED action as contemplated by the authority cited.* As all FED like claims of the amendment relate back to the notice to quit, the motion is denied.

33731947:comment (emphasis added).

This ruling was erroneous when made, and remained in error when the district court continued to entertain Counterclaim H through trial and disposition. The FED statute is quite particular in its requirements, and those requirements are not obviated just because a landlord brings its claims in an irregular way, including as a counterclaim instead of as contemplated by the statute. FED claims do not

"relate back" to earlier claims, and *each* FED claim must be preceded by a three-day demand for compliance or possession to establish an unlawful detainer in the first place. CRS §13-40-104(d).

Finally, it is clear from the statutory language and the cases interpreting the statute that the failure to comply with the statutory prerequisites are not only fatal to the claim—it is *jurisdictional*. The FED statute explicitly confers jurisdiction over FED claims brought "in the manner provided in this article." CRS §13-40-109. In *Adams Cty. Dept. Soc. Servs. Child Support Enf. Unit v. Huynh*, 883 P.2d 573, 574 (Colo.App.1994), the Court of Appeals ruled that the district court lacked subject matter jurisdiction over a case that was not brought in compliance with the statutory requirements. The court found that even though the courts *generally* have jurisdiction over such claims, "[t]he court's authority must be properly invoked before it can act." *Id*. The cases under the FED statute confirm that the failure to provide the statutory notice deprives the courts of jurisdiction over the statutory claim. *Magliocco,* 762 P.2d at 684 (posting three-day notice as provided by statute adequate to provide jurisdiction for entry of judgment for possession); *Clark*, 710 P.2d at 1132 (court lacked jurisdiction over FED claim when landlord failed to comply with statutory requirements).

In sum, the district court erred in asserting jurisdiction over Counterclaim H in the first place, let alone ruling that Landlord's failure to provide the statutorily-required notice in the proper manner was somehow excused or unnecessary. The district court's order defies the plain statutory language enacted by the legislature, as well as controlling precedent predating Colorado's statehood. The district court's novel formulation of landlord-tenant law should be squarely rejected and reversed.

2. Contractual Penalties Are Unenforceable In Colorado, and May Not Serve as the Basis of the Termination of the Tenant's Lease.

The district court likewise misstates Colorado law in its proclamation that:

> Plaintiff argues that late charges designated penalties cannot stand. This Court does not agree. While the case law given addresses liquidated damages and are somewhat analogous, late fees, whether they are defined as penalties or fees, are not equivalent to liquidated damages. Further, the Plaintiff signed the Lease with full awareness of the late fee section. … As such, the Court does not find the fees unenforceable, contrary to law, or voidable.

Order, **App.2:13**.

The district court's central premise—that "late fees" are a permissible form of damages, whether they are characterized as "penalties" or something else, is flatly wrong. There is no form of damages known as "late fees" recognized or accepted in jurisprudence. No definition of "late fee" or "late charge" appears in

Black's Law Dictionary, for example. Rather, the term "late fees" is a colloquial term commonly used by laypersons, but which might imprecisely describe several different legal concepts, including (a) liquidated damages, (b) administrative charges, or (c) impermissible penalties. The court's assertion that "late charges are permissible, no matter how they are characterized," states the matter exactly backwards: "late charges" is itself the characterization of the legal theory to which it applies. It is up to the court to determine which theory is contemplated by the term "late charge," and then determine whether that theory is enforceable or not.

The provision of the lease in question explicitly provides for a "penalty": "If any payment of Rent or other charge is not paid when due, Tenant shall, **as a penalty for such delinquency**, pay to Landlord ten percent (10%) of the amount due or Two Hundred Fifty Dollars ($250.00), whichever is greater." Lease, **App.1:§17.02**. The lease, just like any other contract, should be interpreted exactly as written, not as a court believes it could have or should have been written. "Simply, the court must apply the agreement as it is written, not as if it contained language which, in the court's opinion, might have or should have been used." *Colonial Painting Co. v. Georgian Center, Inc.*, 685 P.2d 223, 224 (Colo.App.1984) (citing *Tumbarello, supra,* 543 P.2d at 1282). Here, as it happens, the landlord is bound by the language Landlord itself drafted, which is unequivocal

and fully embraces the subject matter of "late charges"—and which unambiguously requires a "penalty."

Contractual penalties are unenforceable as against public policy in Colorado.

> [T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.

Restatement (Second) of Contracts §356 Comment a.

Colorado courts have adopted both the specific provision of Restatement §356 as well as the comment quoted above. *Klinger v. Adams Co. Sch. Dist. No. 50*, 130 P.2d 1027, 1033-34 (Colo. 2009) (quoting and adopting foregoing quoted language from Restatement §356 comment a, and establishing that objective behind contract remedies is compensatory, not punitive). Therefore, if the court interprets the clause exactly as written, the clause requires a contractual penalty, which courts in Colorado do not enforce.

Yet even if the court construes the penalty clause as a liquidated damages clause, the provision still fails. To be enforceable, a liquidated damages clause must be reasonable in relation to the damages actually sustained by the landlord. "Also, if the contract stipulates a single liquidated damage for several possible breaches, the damage provision is invalid as a penalty if it is unreasonably

disproportionate to the expected loss on the very breach that did occur and was sued upon, regardless of whether it would have been reasonable for some other breach that did not in fact come into issue." *Yerton v. Bowdin,* 762 P.2d 786, 788 (Colo.App.1988); *see also H.M.O. Systems, Inc. v. Choicecare Health Services, Inc.*, 665 P.2d 635, 638 (Colo.App.1983); *O'Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc.,* 595 P.2d 679, 683 (Colo. 1979); *Perino v. Jarvis,* 312 P.2d 108 (1957). This is exactly what happened in this case. A charge of $250 assessed in response to an overdue payment of $451—a penalty of over 55%—is inherently unreasonable. Further, the $250 penalty applies whether the tenant fails to pay the entire amount of rent due, or if the tenant is one dollar short with its rent. Because the clause is not related to actual damages incurred by landlord, nor is it in any way proportionate to the actual "expected loss" in this case, the clause is unreasonable and unenforceable in Colorado.

Thus, whether the penalty clause is construed exactly as written or as a liquidated damages clause, it is unenforceable as against public policy in Colorado. Tenant's failure to comply with an unenforceable provision is not a "default" for which a tenant may be evicted. Or, put another way, the district court erred in enforcing an "unenforceable" provision. For this independent reason, the district court's order must be reversed.

3. The District Court Improperly Rewrote the Lease to Impose Non-Existent Conditions on Tenant's Exercise of Its Unilateral Option to Extend the Lease.

The district court likewise erred in rewriting the lease to deny Tenant's proper exercise of its unconditional option to extend the lease for an additional five-year term.

Tenant negotiated for, and received, the option to extend the lease for up to two additional five-year periods. The relevant provision of the lease states that "Tenant shall have Two 5-year Options, Rent will be at Market Rent at the time of exercise of each option, however, the Option rents shall not be less than the Tenants previous years rent." **App.1:¶1.07**. Tenant properly notified Landlord of its exercise of the first such five-year option on August 29, 2008. **Exh.2**.

The district court correctly notes that the lease contains "no qualification on the options or means to exercise the options except to address rent for the periods." **App.2:3**. Moreover, the district court correctly notes that when a lease contains no provisions requiring the lessee to give notice of its election to extend the lease, no notice is necessary. *Id.* Yet, despite these straightforward rulings, the court nevertheless imposed an additional condition on the exercise of the option, namely, that because Landlord alleged an event of default when it received Tenant's exercise notice, Landlord could "reject" the exercise of the option. "Under the

terms of the lease (or more correctly the lack of terms of the lease) the Defendants had the right to enforce the lease before accepting the execution of the option." **App.2:3**.

This ruling is erroneous. Neither the lease nor Colorado law permits a landlord to "reject" the exercise of an unconditional option to extend the lease. Nor may a court enforce the "lack of terms of a lease." While a court will enforce provisions that impose conditions on a tenant's extension of the lease, *see, e.g., Brown v. Hoffman*, 628 P.2d 617, 621-22 (Colo. 1981) (where addendum to lease containing renewal option was granted "in consideration of the keeping and performance of the covenants and agreements" of the lease, substantial breach of covenants precluded exercise of option), where the right to extend is unconditional, allegations of a breach of the lease do not preclude a tenant's extension of the lease. *See generally* Wakefield, W., Right to exercise option to renew or extend lease as affected by tenant's breach of other covenants or conditions, 23 A.L.R.4th 908 (1983) at §5; *see also Jameson v. Foster*, 646 P.2d 955, 957-58 (Colo.App.1982) (declining to apply *Hoffman* to preclude extension of lease where breach was not "substantial" and where landlord had waived any past conduct that could be deemed a breach).

Jameson controls this case. As noted above, the option language in the lease is unconditional. "[A] court must enforce a contract as written; … a court is not at liberty to rewrite a contract for the parties; … words used in a contract must be accorded their plain and accepted meaning." *Jameson*, 646 P.2d at 958 (citing *Connell v. Sun Oil Co.*, 596 P.2d 1215 (Colo.App.1979); *Helmericks v. Hotter*, 492 P.2d 85 (Colo.App.1971).

Moreover, like *Jameson*, the events that the court deemed to be "defaults" for purposes of precluding the option (*see* **App.2:2-4**) all related to Tenant's use of the public right-of-way, which the district court found to be outside the scope of the lease in any event. **App.2:8-9** (district court finding that the lease "does not address public rights of way"). Actions beyond the scope of the lease cannot be deemed breaches of the lease.

Furthermore, even if the installation of a play set and wood chips in the public right-of-way in October, 2007, were governed by the lease, Landlord's acceptance of rent every single month thereafter until the exercise of the option in August, 2008, with full knowledge of the alleged violation, effects a waiver of the right to terminate the lease as a result of that violation. *Merkowitz v. Mahoney,* 215 P.2d 317, 320 (Colo. 1949) ("where a landlord after violation of the lease has his election to declare the lease at an end or to permit it to continue, the acceptance of

rent due thereafter is usually held to constitute an election to waive the forfeiture"); *see also Werner v. Baker*, 693 P.2d 385, 387 (Colo.App.1984) (acceptance of rent by landlord with knowledge of previous violation of lease operates to waive the landlord's right to terminate the lease); *Duran*, *supra,* 671 P.2d at 182-3 (subsequent notice of default and demand for cure recognized continuing existence of lease so as to waive previous default); 23 A.L.R.4th 908, *supra*, at §6.

Tenant properly exercised the option to extend the lease, and the district court's erroneous ruling to the contrary must be reversed.

C. THE DISTRICT COURT ERRED IN FAILING TO ENTER A DECLARATORY JUDGMENT IN FAVOR OF TENANT.

As argued in Sections A and B above, it is clear that as of the date of judgment, (a) Tenant properly exercised the option, and (b) the lease was in full force and effect. The district court refused to enter declaratory judgment as Tenant sought, but the district court's ruling was in error, as a matter of law, as demonstrated above. Plaintiffs-Appellants request this court to reverse the district court's order and enter declaratory judgment in favor of Tenant in these two respects.

D. THE DISTRICT COURT FAILED TO ENFORCE THE LEASE AS WRITTEN.

The district court likewise erred in failing to enforce the lease as written and denying Tenant its rights under the lease.

1. The Court Misapplied the Terms Applicable to CAM Charges.

In its First Claim for Relief, Tenant sought relief for Landlord's improper overcharge for rent, taxes and CAM charges. **34791923:¶46-55;80**. At trial, Tenant testified that the area of Tenant's premises is overstated, while the total area of the Shopping Center is understated, with the result that Tenant's pro-rata share is improperly exaggerated. **Tr.(1/27/11):84-89** (discussion of measurement of space; **Tr.(1/27/11):87:3** (premises measure 775 sf); **Tr.(1/27/11):89:7** (total Shopping Center area is 12,285 sf).

The district court interpreted the general statement that "the leased area shall be a unit (the 'Premises') consisting of approximately 820 square feet, at 2202 Kearney Street" (**App.1:¶1.05**) to mean that "820 square feet" was the agreed-upon square footage for all purposes under the lease. But the district court simply ignored the specific language applicable to computation of common area maintenance (CAM) charges, which contradicts the district court's interpretation, and provides as follows:

> "The Tenant's pro rata share of the Building Expenses shall be equal to the amount of Expenses multiplied by a fraction, the numerator of which is the number of square feet of the Floor Area of the Tenant's Premises and the denominator of which is the total number of square feet of the leasable ground area in Shopping Center."

App.1:§8.01. A similar provision defines Tenant's pro rata share of the taxes. **App.1:§6.01**. The term "Floor Area," in turn, is defined as follows:

> The term "Floor Area," as used in this Lease, means with respect to any leasable ground floor premises in the Shopping Center, the aggregate number of square feet of floor space of the ground floor level therein. All space shall be measured from (i) the outside faces of all perimeter walls thereof other than any party wall separating such premises from other leasable premises; (ii) the center line of any such party wall; (iii) the outside face of any interior wall where the floor extends to an interior wall; and (iv) the building and/or lease line adjacent to any entrance to such premises.

App.1:§24.12.

The district court flatly ignored the parties' agreement to use actual measurements to determine Tenant's pro rata share of CAM charges and taxes—and instead endorsed Landlord's use of the incorrect—and inapplicable—"approximate" term. Indeed, the district court acknowledges that the landlord did not use the right method, but nevertheless made the following conclusion: "To constitute breach of the Lease, Plaintiffs must show more than that the figure was inaccurate. They must show that the Defendant failed an obligation within the lease to be exact, which they have not done." **App.2:5**. This conclusion of law is

erroneous on its face, and must be rejected, since it is plainly contradicted by Sections 6.01, 8.01 and 24.12 of the Lease (**App.1**).

Nor do principles of contract interpretation (which the district court never applied in any event) provide a basis for the district court's conclusion. "[I]t is a basic principle of contract interpretation that a more specific provision controls the effect of general provisions." *E-470 Public Highway Authority v. Jagow,* 30 P.3d 798, 801 (Colo.App.2001). Obviously, the language of Sections 6.01, 8.01 and 24.12 are specific, while the "approximate" language in the preamble of the lease is general.

The district court's reliance on the general language of the preamble must be rejected, and the district court's finding in reliance on the general provision that the premises consist of 820 square feet must be reversed. By Landlord's own admission, nobody except Tenant ever measured the building or the premises. **Tr.(2/22/11):181:20-24**. As a consequence, CAM charges, taxes and rent must be recalculated using the correct prorations and the excess amounts improperly charged awarded as damages. Plaintiff Darren Spreeuw is the only person who actually measured the space as required by the lease, and determined Tenant's correct Floor Area is 775 sf and Tenant's correct pro-rata share of the Shopping Center is 6.3%. **Tr.(1/27/11):85:10-88:23**. Judgment should be entered in favor of

Plaintiffs, and damages calculated for all excessive rent and CAM charges assessed and paid.

2. The District Court Misinterpreted the Exclusive Use Clause.

In its First Claim for Relief, Tenant sought damages for Landlord's violation of the exclusive use clause **(34791923:¶56-58,80)**, which provides that "Perk Hill Coffee shall be the only coffee house in the Shopping Center." **App.1:§24.03**. At trial, the sole expert witness on the subject, testified that a coffeehouse is a business that typically opens early (6:00 or 7:00 a.m.) to serve coffee and pastries to morning customers, provides comfortable seating and free wireless internet access to encourage people to sit and enjoy a drink and a pastry, serves coffee and pastry in Starbuck's-style to-go cups and bags, provides a community bulletin board, and acts as a community gathering place. Testimony of Coffeehouse Expert Dan Oltersdorf, **Tr.(1/27/11):281-83**. Further, Landlord leased a unit in the Shopping Center (**Exhs.51-52**) to Cake Crumbs, a business that provides these amenities. **Tr.(1/27/11):60:3-61:25** (Cake Crumbs has specific coffeehouse characteristics, and if someone were told to "meet me at the coffeehouse at 22nd and Kearney," one would not know whether this meant Perk Hill or Cake Crumbs); **Tr.(1/27/11):275:5-10** (court acknowledges stipulation that Cake Crumbs has

coffeehouse characteristics and public believed both Cake Crumbs and Tenant are "coffeehouses").

But despite this clear proof and the plain language of the lease, the district court denied Tenant's claim for damages for violation of the exclusive use clause, holding that Tenant had failed to prove that Cake Crumbs was a "coffeehouse": "While the Court heard expert testimony concerning the *definition of coffeehouse* and notes that Cake Crumbs shares characteristics that were described by the expert, this does not end the inquiry. *Under the scenario given by the expert,* ***many businesses could fall into the definition*** *and, even with expert opinion; the exact nature of a coffeehouse is subjective*." Order, **App.2:7** (emphasis added).

The district court's reasoning and analysis is in error. The problem is not lack of evidence or lack of clarity about the nature of Cake Crumbs, or, indeed, the nature of a "coffeehouse." The problem is, rather, that the court failed to give the word "coffeehouse" its plain and ordinary meaning and to enforce the lease as written, *i.e.,* to enforce the broad definition used in the lease, which, as the court found "many businesses could fall into." The lease was drafted by the Landlord. Moreover, the principals of Landlord own and operate a coffeehouse themselves. **Tr.(2/22/11):116-119**. The lease should be interpreted to give "coffeehouse," as used in the lease, its plain and ordinary meaning—certainly a meaning understood

by both Landlord and Tenant, and the nature of which was clearly expressed by the sole expert witness who testified, Dan Oltersdorf. Under the evidence provided, which the district court plainly understood, "many businesses could fall into that definition," seemingly including Cake Crumbs. But yet, apparently because the district court was uncomfortable giving the word "coffeehouse" a meaning that would include a broad category of businesses within its purview, it redefined "coffeehouse" more narrowly than its typical meaning.

Quite simply, if Landlord had wished to qualify which "coffeehouses" are permitted and which are not, it could have drafted the exclusive use provision some other way. For example, it could have defined "coffeehouse" as any business that derives more than X percent of its revenues from the sale of coffee, or any business that sells espresso drinks. Instead, Landlord drafted a clause that provides no limitations or qualifications on which "coffeehouses" are prohibited—and promises Tenant that *all* coffeehouses, of whatever nature, will be excluded from the Shopping Center.

The district court's conclusion is not supported by the lease. In Colorado, courts are to enforce contracts as they are written, not as they could have been written. "The court's duty is to interpret and enforce contracts as written between the parties, not to rewrite or restructure them." *Fox v. I-10, Ltd.*, 957 P.2d 1018,

1022 (Colo. 1998). "Courts do not make contracts for parties. It is not for us to say whether [a contracting party] made a wise choice. … [W]e must apply the well known rule that it is the duty of the court to interpret the contract made by the parties themselves, and not to make a new one for them." *Gertner v. Limon Nat. Bank*, 257 P. 247, 257 (Colo. 1927) (citations omitted). Yet, apparently in the belief that Landlord had agreed to "unfairly" broad language, added new terms to the lease to make it more favorable to Landlord. The district court's interpretation violates Colorado law, and must be reversed.

Moreover, Colorado courts adhere to the following: "Two well-established principles governing the interpretation of contracts must be borne in mind: (a) In case of doubt, a contract is construed most strongly against him who drafted it. (b) Where a doubt exists as to the proper construction of a given clause, it should be construed in favor of him for whose protection it was obviously inserted." *Christmas v. Cooley*, 406 P.2d 333, 336 (Colo. 1965) (quoting *Globe Nat. Bank v. McLean*, 269 P. 9 (Colo. 1928)); *see also Evergreen Square Corp. v. Spence*, 535 P.2d 225, 227 (Colo.App.1975) (citations omitted) (vague or ambiguous contractual provisions should be construed against drafting party).

Landlord drafted the lease, including the clause that promised that Tenant would be the only "coffeehouse" in the Shopping Center. Therefore, doubts should

be resolved against the Landlord and in favor of the Tenant. Further, the exclusive use clause is obviously intended to benefit the Tenant, as it restricts what the Landlord may do with its property and protects Tenant's business from competition. Accordingly, once again, the clause should be construed in Tenant's favor, and interpreted broadly in determining whether similar businesses are "coffeehouses" or not.

The district court's refusal to enforce the broad exclusive use clause as written violates long-established principles of contractual interpretation, and must be reversed. Judgment must be entered in favor of Plaintiffs on its claim for breach of contract arising from violation of the exclusive use clause, and damages awarded as proven at trial.

CONCLUSION

The district court misconstrued the law and the lease to find in favor of Landlord when it should have found for Tenant on virtually every aspect of this case. The district court's grant of judgment, award of attorneys' fees under the FED statute, and issuance of a writ of restitution in favor of Landlord on its FED claim must be vacated for lack of jurisdiction and/or reversed as contrary to the statute and established law. Likewise, the district court's finding that Tenant's

option was forfeited must be reversed, and declaratory judgment that the lease continued in full force and effect must be entered in favor of Tenant.

Furthermore, judgment must enter in favor of Tenant on its claims for breach of contract arising from violation of the exclusive use clause and overcharging for CAMs, taxes, insurance and rent, and damages must be awarded to Tenant as proven at trial for these elements. The district court's denial of Tenant's other claims should also be vacated, and the matter remanded for further proceedings. The order denying Landlord's other counterclaims, which are not the subject of this appeal or any cross-appeal, should be left undisturbed. In connection with any further proceedings in the trial court, this Court should instruct the district court that it is required to enforce all discovery rules and to permit Tenant to take all discovery to which it is entitled.

REQUEST FOR ATTORNEYS' FEES

Because Plaintiffs were entitled to judgment on the improper FED claims, Plaintiffs are entitled to an award of attorneys' fees under CRS §13-40-123. In addition, Section 17.03 of the lease (**App.1**) provides that the prevailing party in all legal actions under the lease shall be entitled to recover attorneys' fees and costs, including on appeal. Pursuant to CAR 39.5, Plaintiffs hereby respectfully request an award of attorneys' fees and costs incurred in connection with all district court

proceedings and in connection with the prosecution of this appeal pursuant to CRS §13-40-123 and Section 17.03 of the lease (**App.1**). Plaintiffs respectfully request that this court determine the proper award of attorneys' fees as permitted under CAR 39.5, rather than exercising its discretion to remand the determination of attorneys' fees to the district court.

DATED: November 29, 2011

DANIEL J. CULHANE LLC

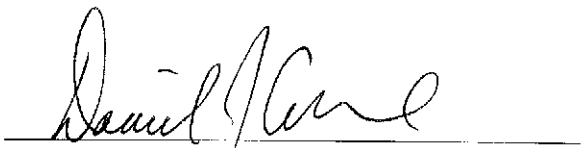
By: 

Daniel J. Culhane, #22196
1600 Broadway, Suite 1400
Denver, CO 80202
(303) 945-2070
Fax: (720) 420-5998

CERTIFICATE OF MAILING

I hereby certify that, in Compliance with C.A.R. Rule 25, on this 29th day of November, 2011, that I served the foregoing **Appellants' Opening Brief** in this action, together with **Appendix 1** and **Appendix 2** thereto, via Lexis/Nexis File & Serve and via hand delivery on the following:

Casey Frank
1357 Williams St., No. 307
Denver, CO 80218
letters@caseyfrank.com



Daniel J. Culhane