ADVANCE SHEET HEADNOTE
October 21, 2024

2024 CO 68

No. 24SA163, *In re Mercy Housing Management Group, Inc. v. Naomi Bermudez* — Forcible Entry and Detainer — Jury Trials — Ejectment — § 13-40-115, C.R.S. (2024) — C.R.C.P. 338(a) — *Pernell v. Southall Realty*, 416 U.S. 363 (1974) — *Baumgartner v. Schey*, 353 P.2d 375 (Colo. 1960) — *Husar v. Larimer Cnty. Ct.*, 629 P.2d 1104 (Colo. App. 1981) — C.A.R. 21.

The supreme court holds that there is a right to a jury trial on any factual disputes in forcible-entry-and-detainer ("FED") actions. The tenant in this FED case timely requested a jury trial and paid the requisite jury fee, and the parties' lease does not contain a jury waiver. Because the county court nevertheless denied the tenant's request for a jury trial on the parties' factual disputes, the supreme court makes absolute the order to show cause. On remand, the county court must hold a jury trial on any factual issues.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 68

Supreme Court Case No. 24SA163
Original Proceeding Pursuant to C.A.R. 21
County Court, City and County of Denver, Case No. 24C58400
Honorable Isaam Shamsid-Deen, Judge

In Re
Plaintiff:

Mercy Housing Management Group Inc.,

v.

Defendant:

Naomi Bermudez.

Order Made Absolute
en banc
October 21, 2024

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE GABRIEL**, and **JUSTICE HART** joined.
JUSTICE HOOD, joined by **JUSTICE BERKENKOTTER**, dissented.
JUSTICE BOATRIGHT did not participate.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 The tradition of trial by jury in possessory actions is of revered vintage. One of its earliest forms, known as "the assize of novel disseisin," can be traced back to the twelfth century. *Pernell v. Southall Realty*, 416 U.S. 363, 371 (1974). The assize of novel disseisin allowed those dispossessed of their tenement to speedily seek recovery of their property. *Id.* Once a dispossessed plaintiff lodged a complaint, "a writ would issue bidding the sheriff to summon 12 good and lawful men of the neighborhood to 'recognize' before the King's justices whether the defendant had unjustly disseised the plaintiff of his tenement." *Id.* at 371–72. Still, despite the necessity to assemble a jury, the action was intended to be "a summary procedure designed to mete out prompt justice in possessory disputes." *Id.* at 372.

¶2 Some eight centuries later, in 1974, with an eye toward this history, the Supreme Court declared that the role of juries persisted in a statutory possessory action. *Id.* at 371–76. Furthermore, the Court issued a forceful defense of the importance of juries in landlord–tenant disputes. Eschewing concerns that a jury-trial right was at odds with the intended summary proceeding, the Court recognized that "[s]ome delay, of course, is inherent in any fair-minded system of justice." *Id.* at 385. Paramount for the Court was the "fair opportunity" for both parties in a landlord–tenant dispute "to present their cases" in order to ensure "that justice be done before a man is evicted from his home." *Id.*

¶3 Fast-forward fifty years. Before us is Naomi Bermudez, who, in danger of eviction from her home, asks to be heard by a jury regarding factual disputes on her alleged violations of her lease agreement with her landlord, Mercy Housing Management Group Inc. ("Mercy Housing"). Mercy Housing, however, argues that a jury trial has no place in this forcible-entry-and-detainer ("FED") action seeking possession of the property Bermudez leases. In so doing, it relies on section 13-40-115, C.R.S. (2024), "Judgment—writ of restitution—cure period," which is part of the FED statutory framework.[1] The question for us is whether Bermudez is entitled to a jury trial on the factual disputes underlying this FED-possession action.

¶4 In Colorado, there is no constitutional right to a trial by jury in civil cases. *Husar v. Larimer Cnty. Ct.*, 629 P.2d 1104, 1104 (Colo. App. 1981) (citing *Setchell v. Dellacroce*, 454 P.2d 804, 806 (Colo. 1969)). Instead, such a right derives from either statute or court rule. *Id.* (citing *Jones v. Est. of Lambourn*, 411 P.2d 11, 15 (Colo. 1966)). In county court cases like this one, the governing rules are those within the Colorado Rules of Civil Procedure that are applicable to county courts. *See* § 13-40-119, C.R.S. (2024); C.R.C.P. 301. And C.R.C.P. 338, "Right to Trial by Jury,"

[1] Article 40 of title 13, "Forcible Entry and Detainer," contains numerous statutes. *See* §§ 13-40-101 to -128, C.R.S. (2024). Strictly for the sake of convenience, in this opinion we refer to these statutes collectively as "article 40" or the "FED statutory framework" and to section 13-40-115 individually as the "FED statute."

specifically declares that where the legislature has provided a statutory right to a jury trial, a jury must decide all issues of fact. C.R.C.P. 338(a). That rule is clear as a bell: "[I]n actions wherein *a trial by jury is provided by . . . statute, including actions for the recovery of specific real . . . property* . . . all issues of fact shall be tried by a jury." *Id.* (emphasis added).

¶5 Mercy Housing nevertheless urges that C.R.C.P. 338(a) does not reflect that there is a statutory right to a jury trial in FED-possession actions. According to Mercy Housing, FED cases are actions for the *possession of real property*, not actions referenced in C.R.C.P. 338(a) for the "recovery of specific real . . . property." In the alternative, says Mercy Housing, even if C.R.C.P. 338(a) applies here, it clashes with, and must give way to, the FED statute. That is, even assuming C.R.C.P. 338(a) refers to the FED statute, Mercy Housing contends that there is no right to a jury trial in this possession case because that statute limits the jury-trial right to cases in which the plaintiff seeks money damages. What's more, Mercy Housing asserts that the summary nature of FED actions for possession, coupled with the high volume of such cases, would make jury trials impractical, if not altogether impossible.

¶6 The trial court denied Bermudez's request for a jury trial. And its ruling, which it defends before us, aligns with the prevailing practice in county courts throughout the state. We speak up now to correct that trend.

¶7 Turning first to the statutory right to a trial by jury in actions seeking what C.R.C.P. 338(a) refers to as "the recovery of specific real . . . property," the case law demonstrates that there is no substantive difference between the old common law action of ejectment and the modern statutory FED-possession action, and since the former was an action "for the recovery of specific real . . . property," as that phrase is used in C.R.C.P. 338(a), so is the latter. Thus, contrary to the assertions by Mercy Housing and the county court, the rule encompasses FED-possession actions, and the statutory right to a jury trial applies as much in a modern FED-possession action as it did in an old ejectment action.

¶8 The case law also undercuts the county court's contention that FED-possession actions are actions in equity that must thus be tried to a court instead of a jury. Precedent from our court and the Supreme Court makes clear that FED-possession actions are legal in nature and that factual disputes in such actions may be tried to a jury.

¶9 Importantly, guided by the case law, we discern that the FED statute itself confers the right to a jury trial regarding factual disputes in FED-possession cases. Hence, instead of clashing with C.R.C.P. 338(a), the FED statute works hand in hand with it. To borrow from Forrest Gump, the statute and the rule go together like peas and carrots.

¶10 While we fully acknowledge concerns that a jury-trial right might overwhelm our county courts, we ultimately conclude that the limited nature of this right will not prove unworkable. Regardless, our job is to interpret and apply the law handed down by the legislature, and we may not act by judicial fiat when the practical consequences may be deemed undesirable by some.

¶11 Accordingly, we hold that there is a right to a jury trial on any factual disputes in FED-possession actions. Because the dispute here involves factual issues related to possession, we make absolute the order to show cause and remand with instructions for the county court to schedule a jury trial on those limited issues.

I. Facts and Procedural History

¶12 Bermudez is a tenant in Clare Gardens, a federally subsidized low-income housing complex managed by Mercy Housing. In December 2022, Bermudez and Mercy Housing executed a residential lease agreement ("Lease"). The initial term of the Lease was scheduled to end on November 30, 2023. In March 2023, however, Mercy Housing sought to terminate the Lease early, claiming that Bermudez had repeatedly violated it.

¶13 In its Notice to Quit, Mercy Housing specifically alleged that: (1) an unauthorized guest had resided with Bermudez at Clare Gardens for longer than a ninety-day period; (2) Bermudez's unauthorized guest had violated the

prohibition against maintaining or repairing vehicles on the property; and (3) the unauthorized guest had verbally threatened and harassed another resident on the property. Bermudez did not vacate her unit.

¶14 Mercy Housing subsequently filed this FED-possession action. In its complaint, it clarified that this was "a possession only matter" and that it was "not requesting money damages." It further stated that Bermudez had "refused to . . . vacate the premises" and continued "to wrongfully hold possession." Bermudez timely filed an answer in which she denied each of the allegations in the Notice to Quit and demanded a jury trial. She separately filed, again timely, a Notice of Jury Demand "on all issues so triable, including . . . on the issue of possession and all issues of fact." Bermudez simultaneously paid the requisite jury fee.

¶15 The county court set the matter for a bench trial and stated that it would hear arguments on Bermudez's jury demand on the day of trial. When Bermudez requested an earlier ruling on her jury demand, the court immediately issued an order denying the jury demand. It concluded that "[i]n Colorado, there is no constitutional right to a jury trial in civil matters."

¶16 Bermudez then brought this C.A.R. 21 petition. For the reasons set forth below, we exercise our original jurisdiction.

II. Original Jurisdiction

¶17 C.A.R. 21 vests our court with sole discretion to exercise our original jurisdiction. *See* C.A.R. 21(a)(1). Mindful that a proceeding under C.A.R. 21 is extraordinary in nature and limited in both purpose and availability, we have confined exercise of our original jurisdiction to specific circumstances. *People v. Cortes-Gonzalez*, 2022 CO 14, ¶ 21, 506 P.3d 835, 842. In the past, we've exercised our original jurisdiction when "an appellate remedy would be inadequate, a party may suffer irreparable harm, or a petition raises an issue of first impression that has significant public importance." *People v. Kembel*, 2023 CO 5, ¶ 18, 524 P.3d 18, 23.

¶18 Bermudez raises four contentions to support her invocation of our original jurisdiction. We discuss each in turn.

¶19 First, Bermudez contends, and we concur, that this is an issue of significant public importance because numerous county courts across the state are denying requests for jury trials in FED-possession cases, a practice that will continue unless our court intervenes. *See People v. Sherwood*, 2021 CO 61, ¶ 17, 489 P.3d 1233, 1238 (granting a C.A.R. 21 petition in a different context because "we confront[ed] a question of statewide importance that [was] likely to recur"); *Kembel*, ¶ 20, 524 P.3d at 23 (finding C.A.R. 21 relief appropriate when "waiting to address the issue on direct appeal would mean that [the trial] court, and likely others, would continue

to [rule erroneously]"); *Magill v. Ford Motor Co.*, 2016 CO 57, ¶ 9, 379 P.3d 1033, 1036 (electing to hear a case under C.A.R. 21 because "[t]his issue not only concern[ed] the rights of the parties . . . but also affect[ed] the rights of future litigants").

¶20 Second, Bermudez maintains she has no adequate remedy. She's right. As Bermudez notes, if she has to wait to raise this issue on appeal in the event she loses at trial, she will likely suffer irreparable harm.

¶21 In appealing to the district court, Bermudez would be required to post a bond to stay the eviction. § 13-6-311(1)(b), C.R.S. (2024); C.R.C.P. 411(a). Bermudez, however, is a low-income tenant in a federally subsidized housing project, and she informs us that she's unlikely to be able to afford a bond to stay the eviction. Consequently, she could be evicted while awaiting the outcome of any appeal. Even if Bermudez were able to obtain a nominal appeal bond and prevail in her appeal, the record of her eviction could still be held against her in the future by tenant-screening companies.[2] This court has recognized that an

[2] *See, e.g.*, Adam Porton et al., *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, Hous. Pol'y Debate (2020), https://www.tandfonline.com/doi/pdf/10.1080/10511482.2020.1748084?needAccess=true [https://perma.cc/Z748-Y6TU]; Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, Hous. Pol'y Debate (2023), https://www.tandfonline.com/doi/epdf/10.1080/10511482.2022.2113815?needAccess=true [https://perma.cc/VW6U-HAPX]; Eric

appeal is an inadequate remedy if an eviction will move forward and dispossess a tenant of her home, mar her rental history, and potentially lead to termination of her subsidized housing voucher. *Arvada Vill. Gardens LP v. Garate*, 2023 CO 24, ¶ 7, 529 P.3d 105, 107.

¶22 Third, Bermudez correctly points out that we have found on several occasions that violation of the right to a jury trial may warrant C.A.R. 21 review. *See Murray v. Dist. Ct.*, 539 P.2d 1254, 1254 (Colo. 1975); *Halliburton v. Cnty. Ct.*, 672 P.2d 1006, 1009 (Colo. 1983); *McConnell v. Dist. Ct.*, 680 P.2d 528, 531 (Colo. 1984). As we see it, the denial of Bermudez's jury-trial request deserves our interlocutory attention.

¶23 And finally, Bermudez argues that this issue is otherwise likely to evade appeal as few tenants have the resources or incentive to appeal a county court's denial of their jury-trial demand. *See In re Marriage of Wollert*, 2020 CO 47, ¶ 19, 464 P.3d 703, 709 (exercising original jurisdiction because the issues were "likely to evade our review"). Once again, we agree.

¶24 Accordingly, the exercise of our original jurisdiction in this matter is appropriate. We thus proceed to the question of whether the county court erred when it denied Bermudez a jury trial on factual disputes relevant to the issue of

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Dunn, *The Case Against Rental Application Fees*, 30 Geo. J. on Poverty L. & Pol'y 21, 24–28 (2022).

possession in this FED action. As usual, though, before turning to our analysis, we set forth the standard that illuminates our review.

III. Standard of Review

¶25 Whether there exists a jury-trial right on factual disputes relevant to the issue of possession in FED cases hinges largely on the FED statute and C.R.C.P. 338(a), which we interpret de novo. *Arvada Vill. Gardens*, ¶ 9, 529 P.3d at 107 (stating that issues of statutory interpretation are reviewed de novo); *Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 7, 287 P.3d 112, 114 ("We review de novo the trial court's interpretation of a rule of civil procedure."). And to the extent that our analysis is rooted in the case law, it entails a question of law, which we likewise review de novo. *Cortes-Gonzalez*, ¶ 24, 506 P.3d at 842.

IV. Analysis

¶26 In Colorado, the right to a trial by jury in civil cases is rooted in either statute or rule, not the constitution. *Husar*, 629 P.2d at 1104. C.R.C.P. 338(a) states that "all issues of fact shall be tried by a jury" in "actions" in which a statute provides "a trial by jury . . . , including actions for the recovery of specific real . . . property, with or without damages." C.R.C.P. 338(a).

¶27 Bermudez argues that, under the case law, there is no meaningful difference between the old common law action of ejectment and the modern statutory FED-possession action, and since the former was subject to the statutory jury-trial

right referenced in C.R.C.P. 338(a), the latter is, too. According to Bermudez, then, the case law enshrines her right to a jury trial on issues of fact in this FED action for possession, which is legal, not equitable, in nature. *See Baumgartner v. Schey*, 353 P.2d 375, 378–81 (Colo. 1960); *Davis v. Holbrook*, 55 P. 730, 730–31 (Colo. 1898); *RTV, L.L.C. v. Grandote Int'l Ltd. Liab. Co.*, 937 P.2d 768, 770 (Colo. App. 1996); *Husar*, 629 P.2d at 1105. As for the FED statute, Bermudez urges that it is consistent with the right to a jury trial referenced in C.R.C.P. 338(a). And, says Bermudez, the policy reasons advanced by Mercy Housing and the county court do not compel a different ruling.

¶28 We agree with Bermudez. In fact, her rationale supplies the blueprint for our four-floor analytical architecture.

¶29 First, focusing on the statutory right to a trial by jury in actions seeking "the recovery of specific real . . . property," as referenced in C.R.C.P. 338(a), the case law reveals an unbroken thread between the old common law action of ejectment and the modern statutory FED-possession action. And since the former was an action "for the recovery of specific real . . . property," the latter is as well. Thus, contrary to the assertions by Mercy Housing and the county court, we perceive no meaningful difference between "the recovery of specific real . . . property," as that phrase is used in C.R.C.P. 338(a), and the issue of *possession* in statutory FED actions. Accordingly, we conclude that the rule encompasses FED-possession

actions and that the statutory right to a jury trial applies in FED-possession actions as much as it did in old ejectment actions.

¶30 The case law also undercuts the county court's contention that FED-possession actions are actions in equity that must thus be tried to a court instead of a jury. Precedent from our court and the Supreme Court makes clear that FED-possession actions are actions at law.

¶31 Second, we turn to the FED statute itself. Steered by the case law, we discern that this statute confers the right to a jury trial regarding factual disputes in FED-possession cases. Therefore, in our view, the FED statute and C.R.C.P. 338(a) are congruous.

¶32 Third, we explain why policy arguments relating to the volume of jury trials that may ensue in the wake of today's ruling do not deter us from our course. Although the concerns are understandable, we are unpersuaded that today's decision will cause the sky to fall. And, in any case, such concerns do not give us license to contravene the FED statute.

¶33 Fourth, we apply these principles to the facts in the instant matter. We ultimately conclude that Bermudez is entitled to a jury trial on the factual issues she raises.

A. C.R.C.P. 338(a) References a Statutory Right to a Jury Trial on Factual Issues in FED Actions for Possession, and the Case Law Is Consistent with the Rule

¶34 C.R.C.P. 338(a) clearly identifies an action for the recovery of real property as one in which the right to a trial by jury is provided by statute:

> Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided . . . by statute, *including actions for the recovery of specific real . . . property*, *with or without damages*, . . . *all issues of fact* shall be tried by a jury.

(Emphases added.) Thus, so long as landlords or tenants timely demand a jury trial and pay the requisite jury fee in an action for the recovery of real property, they are entitled to a jury trial on all issues of fact, regardless of whether the plaintiff seeks money damages.

¶35 But Mercy Housing tries to distance itself from the rule by nudging us to hold that FED actions for *possession* differ from actions referenced in C.R.C.P. 338(a) "for the *recovery* of specific real . . . property." (Emphasis added.) And so, the argument goes, the rule is inapplicable in this FED-possession action. Mercy Housing further contends that the cases on which Bermudez relies are fatally flawed because they improperly equate the old common law action of ejectment to the modern statutory FED-possession action. In Mercy Housing's view, the FED statute abrogated the common law and, therefore, ejectment principles are inapposite in FED-possession cases.

¶36 For its part, the county court agrees with Mercy Housing that the common law action of ejectment is not coextensive with the modern statutory FED-possession action. Beyond that, though, it points out that the case law provides for jury trials in proceedings that are legal, not equitable, in nature. And, maintaining that FED-possession actions seek only equitable relief, the county court asks us to hold that they are properly tried to the court, not a jury. The county court also homes in on C.R.C.P. 338(a)'s use of the word "specific" (as in "the recovery of specific real . . . property") as a basis to distinguish FED-possession actions.

¶37 We are unmoved by any of these contentions. In the final analysis, adherence to jurisprudence from our court and the Supreme Court, not deviation from it, wins the day. Indeed, the common law in this area is an edifice built on rock, not sand; it has endured through the decades and stands foursquare in Bermudez's corner.

¶38 At base, the dispute before us is governed by the notion that the right to a jury trial under the Colorado Rules of Civil Procedure exists for proceedings that are legal, not equitable, in nature. *See Mason v. Farm Credit of S. Colo., ACA*, 2018 CO 46, ¶ 10, 419 P.3d 975, 979. But controlling precedent—both from our court and the Supreme Court—bespeaks a stalwart cord between modern FED actions for the possession of real property and their ancient predecessor, ejectment

proceedings for the recovery of specific real property, which, since time immemorial, have been considered fundamentally legal in nature. This case law is both on point and dispositive. Therefore, today, we reaffirm those time-honored principles and clarify that FED-possession actions *are* actions at law for the recovery of specific real property and that the factual disputes in such actions may be tried to a jury.

¶39 Our decision in *Baumgartner* is our jumping-off point. There, the owner of certain real property sought a declaratory judgment, claiming that lessees of the property were in possession without a lease agreement. 353 P.2d at 375. One of the putative lessees filed an answer denying the landowner's allegations; he asserted that he did, in fact, have a lease for the year in question and raised other factual disputes. *Id.* at 375–76.

¶40 In deciding whether the putative lessee was entitled to a jury trial, we first looked to the remedy being sought in the landowner's action: "In essence[,] the [landowner] claims to be entitled to possession of the land involved on the assertion that there is no . . . lease for the year [in question] . . . and seeks immediate possession thereof." *Id.* at 378. Although the landowner ostensibly sought a declaratory judgment, we determined that the action was "clearly one in the nature of ejectment." *Id.* at 379.

¶41 Our focus on the requested remedy dovetailed nicely with our regard for the historical nature of the right sought to be enforced. We declared that the "modern form of the common law action of ejectment is forcible entry and detainer as provided in [the FED statutory framework]." *Id.* "The modern statutory action of forcible-entry-and-detainer," we continued, "is essentially the same as the old ejectment action." *Id.*

¶42 Significantly, we observed that "the nature of the action as one in ejectment ha[d] not been changed by statutes abolishing fictions or regulating procedure." *Id.* (quoting 18 Am. Jur. *Ejectment* § 5, at 11 (1938)). So, notwithstanding the new statutes, we discerned that the common law still elucidated the principles governing FED-possession actions. On this point, we unequivocally concluded that "ejectment is, primarily, a legal action." *Id.* (quoting *French v. Golston*, 100 P.2d 581, 584 (Colo. 1940)). Thus, we resolved the issue in the following terms:

> It is, therefore, clear that if [the landowner's] action had not been brought under the Declaratory Judgments Act prior to the end of the lease period it would have been *an action in ejectment or forcible entry and detainer and in either case would have been an action at law*. *Thus, the character of the action, the entire controversy, is one at law, and one entitling [the putative lessee] to a trial by jury of issues of fact*.

Id. at 380 (emphasis added). We couldn't have been clearer.

¶43 Digging even deeper into the archives, we find *Davis*, a case dating back to the nineteenth century, which proves the pedigree of *Baumgartner*. The FED-possession proceeding there was initially "tried before the court and a jury."

Davis, 55 P. at 730. Ultimately, though, "the court, of its own motion, took the case from the jury and directed a verdict for the plaintiffs." *Id.* The case then made its way to our court. Our opinion in *Davis* is instructive here in two ways.

¶44 First, we noted that the "object of th[e] action was the recovery of the possession of real property." *Id.* Along the same lines, we observed that "before the reformed procedure"—i.e., the enactment of the FED statutory framework—"the action would have been denominated 'ejectment.'" *Id.* As such, we characterized the "cause of action set forth in the complaint" as "strictly legal." *Id.* Thus, even our nascent case law plainly teaches that, in FED-possession actions, both the nature of the remedy sought and the historical nature of the right to be enforced are legal, not equitable.

¶45 Second, we said in *Davis* that "the issue upon the *legal cause of action alleged in the complaint* should have been submitted to the jury, *if there was any dispute* concerning it." *Id.* at 731 (emphases added). True, this axiom didn't affect the outcome in that case. But that's because the defendants had raised only an "equitable defense in the[ir] answer"—they hadn't raised any questions of fact related to the ejectment action itself. *Id.* at 730. Indeed, at trial, the defendants had "conceded that the legal title was in plaintiffs, and there was no evidence at all contradicting it; . . . the only evidence was that pertaining to the equitable defense." *Id.* at 731. The salient upshot of *Davis* is this: Since FED-possession

actions are "strictly legal" in nature, whenever defendants in such proceedings raise factual disputes in their answer to the plaintiff's complaint, they are entitled to a jury trial on those factual disputes. *Id.* at 730–31.

¶46 The county court here, however, points to *Dohner v. Union Central Life Insurance Co.*, 121 P.2d 661 (Colo. 1942), for the proposition that FED-possession actions are equitable in nature. *Dohner*, though, simply reiterates the second point we extract from *Davis*. In *Dohner*, we reviewed a "statutory unlawful detainer action" and considered whether "the trial court erred in denying [the defendant's] request for a jury trial." 121 P.2d at 661–62. The defendant there relied on language in the relevant provision of the former Code of Civil Procedure, which was nearly identical to that currently found in C.R.C.P. 338(a). *Dohner*, 121 P.2d at 662. Specifically, the former Code stated that, "[i]n actions for the recovery of specific, real . . . property, . . . an issue of fact must be tried by a jury, unless a jury trial is waived . . . ." *Id.* (quoting Colorado Code of Civil Procedure § 191 (1935)). As in *Davis*, the only reason we concluded that the defendant wasn't entitled to a jury trial was because the defendant had "interposed" a purely "equitable defense." *Id.* And so, again, although the nature of the unlawful detainer action itself was legal, there were no factual disputes to resolve. In that circumstance, we said, the pertinent provision of the code "was without application, and . . . the determination of the equitable issue was for the court and not a jury." *Id.* (first

citing *Weir v. Welch*, 203 P. 1100, 1101 (Colo. 1922); and then citing *Davis*, 55 P. at 731).

¶47 Colorado precedent from a more recent epoch, too, reinforces what we taught all those years ago in *Davis* and *Dohner*. *See RTV,* 937 P.2d at 770; *Husar*, 629 P.2d at 1104–05. Like its ancestors, *Husar* drives a stake into the heart of Mercy Housing's asserted distinction between statutory FED-possession actions, on the one hand, and actions referenced in C.R.C.P. 338(a) for the recovery of specific real property, on the other. 629 P.2d at 1104–05. *Husar* reaffirms that this semantic challenge has no place to lay its head.

¶48 In *Husar*, a landlord filed a statutory FED action, seeking, among other things, "possession of the property." *Id.* at 1104. The tenant "filed an answer denying the allegations in the complaint" and demanding a jury trial. *Id.* The county court rejected the demand, finding that there was "no right to a jury trial in a forcible entry and detainer action." *Id.* A division of our court of appeals rightly disagreed.

¶49 The division uttered a now-familiar refrain: "[T]he forcible entry and detainer statutes are the modern descendants of the common law action of ejectment." *Id.* at 1105 (first citing *Pernell*, 416 U.S. at 375; then citing *Baumgartner*, 353 P.2d at 379; and then citing *Davis*, 55 P. at 730). Talk about hitting the nail on the head: In the same way that "[e]jectment actions were actions at law and thus

triable to a jury," so too are statutory FED-possession actions. *Id.* And *Husar* distinguished *Dohner* on the same ground we do—in FED-possession actions, "there is no right to a jury trial where the only issues to be tried are equitable." *Id.*

¶50 Of particular interest here is the *Husar* division's reliance on *Pernell*, where the Supreme Court recognized that an action seeking simply "the *recovery* and *possession* of *specific*, *real*, or personal *property* . . . is one at law."[3] *Pernell*, 416 U.S. at 370 (emphases added) (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)). And *Whitehead*, the case on which *Pernell* leaned, went on to say that "[a]n action *at law, whether in the ancient form of ejectment or in the form now commonly used*, will lie only against a party in *possession*." 138 U.S. at 156 (emphases added). As with all semantic inquiries, language matters. And the language the Supreme Court used in *Pernell* and *Whitehead* is telling. It effectively blended the terms of C.R.C.P. 338(a)—"recovery of specific real . . . property"—with *possession of real property* in an eviction proceeding. Indeed, the *Pernell* Court cited C.R.C.P. 38(a)—which contains identical language to, and is the district-court analogue of, C.R.C.P. 338(a)—as authority placing Colorado among those states that "provide for trial

[3] We realize that *Pernell* was a Seventh Amendment case, which is not implicated here, but the source of the jury-trial right at issue there doesn't affect the part of the analysis on which we rely. Unsurprisingly, although the Seventh Amendment wasn't implicated in *Husar* either, the division there drew the same guidance from *Pernell* that we do.

by jury in summary eviction proceedings." 416 U.S. at 384 & n.34. This case law prompts us to reject the distinction that Mercy Housing and the county court ask us to make between the "recovery of specific real . . . property," as referenced in C.R.C.P. 338(a), and the possession of real property in a statutory FED action.

¶51 The case law also tears down one of the supporting beams of the county court's position—namely, that C.R.C.P. 338(a)'s inclusion of the word "specific" (as in the "recovery of specific real . . . property") somehow differentiates it from the FED statutory framework. Based on the Supreme Court's pronouncements, that simply isn't so. And, in lockstep with that jurisprudence, our common law has plainly held, for well over a century, that FED-possession actions *are actions to recover specific real property*. *See RTV*, 937 P.2d at 770 (noting that actions "for the recovery of specific real . . . property" is a phrase that "describes the common law action of ejectment," and that, because ejectment "has been supplanted by the modern action for forcible entry and detainer . . . the right to jury trial . . . normally exists in such an action" (first omission in original)).

¶52 In short, far from finding shelter in the case law, the contentions advanced by Mercy Housing and the county court are undermined by it. Today, we place our renewed imprimatur on the well-established lessons in the case law. In so doing, we perceive no meaningful difference between "the recovery of specific real . . . property," as that phrase is used in C.R.C.P. 338(a), and the issue of

possession in FED actions. Instead, we reaffirm what our court of appeals said more than four decades ago when it acknowledged a continuous string between the old common law action of ejectment and our modern FED statute: "The general assembly recognized that there could be jury trials in forcible entry and detainer actions by the language used in [the FED statute]." *Husar*, 629 P.2d at 1105. That statutory language is where we turn our attention next.

B. The FED Statute Provides a Right to a Jury Trial on Factual Issues in FED Cases for Possession

¶53 Mercy Housing maintains that, even if C.R.C.P. 338(a) encompasses FED-possession actions, it is incompatible with the FED statute, and the FED statute deserves preeminence. More specifically, according to Mercy Housing, the FED statute requires a summary bench process that clashes with the right to a jury trial referenced in C.R.C.P. 338(a). Au contraire. In our view, the FED statute and C.R.C.P. 338(a) are compatible.

¶54 By Mercy Housing's telling, the FED statute supplants C.R.C.P. 338(a) by route of section 13-40-119 and C.R.C.P. 381. Let's take section 13-40-119, "Rules of practice," first. It directs that, "[i]n all actions brought under any provision of this article [40] in any court, the proceedings shall be governed by the rules of practice and the provisions of law concerning civil actions in such court . . . ." Accordingly, both C.R.C.P. 338(a) and 381 apply to FED actions filed in county court. And in Mercy Housing's view, it is the language of C.R.C.P. 381 that gives the FED statute

the authority to usurp C.R.C.P. 338(a). C.R.C.P. 381 states that "[t]hese rules do not govern procedure and practice in any special statutory proceeding *insofar as they are inconsistent or in conflict with* the procedure and practice provided by *the applicable statute*." (Emphases added.) Mercy Housing perceives a conflict between C.R.C.P. 338(a)'s reference to the statutory right to a jury trial in actions to recover specific real property and the purported designation of decision-making power in the court under the FED statute. Believing that these authorities are at blows, Mercy Housing contends that C.R.C.P. 381 hands the victory to the FED statute.

¶55 Mercy Housing's interpretation misunderstands the relationship of the civil rules to the FED statute. Section 13-40-119 itself *broadly* applies the Colorado Rules of Civil Procedure (including C.R.C.P. 338(a)) to FED actions. The only exception to this broad application of the rules is if it is "otherwise provided in this article [40]." § 13-40-119. Neither Mercy Housing nor the county court points to any provision in article 40 that exempts C.R.C.P. 338(a) from applying to FED actions. And we have not identified any in the course of our own research. Thus, rather than eclipse the Colorado Rules of Civil Procedure, the FED statute takes their hand and allows them to take the lead in this procedural tango.

¶56 But doesn't C.R.C.P. 381 alter the analysis? The answer is "no." Nowhere does C.R.C.P. 381 provide a method through which the procedural hand of

C.R.C.P. 338(a) is shaken off and not allowed to guide in FED-possession actions. That's because there is no conflict between C.R.C.P. 338(a) and the FED statute. Actually, the pertinent sections of the FED statute, section 13-40-115(1)–(2) (referred to individually as "subsection (1)" and "subsection (2)" or, collectively, as "subsections (1) and (2)"), expressly contemplate jury trials for FED actions like this one.

¶57 In coming to the opposite conclusion, Mercy Housing expands the scope of subsection (1), which makes no mention of a trial by jury, while diminishing the scope of subsection (2), which does mention a trial by jury (twice). But we're required to construe these two subsections together. Appellate courts "must read a statute as a whole, aiming to give consistent, harmonious, and sensible effect to all of its parts." *Castro v. People*, 2024 CO 56, ¶ 33, 550 P.3d 1124, 1131.

¶58 When subsections (1) and (2) are read together, it becomes clear that they work in tandem. These two subsections present a binary choice. Much like a sunrise and a sunset can't both be present at the same time, subsections (1) and (2) can't both be in play at the same time. Subsection (1) applies when the defendant *could not be personally served* pursuant to section 13-40-112(1), C.R.S. (2024), and "service was had only by posting in accordance with section 13-40-112(2)."[4]

[4] Under section 13-40-112(2), if diligent efforts to personally serve the defendant fail, the plaintiff may achieve service "by posting a copy of the summons and the

§ 13-40-115(1). Subsection (2), in turn, applies when the defendant *was personally served* pursuant to section 13-40-112(1). § 13-40-115(2). Hence, when subsection (1) applies, subsection (2) doesn't, and when subsection (2) applies, subsection (1) doesn't.

¶59 Mercy Housing champions subsection (1) while ignoring subsection (2). But we see it differently. We conclude that subsection (2) controls here because Bermudez *was* personally served.

¶60 Under subsection (1), "[u]pon the trial of any action" pursuant to article 40 involving a defendant who could *not* be personally served, "if *the court* finds that the defendant has committed an unlawful detainer, *the court* shall enter judgment for the plaintiff to have restitution of the premises and shall issue a writ of restitution." § 13-40-115(1) (emphases added). By contrast, under subsection (2), "[u]pon a trial or further hearing pursuant to this article 40" involving a defendant who *was* personally served, "if the court *or jury* has not already tried the issue of unlawful detainer, it may do so." § 13-40-115(2) (emphasis added). This language contemplates that a jury (not just a court) may try "the issue of unlawful

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complaint in some conspicuous place upon the premises" and mailing a copy of the complaint and the summons (or the alias summons) "to the defendant at the premises."

detainer" when subsection (2) is triggered (i.e., when the defendant was personally served). Subsection (2) then reads as follows:

> *If the court finds that the defendant has committed an unlawful detainer*, the court shall enter judgment for the plaintiff to have restitution . . . . In addition to the judgment for restitution, *the court or jury shall further find the amount of rent, if any*, due to the plaintiff . . . [and] the amount of damages, if any, sustained by the plaintiff . . . and damages sustained by the plaintiff . . . on account of injuries to the property. The court shall enter judgment for such amounts, together with any reasonable attorney fees and costs . . . .

Id. (emphases added).[5]

¶61 With the case law as our beacon, we interpret the phrase, "the issue of unlawful detainer" in subsection (2), to refer to the *factual* issue of unlawful detainer (i.e., the factual dispute in an unlawful detainer action), as to which there is a jury-trial right, and the phrase, "whether the defendant has committed unlawful detainer" in the same subsection, to refer to the ultimate *legal* question in an unlawful detainer action, which a court must resolve. We, of course, are no strangers to the well-accepted use of case law as an interpretive aid in the construction of statutes. *See, e.g.*, § 18-1-104(3), C.R.S. (2024) (recognizing this

[5] We need not—and thus do not—decide why the legislature referenced jury trials, money damages, and reasonable attorney fees and costs only in subsection (2). But, to the extent that the omission of these terms from subsection (1) accurately telegraphs the legislative intent, it was the General Assembly's prerogative to disallow jury trials, money damages, and reasonable attorney fees and costs in cases in which the defendant could not be personally served.

principle in the context of the criminal code). Indeed, when our General Assembly legislates in a particular area, we presume it was "aware of existing case law precedent." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). And we must generally construe statutes "as consistent with the common law." *Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 13, 303 P.3d 558, 561; *see also Bradley v. People*, 9 P. 783, 786 (Colo. 1886) ("The common law is . . . to be taken into account in construing a statute.").

¶62 While the legislature is free to abrogate the common law, "[a] statute is not presumed to alter the common law except to the extent that such statute expressly provides." *Beach v. Beach*, 74 P.3d 1, 4 (Colo. 2003); *see also Robbins v. People*, 107 P.3d 384, 387 (Colo. 2005) (noting that a "statute may not be construed to abrogate the common law unless such abrogation was clearly the intent of the general assembly"). Consequently, when the legislature decides to "abrogate . . . the common law, it must manifest its intent either expressly or by clear implication." *Vigil*, 103 P.3d at 327 (quoting *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997)).

¶63 There is no clear intent, either express or implicit, in subsection (2) that the General Assembly wished to abrogate the common law and to take away the right to a jury trial on factual disputes in FED-possession cases. And we refuse to "lightly infer a legislative abrogation of the common law." *State Farm Mut. Auto.*

Ins. Co. v. Johnson, 2017 CO 68, ¶ 15, 396 P.3d 651, 655. Accordingly, our jurisprudence requires us to interpret the language of subsection (2) consistent with the common law.

¶64 Significantly, this is not the first time we have looked to the common law in interpreting the FED statute. In *Francam Building Corp. v. Fail*, 646 P.2d 345, 348 (Colo. 1982), we held that the statutory notice requirement in FED actions was waivable. One of the considerations that led us to that conclusion was that "the demand and notice requirement . . . [was] the modern, statutory counterpart of the common-law demand for rent requirement," which could be "waived by lease provisions." *Id.* Guided by the common law here, as we were forty-two years ago in *Francam Building Corp.*, we conclude that in FED-possession actions, subsection (2) assigns to the jury the role of resolving factual disputes underlying the issue of unlawful detainer, and to the court the role of resolving the ultimate legal question of whether the defendant committed unlawful detainer.

¶65 True, subsection (2) says that "the court or jury," not just the jury, may resolve the factual allegations underpinning the issue of unlawful detainer. But that's because it is not a given that there will be a jury trial. Remember that, in order to receive a jury trial, a party must timely request a jury and pay the jury fee. C.R.C.P. 338(b), (c); *see also* § 13-71-144(1)(c), C.R.S. (2024). Further, the parties may waive a trial by jury.

¶66 Even if there is a jury trial, the ultimate legal question always remains the exclusive province of the court. Thus, the court or the jury may try the factual disputes underlying the issue of unlawful detainer and may further decide how much rent (if any) the defendant owes and, if the plaintiff is seeking money damages, what money damages (if any) the defendant is liable for. However, the court (and only the court) must decide the ultimate legal question of whether "the defendant has committed an unlawful detainer." § 13-40-115(2). And if the court finds that the defendant has done so, it must enter a restitution judgment and impose reasonable attorney fees and costs.

¶67 By way of example, a jury may resolve a factual dispute related to whether a tenant engaged in conduct that constitutes a breach of the lease (e.g., having pets in the residence), but the court may still find no unlawful detainer under the law because the landlord failed to comply with the requirements under the FED statute. *See Hix v. Roy*, 340 P.2d 438, 439 (Colo. 1959) (reversing the judgment in a statutory FED suit because the landlord did not serve "a proper notice to quit"); *Arvada Vill. Gardens*, ¶ 17, 529 P.3d at 108 (dismissing a statutory FED action because the landlord failed to satisfy the statutory notice requirements). Or, alternatively, the court may find no breach of the lease by the tenant, and thus no unlawful detainer, based on its interpretation of the terms of the lease, even though a jury may have already found that the tenant engaged in the alleged

conduct.[6] After all, the interpretation of a lease agreement is a question of law for the court. *See French v. Centura Health Corp.*, 2022 CO 20, ¶ 24, 509 P.3d 443, 449; *Perry v. White*, 193 P. 543, 544 (1920) ("What the lease contained was a question for the court.").

¶68 Mercy Housing nevertheless insists that subsection (1) controls when, as here, possession is the only claim at issue. In its view, subsection (2) is relevant only when there are both possessory and money damages claims. According to Mercy Housing, the use of the word "jury" in subsection (2) means that it is for the *court* to determine possession while the "*court or jury*" may determine the amount of damages. But such an interpretation ignores some of the language in subsection (2). Specifically, it overlooks the following phrases: "[I]f the court *or jury* has not already tried *the issue of unlawful detainer*, it may do so," and "the court *or jury* shall *further find the amount of rent*, *if any*, due to the plaintiff." § 13-40-115(2) (emphases added). These phrases clearly envision that a "jury" "may" "tr[y] the issue of unlawful detainer" and may, in addition, determine "the amount of rent owed, if any."

[6] Of course, a trial court may resolve any legal questions in advance of a jury trial to foster judicial economy. If, based on its interpretation of the parties' lease, a court rules that no breach occurred even if the factual allegations are true, it doesn't make sense to proceed to a jury trial on those factual allegations first.

¶69 Importantly, interpreting subsection (2) as we do is *the only way* to avoid deleting words or rendering them meaningless. Of course, "[w]e do not . . . subtract words from a statute." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12, 488 P.3d 1140, 1143 (quoting *People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560). Nor may we construe a statute in a way that renders any terms meaningless. *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 420 (Colo. 2009). Instead, "we must respect the [legislature's] choice of language." *Pellegrin v. People*, 2023 CO 37, ¶ 22, 532 P.3d 1224, 1228–29. Subsection (2) says what it says. It mentions "jury" twice, and nowhere does it restrict the role of the jury to determining money damages. We cannot pretend otherwise.

¶70 Notably, since 2019, the General Assembly has amended provisions in the FED statutory framework a dozen times without making any relevant changes. Mercy Housing sees this as an affirmation of its interpretation of subsections (1) and (2). But we consider Bermudez's analysis of the amendments more persuasive. When the General Assembly "chooses to legislate in a particular area," we presume that it is "aware of existing case law precedent." *Vigil*, 103 P.3d at 327. Consequently, we presume the General Assembly was aware of *Baumgartner*, *Husar*, *RTV*, and other cases holding that tenants are entitled to a jury trial on factual issues in FED-possession cases. Yet, when it has amended provisions in

the FED statutory framework, the General Assembly has made no attempt to overrule that authority.

¶71 Having now (1) reaffirmed that, as recognized in C.R.C.P. 338(a), there is a statutory right to a jury trial on factual issues in FED-possession actions, and (2) clarified that the rule is consistent with the FED statute, we turn to the concerns expressed by Mercy Housing and the county court that, with this holding, we take a battering ram to the floodgates, which will cause our justice system to break down.

C. Policy Arguments Against Recognizing a Jury-Trial Right in FED-Possession Actions

¶72 Mercy Housing and the county court argue that the summary nature of FED actions paired with the large volume of these cases would make jury trials functionally impractical, if not impossible. They assert that, of the approximately 27,000 cases on the Denver County Court's civil docket each year, the vast majority (an estimated 90% or more) are FED cases, and that the county court sets thirty to forty-five of these cases for trial every week. Should these cases begin to go to jury trial, Mercy Housing and the county court argue that the expanded demand would overwhelm the jury pool, making it unrealistic that judges will be able to impanel the requisite number of jurors in any case. That the issues of possession and money damages in FED trials are often bifurcated will arguably further exacerbate the demand on the courts and jurors.

¶73 Adding to the consternation, Mercy Housing worries that this volume of jury trials would make compliance with the timelines in the FED statutory framework an insurmountable challenge, defeating the purpose of a summary process. As Mercy Housing correctly notes, in FED actions, once the defendant's answer is filed, the court is required to "set a date for trial no sooner than seven, but not more than ten days after" that filing, absent the court's finding of good cause or the defendant's request for a waiver. § 13-40-113(4)(a), C.R.S. (2024). Mercy Housing also fears that jury demands could become ripe for abuse as a means for obtaining an automatic delay.

¶74 We hear these concerns; we do. But in the end, we are bound by subsection (2). "The fact that the [law] is difficult to administer does not justify a ruling of invalidity . . . ." *Flank Oil Co. v. Tenn. Gas Transmission Co.*, 349 P.2d 1005, 1014 (Colo. 1960). So, to the extent change is needed, Mercy Housing is knocking on the wrong door; the legislature's residence is across the street from ours. In any event, as we discuss next, there are compelling reasons to believe that the parade of horribles Mercy Housing and the county court are anticipating won't come to pass.

¶75 We are not the first court to acknowledge that the right to a jury trial on an issue of possession is relatively circumscribed and thus of limited burden. While

recognizing a jury-trial right in an action brought by a landlord for possession of real property, the Supreme Court reasoned that:

> In the average landlord-tenant dispute, where the failure to pay rent is established and no substantial defenses exist, it is unlikely that a defendant would request a jury trial. And, of course, the trial court's power to grant summary judgment where no genuine issues of material fact are in dispute provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction.

Pernell, 416 U.S. at 384. Mercy Housing protests, however, that much has changed since *Pernell* was issued in 1974, pointing to the half-dozen tenant advocacy groups now available to assist tenants in eviction cases. While things no doubt have changed since 1974, we perceive the state of affairs with regard to the finite need for jury trials as relatively unaltered.

¶76 Although tens of thousands of FED-possession cases are *filed* each year, the number of those actually *eligible* for a jury trial is much smaller. For example, the majority of FED-possession cases filed in Colorado result in a default judgment because the tenant fails to file an answer.[7] Others end in dismissal, judgment on

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[7] Enterprise Cmty. Partners, *A New Normal: How Eviction Court Filing Data Can Advance a More Stable Housing Ecosystem for All Coloradans* 1, 6 (Oct. 2022), https://www.enterprisecommunity.org/sites/default/files/2022-10/2022-006%20Denver%20White%20Paper%20%28A%20New%20Normal%29%20R7.pdf [https://perma.cc/7SJN-7YN9]; *see also* Colo. Futures Ctr., *Eviction Cases in Colorado County Courts: A summary and limitations of data available from July 2017–July 2021* 1, 23 (Oct. 2022), https://coloradofuturescsu.org/wp-content/uploads/2022/10/CFC_Enterprise_Eviction_Cases_Summary_final.pdf

the pleadings, or settlement because the risk of trial is often too great for tenants.[8] Mercy Housing itself acknowledges that of the 36,656 FED-possession actions filed by its law firm in Colorado in 2023, only 4,683 cases (roughly 13%) were set for trial after defendants filed answers.

¶77 And of those cases that do proceed to trial, many are ineligible for a *jury* trial. A lot of tenants have leases that contain jury-trial waivers. *See* § 38-12-801(3)(a)(III)(A), C.R.S. (2024) (permitting waiver of a jury trial "in a hearing to determine possession of a dwelling unit"). Furthermore, the jury-trial right referenced in C.R.C.P. 338(a) is available only for factual disputes. Additionally, the vast majority of FED actions are filed for nonpayment of rent,[9] and as Bermudez points out, it is rare for tenants to assert they *did* pay rent. Rather, most tenants admit to not having paid rent and raise defenses (such as those

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[https://perma.cc/74LL-Y254] (showing that between 2017 and 2021, the percentage of county court eviction cases where a tenant filed an answer ranged from 5.7% to 15.5%, respectively).

[8] *See* Colo. Futures Ctr., *supra* note 5; Aubrey Hasvold & Jack Regenbogen, *Facing Eviction Alone: A Study of Evictions: Denver, Colorado 2014–2016* 1, 7–8 (2016), https://www.coloradocoalition.org/sites/default/files/2017-09/Facing%20Eviction%20Alone%209-11-17.pdf [https://perma.cc/89AS-5PC4] (reviewing eviction cases and finding that many tenants lost possession of their home due to "stipulated" agreements).

[9] Hasvold & Regenbogen, *supra* note 6, at 11 (reviewing eviction cases and noting in "the majority of cases" surveyed "the landlord alleged an amount of overdue rent owed by the tenant").

grounded in equity) that must be addressed by the court. Still other cases are stymied by the non-refundable $98 fee required for a jury demand. § 13-71-144(1)(b). Left with the few cases that can pass through this exacting strainer, any concerns about overburdening the courts are greatly reduced.

¶78 The county court pushes back, however, arguing that even just a few cases proceeding to jury trial would be infeasible. Yet, the fact that dozens of states recognize a right to a jury trial in FED actions for possession suggests the contrary. The amici point us to over twenty-five such states.[10] Several of those states have rates of eviction filings that surpass those of Colorado.[11]

¶79 Nor have other states balked at recognizing the right to a jury trial in the context of an expedited timeline for FED-possession actions. The demanding timeline to which Mercy Housing and the county court anchor some of their policy

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[10] Amici are the Colorado Poverty Law Project and Colorado Legal Services. *See* Ryan P. Sullivan, *Survey of State Laws Governing the Right to Trial by Jury in Eviction Proceedings* 1–3 (Oct., 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4252792 [https://perma.cc/BU88-76ND] (listing thirty states that "provide for access to a jury in eviction proceedings with minimal restrictions or conditions").

[11] Eviction Lab, https://evictionlab.org/map/?m=modeled&c=p&b=efr&s=all&r=states&y=2018&z=3.65&lat=38.42&lon=-93.23&lang=en (last visited Oct. 1, 2024) (providing an interactive map of the United States showing eviction data per state from 2000–2018).

arguments is not unique to Colorado. Other states' FED-possession actions are subject to similar short-fuse deadlines.[12]

¶80 West Virginia's highest state court acknowledged that if all tenants asserted their jury-trial right under the state's FED statute, that might thwart the statute's purpose of providing "a quick procedure to remove a hold-over tenant." *Criss v. Salvation Army Residences*, 319 S.E.2d 403, 407 (W. Va. 1984). However, the court "d[id] not think this [was] likely," explaining that the right to a jury trial under that state's FED statute was "not unlimited," was "fruitless" in certain cases, and was subject to all of the rules that apply to summary judgments. *Id.* And just as in Colorado, the majority of removal proceedings in West Viriginia are based on the failure to pay rent. *Id.* Once the failure to pay rent is established in those cases, noted the court, there is no genuine issue of material fact and thus no right to a jury trial. *Id.*

¶81 Very recently, the Idaho Supreme Court acknowledged that the twelve-day statutory deadline for bringing FED-possession cases to trial would "pose significant hurdles" to permitting jury trials, and yet that court found tenants were

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[12] Some states that provide a jury-trial right in FED-possession actions have an even shorter timeline than Colorado's deadline of ten days after the answer is filed. For example, in Arizona, the trial must be set no more than five days after the plaintiff files *the complaint*. Ariz. Rev. Stat. Ann. § 12-1176(A) (2024). And in Idaho, the court must schedule a trial within twelve days from the filing of *the complaint*. Idaho Code Ann. § 6-310(2) (2024).

still entitled to a jury trial on disputed facts. *Worthington v. Crazy Thunder*, 541 P.3d 694, 702–03 (Idaho 2024).[13] Likewise, the Alabama Supreme Court, despite conceding that the state eviction statute was specifically designed to provide a "speedy remedy," nonetheless held that tenants had a jury-trial right. *Ex parte Moore*, 880 So. 2d 1131, 1132, 1140 (Ala. 2003). Thus, in the enduring words of the *Pernell* Court, "we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial." 416 U.S. at 384.

¶82 At any rate, in Colorado, the court may find good cause to extend the ten-day deadline. § 13-40-113(4)(a). And a defendant may request a waiver of the deadline. *Id.* Thus, the deadline is not as rigid as Mercy Housing and the county court make it out to be.

¶83 As for the concerns that a jury-trial right is "ripe for abuse" as a delay tactic, Mercy Housing fails to explain why our county courts are ill-equipped to handle the few cases that may arise in bad faith. Indeed, county courts may reach for any number of tools in their procedural toolbox. Following a pretrial conference, the court may enter judgment or issue a dismissal order. C.R.C.P. 316.5(b) (suggesting a summary judgment-like power if there is no genuine dispute of material fact).

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[13] We acknowledge that in *Worthington*, the court found an action for unlawful detainer to be an *equitable* claim. 541 P.3d at 700. Regardless of this break from our own holding, the key point here is the recognition of a jury-trial right on disputed facts in a 2024 case, even in the context of expedited proceedings.

County courts may also grant default judgments and judgments on the pleadings, C.R.C.P. 312.5(d), 355(b); issue sanctions, C.R.C.P. 311(b); and order parties to "give bond or other security" if they request a trial delay longer than five days, § 13-40-114, C.R.S. (2024).

¶84 In sum, we fully recognize that our ruling today may make things more challenging for our county courts. But we cannot disregard the law. Instead, we must faithfully apply the law. Heeding this admonition, we turn now to do just that.

D. Application

¶85 As a reminder, Mercy Housing alleged the following violations of the Lease: (1) an unauthorized guest had resided with Bermudez at Clare Gardens for longer than ninety days; (2) Bermudez's unauthorized guest had violated the prohibition against maintaining or repairing vehicles on the property; and (3) the unauthorized guest had verbally threatened and harassed another resident on the property. In response, Bermudez asserted that the "*facts or events* alleged as a lease violation either *did not occur*, do not violate the lease, or do not provide adequate grounds for termination under federal regulations or state law." (Emphases added.) She timely demanded a jury trial and paid the jury fee. And the Lease does not contain a jury waiver.

¶86 Whether the alleged conduct violated the Lease or provided adequate grounds for termination is a legal question properly determined by the court because it requires interpreting the Lease and the law. *See* § 13-40-115(1)–(2); *French*, ¶ 24, 509 P.3d at 449; *Perry*, 193 P. at 544. But whether the alleged conduct did in fact occur is a factual question that must be decided by a jury. *See Baumgartner*, 353 P.2d at 379 (concluding that the defendants were entitled to a jury trial on questions of fact). For example, Bermudez claims there was no unauthorized guest residing in her residence. Further, asserts Bermudez, "the only time" that the person identified in the complaint as an unauthorized guest "was on the premises and doing anything related to a vehicle" was when he jump-started her car, which is apparently not prohibited by the Lease. These are factual issues a jury must resolve.

¶87 Accordingly, the county court erred by denying Bermudez a jury trial on the disputed facts.

V. Conclusion

¶88 For these foregoing reasons, we reverse the Denver County Court's denial of Bermudez's jury demand, make absolute the order to show cause, and remand with instructions for the county court to hold a jury trial on the limited factual issues underpinning this FED-possession action.

JUSTICE HOOD, joined by **JUSTICE BERKENKOTTER**, dissented.
JUSTICE BOATRIGHT did not participate.

JUSTICE HOOD, joined by JUSTICE BERKENKOTTER, dissenting.

¶89 Because I don't believe the General Assembly intended to establish a right to a jury trial in forcible-entry-and-detainer ("FED") actions for possession, I respectfully dissent.

¶90 I reach this conclusion for three reasons. *First*, irrespective of the many pages the majority devotes to whether the issue here is legal or equitable and what we might glean from the reference in our rule to "specific real . . . property," Maj. op. ¶¶ 34–52, the controlling question remains whether a statute provides the right to a jury trial, C.R.C.P. 338(a) ("[I]n *actions wherein a trial by jury is provided by . . . statute*, including actions for the recovery of specific real . . . property, . . . all issues of fact shall be tried by a jury." (emphasis added)). Stated differently, even if a claim seeking repossession should be categorized as legal (and thus provides a right to a jury trial at common law), the rule requires that a *statute* provide the right to a jury trial. So, the much more straightforward question before us is: Does section 13-40-115, C.R.S. (2024) ("the FED statute"), provide the right to a jury trial?

¶91 Unlike the majority, I find the FED statute to be ambiguous in this regard. *See* Maj. op. ¶¶ 31, 53–69; *see also Elder v. Williams*, 2020 CO 88, ¶ 18, 477 P.3d 694, 698 ("A statute is ambiguous when it is reasonably susceptible of multiple interpretations."). Viewed in isolation, subsection (2) of the FED statute can

reasonably be construed as providing a litigant such as Naomi Bermudez the right to request that a jury decide the factual issue of whether she violated her lease.

> [I]f the *court or jury* has not already tried the issue of unlawful detainer, it may do so. If the court finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution . . . . In addition to the judgment for restitution, *the court or jury shall further find the amount of rent, if any*, due to the plaintiff . . . .

§ 13-40-115(2) (emphases added). The phrase "if *the court or jury* has not already tried the issue of unlawful detainer, it may do so," could contemplate, as the majority contends, "that a jury (not just a court) may try 'the issue of unlawful detainer' when subsection (2) is triggered (i.e., when the defendant was personally served)." Maj. op. ¶ 60 (quoting § 13-40-115(2)). Moreover, the word "further" after the second reference to "court or jury" could be read to imply that the court or jury may determine money damages after the court has addressed the existence of an unlawful detainer in the first instance, as the majority also seems to suggest. *Id.* at ¶ 68.

¶92 But other language in the FED statute also strongly supports the longtime practice in Colorado of judicial officers adjudicating a claim that seeks only the remedy of repossession.

> *If the court finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution* . . . . In addition to the judgment for restitution, the court or jury shall further find the amount of rent, if any, due to the plaintiff . . . [and] the amount of damages, if any, sustained by the plaintiff . . . .

§ 13-40-115(2) (emphases added).

¶93 Because both interpretations are reasonable, the statute is ambiguous.

¶94 *Second*, in resolving this statutory ambiguity, I would look to the structure of Colorado's FED scheme, which requires the court to set a trial not more than ten days after an answer is filed, absent waiver or good cause. § 13-40-113(4)(a), C.R.S. (2024); *see also Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 13, 488 P.3d 1140, 1143 (concluding that when a statute is ambiguous, we examine, among other things, "the language and structure of the statute"). It seems implausible that the General Assembly would have expected a jury trial to occur within ten days. The everyday logistics of summoning jurors and finding space on the docket suggest as much. We can safely assume the legislature is aware of these logistical challenges. And yet we have repeatedly observed that the legislature intended that FED actions should move fast. *E.g.*, *Butler v. Farner*, 704 P.2d 853, 856 (Colo. 1985) ("The structure of the F.E.D. statute evinces a legislative intent to accelerate trial settings in order to provide an expeditious remedy."); *Francam Bldg. Corp. v. Fail*, 646 P.2d 345, 350 (Colo. 1982) (Lohr, J., dissenting) ("The apparent purpose of our [FED] Statute . . . is to provide the landlord with a summary procedure for recovering possession of his property."). Jury trials don't move fast. Not only do they take time to set (and reset with continuances and occasional mistrials), but they often spawn pretrial battles over a wide range of evidentiary and other legal issues that

don't crop up as frequently in bench trials. Therefore, it makes no sense that the legislature, aware of the burdens and delays associated with scheduling jury trials, would authorize a potential avalanche of them to occur in a matter of days.

¶95 *Third*, because the statute is ambiguous, we may also consider the consequences of a particular construction. § 2-4-203(1)(e), C.R.S. (2024). While the majority sees nothing more than the potential for a manageable increase in the number of jury trials on issues now routinely handled by judges, Maj. op. ¶¶ 72–78, I join Mercy Housing in seeing a high risk for trial settings and delays that could overwhelm county court dockets even if only a small percentage of cases set for trial actually go to trial.[1] After all, as the majority recognizes, the

[1] The majority says that even Mercy Housing's own statistics support the notion that requiring jury trials in FED-possession actions wouldn't unduly burden the court system: "[O]f the 36,656 FED-possession actions filed by its law firm in Colorado in 2023, only 4,683 cases (roughly 13%) were set for trial after defendants filed answers." Maj. op. ¶ 76. But even those numbers would result in roughly ninety trials per week from a single organization. Mercy Housing conservatively estimates that perhaps one in five of those would require a jury trial, based on state and federal laws permitting lease agreements to contain jury-trial waivers for most tenants. *See* § 38-12-801(3)(a)(III)(A), C.R.S. (2024) (providing that although residential leases can't contain a general jury-trial waiver, "the parties may agree to a waiver of a jury trial in a hearing to determine possession of a dwelling unit"); *but see* 24 C.F.R. § 966.6(f) (2024) (prohibiting jury-trial-waiver provisions in federally subsidized housing lease agreements). Mercy Housing's one-in-five estimate would result in roughly eighteen FED jury trials per week from its management company alone. *See also* PropertyManagement.com, *The Best Property Management Companies in Denver, Colorado of 2024*, https://www.propertymanagement.com/companies-in-denver-co/ [https://perma.cc/

volume of cases we're talking about, even in Denver alone, is staggering. *Id.* at ¶ 72 ("[O]f the approximately 27,000 cases on the Denver County Court's civil docket each year, the vast majority (an estimated 90% or more) are FED cases, and . . . the county court sets thirty to forty-five of these cases for trial every week."). Unlike the majority, I worry that today's ruling will force courts to find "good cause" to set these trials outside the ten-day requirement based on docket congestion resulting from the increase in jury-trial settings. *See* § 13-40-113(4)(a) ("[A] court may extend beyond ten days if either party demonstrates good cause for an extension, if the court otherwise finds justification for the extension, or if a party participating remotely pursuant to section 13-40-113.5[, C.R.S. (2024),] was disconnected and unable to reestablish connection."). As Mercy Housing argues, if courts start extending the trial timeframes, "jury demands could become ripe for abuse as a means for obtaining an automatic delay." Maj. op. ¶ 73. Again, such a delay is flatly antithetical to a statutory scheme designed for speedy resolution of routine factual issues surrounding alleged violations of residential leases.

¶96 I also feel compelled to address what is not at issue. The majority repeatedly points to *Pernell v. Southall Realty*, 416 U.S. 363 (1974), which addresses the right to a jury trial in unlawful detainer cases seeking possession in Washington, D.C.

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under the Seventh Amendment to the United States Constitution, to support its interpretation of the FED statute as requiring jury trials. Maj. op. ¶¶ 1–2, 50, 75, 81. But the Seventh Amendment doesn't apply here. *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (noting that the Seventh Amendment is one of several amendments contained in the Bill of Rights that have not been fully incorporated by the Fourteenth Amendment's Due Process Clause as applicable to the states). Instead, as the majority acknowledges, Maj. op. ¶ 4, in Colorado there is no constitutional right to a jury trial in civil cases, s*ee, e.g.*, *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 580 n.9 (Colo. 2004) (listing many cases to this effect). Indeed, Colorado is one of three states in the nation that provide no state constitutional analogue to the Seventh Amendment. Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 Stan. L. Rev. 851, 858 (2013). In short, *Pernell* is plainly distinguishable.

¶97 Moreover, the question presented is not whether modern FED proceedings find their roots in common-law ejectment actions. *See* Maj. op. ¶ 7 ("[C]ontrary to the assertions by Mercy Housing and the county court, [C.R.C.P. 338(a)] encompasses FED-possession actions, and the statutory right to a jury trial applies as much in a modern FED-possession action as it did in an old ejectment action."). Simply put, this is not a matter governed by the common law. And so, extrapolating from old precedent about ejectment seems misguided. Particularly

misplaced is the majority's repeated reliance on conclusory dicta in a sixty-four-year-old declaratory judgment action. *Id.* at ¶¶ 27, 39–42, 86 (citing *Baumgartner v. Schey*, 353 P.2d 375 (Colo. 1960)). (*Husar v. Larimer County Court*, 629 P.2d 1104, 1105 (Colo. App. 1981), another old case the majority leans on, relies on the same dicta in *Baumgartner*. Therefore, I would overrule it.) More instructive is the following twenty-first-century quote (from an FED action, no less): "By creating a special [FED] action with accelerated trial procedures, the statutory scheme was intended to avoid much of the expense and delay incident to the more cumbersome action of ejectment formerly employed at common law." *Miles v. Fleming*, 214 P.3d 1054, 1056 (Colo. 2009).

¶98 Mindful that the major policy choice at the heart of this case is for the legislature to make, I believe we would do better to act with restraint and ask the General Assembly to pass legislation that makes its choice plain (and, if it were to permit jury trials in these cases, also perhaps to allocate more resources to the courts that must implement that policy choice).

¶99 For all these reasons, I respectfully dissent.