Colorado fence law

Colorado, like many other western states, is a "fence out" state. Our fence law consists of a series of statutes that were passed since the late nineteenth century. Colorado's fence law has served our state in a reasonable manner for more than 100 years. The following discussion is an overview of how this law came to pass, some of its most important aspects, and examples of how Colorado courts have interpreted it.

How Colorado's current fence laws came to be

Colorado's common law in regard to fence provides that the owner of trespassing livestock is strictly liable for damages caused by his or her livestock (*SaBell's, Inc. v. Felens*, 627 p. 2d 750 (Colo. 1981)). Therefore, it was in the best interest of early Colorado livestock owners to fence in, or enclose all animals so as not to be liable for any damages they caused.

However, in the 1880's the Colorado Legislature passed a fencing statute (C.R.S. § 35-46 et seq.) that superseded the duty of landowners under Colorado common law. Instead of having to fence livestock *in*, landowners became responsible for fencing livestock *out* if they desired to preserve their land. Thus, in order to collect damages caused by trespassing livestock, the owners of the land trespassed upon must have in place a lawful fence.

Colorado's Statute on Fence Law

Lawful Fence

C.R.S. § 35-46-101(1) defines a "lawful fence" as a "well-constructed three barbed wired fence with a substantial post set at a distance of approximately twenty feet apart, and sufficient to turn ordinary horses and cattle, with all gates equally as good as the fence..."

Fence Out Provision

(C.R.S § 35-46-102)

This is the central component of Colorado's fence law. It contains three sections which state the duties of landowners and the liabilities of livestock owners. The fence out provision is sensitive to the needs of Colorado ranchers. In *Schaefer et al v. Mills* case, the Colorado Supreme Court stated that: the policy of the law is to favor stock owners, and permit them to range their stock at large. The duty of protecting crops is placed upon the farmer. The evident purpose of the act is to require crops to be protected by a fence, which will ordinarily turn stock, so as to prevent stock owners form being harried by suits because of the trespass of their stock in cases where the crops are insufficiently protected (*Schaefer et al, v. Mills*, 209 p. 644 (Colo. 1922)).

Section 1

Part one of the fence out statute states that: any person maintaining in good repair a lawful fence, as described in C.R.S.§ 35-46-101, may recover damages for trespass and injury to grass, garden or vegetable products, or other crops of such person from the owner of any livestock which breaks through such fence.

Even though such land, grass, garden or vegetable products or other crops which were not at such time protected *on all sides* by a lawful fence, if it is proved by clear and convincing evidence that livestock have broken through a lawful fence on one side of such land to reach such land, grass, products or crops, recovery and the remedies under this section may be had the same as if such land, grass, products, or crops had been at such time protected on *all* sides by a lawful fence (C.R.S.§ 35-46-102 (1)).

Therefore, the owner of land cannot collect damages caused to his property by trespassing livestock unless: 1) he or she maintains a "lawful fences," and 2) he or she can prove that the trespassing livestock in some way compromised the integrity of such fences. C.R.S. § 35-46-102(1) also allows full damages to be awarded to the landowner whose land is not entirely enclosed by a lawful fence, so long as it can be proved that the trespassing livestock did pass through a lawful fence to get onto the property.

Section 2

C.R.S. § 35-46-102 (2) states that a livestock owner is not always protected from liability when his stock enters

another's land. Firstly, a stock owner who grazes his animals on unfenced land must not place more animals on the land than it can support, with regard to both forage and water. If a landowner's livestock trespass upon neighboring lands, fenced or unfenced, in search of forage or water, the owner will be liable for the trespass of his or her animals. Secondly, a livestock owner is prohibited from placing his or her livestock upon land which he or she has no right to use. Any stock owner who unlawfully uses unfenced land will be deemed a trespasser and be liable for any damages caused by his or her livestock.

Section 3
C.R.S. § 35-46-102(3) grants that any damages caused by trespassing livestock may be recovered along with the costs of arbitration. The trespassing livestock may also be taken up and held as security for the payment of damages. Finally, in cases where the "...injury complained of has been aggravated and attended by a willful or reckless disregard of the injured person's rights, the board of arbitration, court, or jury may include reasonable exemplary damages."

Areas of Liability
C.R.S. § 35-46-102(1) only protects ranchers from the non-willful trespass of stock. Therefore, a livestock owner is liable for damages if he or she willfully drives his or her stock onto the unfenced land of another. If this occurs, the owner of the stock will be held liable for actual and exemplary damages.

Many ranchers may be under the impression that Colorado's fence law statute shields them from personal injury caused by their livestock. This is not true! Although there are twelve states that do consider fences to be personal liability shields, Colorado is not one of them. A livestock owner is not liable for property damages caused by his stock to unfenced land; however, he or she is certainly liable for any personal injury that is a result of his trespassing stock.

One example of this might be if a rancher's bull enters an unenclosed area and begins to eat and/or trample a garden. The owner of the garden tries to drive the bull away and is kicked. The kick from the bull breaks the owner's leg. In this case, the owner of the bull would be liable for the personal damages caused to the other party; however, he would not be liable for the damages caused to the garden itself.

Lastly, the fence out statute does NOT protect stock owners from personal liability or property damages when their stock causes injury on a highway. However, the plaintiff must demonstrate that the stock owner was negligent in allowing his or her stock to be present on a highway.

In 1993, a Douglas County jury awarded the victim of an accident involving cattle on a state highway $2.35 million (*Egan v. Douglas Park, et al.*, 93-CV-258 (Douglas County District Court, Colo.)). Thus, it is good practice to ensure that fences along highways are properly maintained.

Partition Fences
C.R.S. § 35-46-112-114 explains the duties of landowners to build and maintain partition fences. The term "partition fence," as it is used here, indicates a fence separating the adjoining agricultural or grazing land of two or more parties. Under C.R.S. § 35-46-112, when "grazing or agricultural land of two or more persons adjoin, whether or not such lands are farmed or grazed, it is the duty of the owner of each tract to build one half of the line fence."

Thus, each landowner is responsible for constructing one-half of his or her respective partition fence. However, Colorado does not recognize the "left-hand practice," as some states do. This practice states that when two land owners built a partition fence, each is responsible to construct the half of the fence to their left when standing on their respective sides of the boundary line, facing each other.

When disputes arise between adjoining landowners over which half of the fence they are responsible to build, Colorado courts apportion such responsibility in a manner it deems most equitable to all parties involved. A landowner in Colorado owns a half interest in 100 percent of the partition fence, rather than a full interest in 50 percent of the fence. Therefore, a court settlement may direct the disputing parties to equally share the cost of

building the entire fence, build disproportionate amounts of the fence, or take part in virtually any other agreement the court determines to be an equitable remedy.

Furthermore, the statute holds that when an "owner or tenant of any agricultural or grazing land owns a previously erected lawful fence upon any line between such land and the agricultural grazing land of any other person... it is the duty of such owner to pay the person owning such fence one-half of its cash value" (C.R.S. § 35-46-112).

More than 100 years ago a very important case, *Maudlin v. Hanscomb*, 20 p. 619 (Colo. 1888), challenged this statute. The case was based upon a dispute over a partition fence. The plaintiff intentionally built a partition fence ten feet inside the correct boundary line. However, when he asked the neighboring landowner (the defendant) for one-half of the cost of constructing the fence he refused on the grounds that the fence was not on the boundary line.

The case made it all the way to the Colorado Supreme Court, where the plaintiff's claim was rejected. The court held that "the statute provides for line fences, and, in the absence of an agreement that it should be so treated, the fence...cannot be regarded as built in compliance within the provisions thereof" (*Maudlin v. Hanscomb*, 20 p. 620 (Colo. 1888). Thus, a fence cannot be regarded as lawful, nor is a party required to pay for one-half of the construction if it is not on the proper survey line.

Where C.R.S. § 35-46-112 places a duty on landowners to construct and share the cost of partition fences, C.R.S. § 35-46-113 states that it is also their duty to maintain and share the cost of maintaining partition fences. Therefore, unless otherwise agreed, each landowner is responsible for one-half of the cost of repairing any partition fence.

A landowner may give his or her neighbor a written notice that their partition fence is in need of repairs. If the neighboring party does not make repairs to one-half of the partition fence within thirty days, the server of the notice may proceed to repair the entire fence and collect compensation for one-half of the cost of the repairs.

If the neighboring landowner refuses to pay compensation, a judgment or lien may be placed on the land for the value of one-half of the cost of repairs to the partition fence. The same process may be carried out if an adjoining landowner should refuse to pay for half of the cost of constructing a partition fence.

Government Right-of-Way Fences
(C.R.S. § 35-46-105,111)
Livestock on Public Roads
Section 1 of C.R.S. § 35-46-105 deems it unlawful:...for the owner or any person in charge of any livestock knowingly to cause or permit such livestock to graze or run at large in any incorporated or unincorporated municipality, lane, road or public highway if the same is separated from the land or range of such owner or person in charge by a fence or other barrier..."

Therefore, if the driver of a vehicle kills or injures any livestock permitted to run on a public road, etc., that is enclosed by a fence designed to keep livestock out, the driver of the vehicle will not be held liable for damages. However, this statute does not apply to cases in which livestock are being driven across or on such public municipalities, granted there is a person in charge of the livestock at the time. Nor does it apply to situations in which livestock are, unknowing to the owner, present on a public municipality because they have broken through a fence or cattle guard.

C.R.S. § 35-46-105, makes it illegal for cattle to run at large on lanes, roads, highways, etc. This may cause one to think that it is a contradiction with Colorado's fence out doctrine. However, there is no contradiction. The statute states that there must be a fence in place before the presence of livestock on a public municipality becomes illegal.

Colorado Division of Highways
According to Statute C.R.S. § 35-46-111, "it is the duty of the division of highways to maintain right-of-way

fences along and adjacent to all federal aid highways constructed by the division, where such highways are maintained by the division."

It is also the duty of the division of highways to maintain all fences, state or federal, which are erected by the division of highways along rights-of-ways or construction projects. After a highway construction project is completed, the division of highways is under obligation to replace any right-of-way fence that it removed during the project. Finally, a landowner in an agriculturally zoned area may petition the division of highways to remove a fence along a right-of-way. If such a request is granted, the removal of the fence will be at the cost of the division of highways.

The division of highways has the lawful duty to construct and maintain fences along rights-of-ways that are adjacent to agriculturally-zoned areas. However, they only have the duty to repair such fences upon actual notice that the fence is in need of repair. It is the duty of both motorists and landowners to give that notice. Neither the landowner nor the division of highways will be liable for damages caused by failure to repair right-of-way fences unless notice is given.

Railroads

Railroad companies have essentially the same duty as the division of highways in regard to right-of-way fences. Railroad companies are charged with the duty of constructing and maintaining lawful right-of-way fences along their tracks (C.R.S. § 40-27-102(1)). Furthermore, C.R.S. § 40-27-102(1) states that railroads must provide gates and cattle guards at all public road crossings. Such gates are to "...be hung and have latches and hinges, so that they may be opened and shut at all necessary farm crossings...for the use of the proprietors or owners of the land adjoining such railroad..."

Colorado law gives strong incentive for railroad companies to maintain the fences along their tracks. C.R.S. § 40-27-103 explains the liability of railroad companies: Any railroad company running or operating its roads in this state and failing to fence on both sides thereof against livestock running at large at all points shall be absolutely liable to the owners of any such livestock killed, injured or damaged by their agents, employees, engines or cars or by the agents, employees, engines, or cars belonging to any other railroad company or corporation running over and upon such road.

However, once a railroad company constructs and maintains gates at public crossings, it is the responsibility of the landowner adjacent to the right-of-way to ensure that they are kept closed at all times when they are in actual use. When gates are found to be open, the landowner will be liable for any livestock that are killed or injured as a result (C.R.S. § 40-27-102(3)).

Assignment of liability in right-of-way fence cases

When dealing with Colorado's fence law concerning rights-of-way, the question of who is liable for actual damages and personal liability often arises. For example, who is liable when livestock have broken through a right-of-way fence and caused a motor vehicle accident? For these and many similar questions, there actually is no definitive answer. The assignment of liability comes not from statutes or case law, but from the juries that decide such cases.

In cases of this nature, the jury is charged with the duty of determining which parties or party is liable and to what degree. They do this by comparing the actions of the parties involved to the actions that a reasonably prudent person would take in a similar situation. A single person may or may not have 100 percent liability.

In regard to the above example, the driver might have 50 percent liability, the government 25 percent, and the stock owner may bear the remaining liability; or any one of these parties may be found fully responsible. The most important thing to remember about liability in right-of way cases is that the law does not place liability on any one party. Rather the jury of the case decides to what degree the involved parties are liable.

This article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only and you are urged to consult with your own attorney concerning your own situation and any specific legal questions you have.