

This month's article was written by Diane Vaksdal Smith,

A judgment may or may not affect pending litigation. In order to understand whether there is an impact and what that impact might be, it is necessary to fully understand the concept of finality of judgment.

Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case

by Diane Vaksdal Smith

Colorado law establishes three interrelated doctrines regarding the finality of judgment: issue preclusion, claim preclusion, and law of the case.¹ Issue preclusion, formerly referred to as collateral estoppel, is a derivative of the doctrine of claim preclusion, formerly referred to as *res judicata*.² Claim preclusion and law of the case belong to the same family of principles contemplating the termination of an issue when it arises again in the same case (for law of the case) or in subsequent, related litigation (for claim preclusion).³

Though frequently confused, each of these doctrines applies in different circumstances and requires proof of different elements. This article examines the purposes and elements of each of these doctrines. Additionally, it examines selected cases where the doctrines have been applied or rejected, as well as the reasoning of the decisions.

Issue Preclusion

The doctrine of issue preclusion or collateral estoppel provides that a court's final decision on an issue actually litigated and necessarily decided

in a previous suit is conclusive of that issue in a subsequent suit.⁴ This doctrine is “intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.”⁵

Issue preclusion is both broader and narrower than claim preclusion—broader in that it applies to claims for relief different from those litigated in the first action and narrower in that it applies only to issues actually litigated.⁶ Issue preclusion is treated as an affirmative defense that ordinarily must be pleaded in the answer, as provided in C.R.C.P. 8(c).⁷ However, in some instances, an affirmative defense asserted for the first time in a motion for summary judgment will be deemed incorporated into the answer.⁸ The burden of establishing the elements of issue preclusion rests with the party asserting preclusion.⁹

Although issue preclusion typically is explained in the context of “adjudication,” an issue decided on a motion for summary judgment can preclude re-litigation of that issue in a subsequent proceeding.¹⁰ Further, although originally developed in the context of judicial proceedings, issue preclusion also can apply to preclude re-litigation of issues decided in arbitration.¹¹ Moreover, issue preclusion is just as viable in administrative proceedings and can bind parties to an administrative agency’s findings of fact and conclusions of law if the agency, while acting in a judicial capacity, resolved disputed issues of fact and the parties had an adequate opportunity to litigate those issues.¹² However, the application of claim preclusion can be tempered by the courts’ recognition that “compelling reasons may exist not to apply collateral estoppel where proceedings are tailored to promote prompt, inexpensive adjudication of smaller claims.”¹³

Elements of Issue Preclusion

In Colorado, issue preclusion bars re-litigation of an issue if:

- 1) the issue precluded is identical to an issue actually determined in the prior proceeding;

- 2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding;
- 3) there was a final judgment on the merits in the prior proceeding; and
- 4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.¹⁴

Actually Determined: With respect to the first element, the issue to be precluded must be identical to the issue that was actually determined in the prior action.¹⁵ The Colorado Supreme Court has defined the scope of the “actually determined” element by looking to whether the issue was “actually raised and necessarily adjudicated.”¹⁶ For an issue to be actually raised, a party by appropriate pleading must have asserted the issue through a claim or cause of action against the other party.¹⁷ If an issue could have been raised but was not, issue preclusion is inapplicable.¹⁸ Also, the issue actually raised must have been submitted for determination and then actually determined by the adjudicatory body.¹⁹ An issue is necessarily adjudicated when a determination on the issue is necessary to a judgment.²⁰

Party or Non-Party in Privity: Issue preclusion can be asserted against a party or a non-party in privity; issue preclusion cannot be asserted if the defendant was neither a party nor in privity with a party.²¹ Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is virtually represented in litigation.²² At a minimum, a party seeking to show privity must show that the parties in the two actions are really and substantially the same in interest.²³

In *Bennett College*, the Colorado Supreme Court had to determine whether the parties (a trust and a trustee in bankruptcy) were in privity for purposes of the application of issue preclusion. As explained there, “a privy is one who, after rendition of judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by successor, inheritance, or purchase.”²⁴ There, the bankruptcy trustee was deemed to be the privy of the debtor, and issue preclusion applied.

Finality: For the purposes of issue preclusion, the concepts of final judgment and finality of judgment must be distinguished. A final judgment

ends the proceeding in which it is entered and leaves nothing further to be done regarding the rights of the parties.²⁵ This is the predicate for an appellate court to have jurisdiction in most appeals.²⁶ In contrast, finality of judgment, for purposes of issue preclusion, means that the judgment resolving the issue must be “‘sufficiently firm’ in the sense that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review.”²⁷ Thus, a judgment could be final for purposes of appeal, but finality of judgment could be lacking if the appeal is not decided.²⁸ Pronouncing a judgment final while it is still pending on appeal would negate the requirement of finality of judgment.²⁹

Full and Fair Opportunity to Litigate:

The requirement of a “full and fair opportunity to litigate” protects a party’s due process right to be heard before preclusion will apply.

An inquiry into whether a party received a full and fair opportunity to litigate an issue must look to whether the initial proceeding was so inadequate or so narrow in focus as to deprive an individual of his or her due process rights should application of the doctrine of collateral estoppel be used to bar relitigation of that issue.³⁰

Factors determinative of this element include: whether the remedies and procedures in the earlier proceeding are commensurate with those in the subsequent proceeding,³¹ and whether the party against whom issue preclusion is asserted had the same incentive to vigorously defend itself in the previous action.³² “Incentive to vigorously defend” or the lack thereof can be shown where a party’s exposure to liability is substantially less at the earlier proceeding.³³ In addition to the amount of potential money awards, significant variations in exposure can arise from differences in the finality or permanence of judgments,³⁴ as well as from differences in the potential duration of orders.³⁵

For example, issue preclusion does not bar litigation of permanent, total-disability claims for purposes of a Workers’ Compensation Act claim, even after resolution of the issue of temporary total disability benefits. These two issues are different and the adjudication of temporary disability

does not bar the adjudication of permanent disability, because the parties do not have the same motivation in adjudicating these separate, though related, issues.³⁶

No Review of Underlying Judgment

The doctrine of collateral estoppel is designed to save judicial time and resources and relieve the burden on litigants of having to litigate claims more than once. Thus, courts generally do not examine the reasoning of the court that decided the issue initially.³⁷ To do so would defeat the purpose of the doctrine.³⁸

Offensive and Defensive Nonmutual Collateral Estoppel

Although previously an element, mutuality no longer is required for the application of issue preclusion.³⁹ Thus, litigants not originally parties to litigation can seek to use issue preclusion or collateral estoppel both offensively (in the case of a plaintiff) or defensively (in the case of a defendant).

Offensive Nonmutual Collateral Estoppel: Offensive nonmutual collateral estoppel applies when a plaintiff seeks to preclude a defendant from relitigating an issue that the defendant previously litigated unsuccessfully in another action against another party.⁴⁰ Nonmutual collateral estoppel, in which issue preclusion is asserted by a party not governed by the initial factual determination, was first applied by the U.S. Supreme Court in a civil context in *Blonder-Tongue v. University Foundation*.⁴¹

In *Central Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson*, the Colorado Court of Appeals recognized that the determination of the applicable statute of limitations as against one party precluded relitigation of that issue as to another party involved in the same transaction. As the court explained:

Mutuality is no longer required for collateral estoppel to apply, and a non-party to a judgment may invoke collateral estoppel to bar

relitigation of an issue. . . . Collateral estoppel requires only that the party against whom collateral estoppel is asserted—here, the Bank—was a party in the initial proceedings.⁴²

Also, when the doctrine of collateral estoppel was:

expanded to include offensive collateral estoppel, its application was made discretionary with the trial court because it does not promote judicial economy in the same way as defensive nonmutual collateral estoppel and because it often will be unfair to defendants.⁴³

Thus, the court asked to apply the principles of offensive collateral estoppel must exercise its informed discretion and make a fairness determination based on the facts of the particular case.⁴⁴

Defensive Nonmutual Collateral Estoppel: Defensive nonmutual collateral estoppel occurs “when a defendant seeks to bind a plaintiff to a prior judgment, where the defendant was not a party to the prior proceedings.”⁴⁵ A court’s discretion to refuse to apply defensive nonmutual collateral estoppel is highly circumscribed.⁴⁶ As explained by the Colorado Court of Appeals, “except in its offensive nonmutual incarnation, collateral estoppel is not a discretionary doctrine ‘in the sense that the tribunal asked to apply it has a free-swinging, uncanalized discretion to apply it or not[.]’”⁴⁷ If the elements of collateral estoppel are shown, the application of defensive nonmutual collateral estoppel is mandatory.⁴⁸

Claim Preclusion

Claim preclusion, formerly referred to as *res judicata*, is an absolute bar to “relitigation of claims or issues which were or could have been raised in a prior suit between the same parties.”⁴⁹ Claim preclusion serves the “vital interest” of preserving the integrity of the judicial system. “[I]f one matter could be easily relitigated with inconsistent results, judicial integrity would be compromised and the value of and respect for court rulings would seriously be devalued.”⁵⁰

The doctrine holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. It bars re-litigation

not only of all issues actually decided, but also of all issues that might have been decided, “if the claims are tied by the same injury.”⁵¹

Claim preclusion is an affirmative defense that must be pled or raised at the trial-court level in an appropriate motion.⁵² The burden of establishing the elements of issue preclusion rests with the party asserting preclusion.⁵³

Elements of Claim Preclusion

The elements of claim preclusion are:

- 1) finality of the first judgment;
- 2) identity of subject matter;
- 3) identity of the claims for relief; and
- 4) identity or privity between the parties to the action.⁵⁴

Finality of Judgment: Finality of judgment is an essential prerequisite for the applicability of claim preclusion.⁵⁵ For example, in *S.O.V. v. People ex rel. M.C.*, the Colorado Supreme Court rejected S.O.V.’s efforts to apply claim preclusion to a determination of paternity, because the judgment for which preclusive effect was sought was not final. In the underlying proceeding, the state brought an action against S.O.V., which resulted in a jury verdict of non-paternity, “notwithstanding evidence of blood test results indicating a 99.9 percent probability that S.O.V. is M.C.’s father.”⁵⁶ M.C. was not a party to the litigation and the court hearing the paternity action did not appoint a guardian.

After a variety of post-appeal proceedings, an attorney for the child filed a petition seeking to establish paternity. Father moved to preclude re-litigation of the issue, based on both issue and claim preclusion. The trial court found that the petition was barred, but the court of appeals reversed. The Court of Appeals found that, *inter alia*, at the time the petition was filed, the trial court had not concluded the underlying action brought by the state, because the state had challenged the underlying judgment on the basis of a jurisdictional defect—that is, the child had not been a party to the original proceeding. Thus, because the trial court had not entered a final judgment, neither issue nor claim preclusion applied.⁵⁷

Identity of Subject Matter: Although numerous cases list the elements of claim preclusion, few cases discuss the second element, “identity of subject matter.” Identity of subject matter can be evaluated by determining whether the same evidence would be used to prove the claims, even if the actions are different.⁵⁸ In *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, the Colorado Supreme Court considered this element, and concluded that where the litigation involved the same parcel of real property and the same agreements concerning the property, identity of subject matter was established.⁵⁹

Identity of the Claims for Relief: In analyzing whether there is an identity of claims, courts do not focus on the specific claim asserted or the name given to the claim; rather, courts examine the injury for which relief is requested.⁶⁰ In practice, claim preclusion:

bars a litigant from splitting claims into separate actions because once judgment is entered in an action it “extinguishes the plaintiff’s claim . . . including all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”⁶¹

Thus, claim preclusion bars litigation “not only of all claims actually decided, but of all claims that might have been decided if the claims are tied by the same injury.”⁶²

Identity or Privity of Persons to the Action: Claim preclusion bars subsequent claims by identical parties based on the same claim for relief after there has been a final judgment on the merits.⁶³ Identity of parties is essential to the application of *res judicata*.⁶⁴ It requires an identity of parties or their privies, because it would be “unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party.”⁶⁵

Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is virtually represented in litigation.⁶⁶ At a minimum, privity requires a substantial identity between the issues in controversy and a showing that the parties in the two actions

are really and substantially the same in interest.⁶⁷ Thus, privity exists when there is both a “substantial identity of interests” and a “working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.”⁶⁸ For example, where the subject matter is property, successors in interest to that property are in privity of estate with the parties to the litigation, and ordinarily are bound by the judgment.⁶⁹

No Review of Underlying Judgment

Claim preclusion almost certainly will apply, even if the underlying judgment was wrongly decided.⁷⁰ Additionally, claim preclusion cannot be avoided simply because a higher court may have clarified an evidentiary threshold in a legal decision to which the plaintiff was not a party.⁷¹ However, if a correction to a prior legal ruling is based on significant changes in fundamental constitutional rights, the application of claim preclusion might be waived.⁷² Short of an error of constitutional magnitude, claim preclusion will likely apply.⁷³

Law of the Case

The principles of claim preclusion and issue preclusion have no applicability to prior rulings in the same pending case.⁷⁴ Instead, the doctrine of law of the case applies to analyze the finality of issues within the same proceeding. When a court issues final rulings in a case, the “law of the case” doctrine generally requires the court to follow its prior relevant rulings.⁷⁵

The purpose of the doctrine of law of the case is to end litigation “somewhere” and to facilitate the supervisory powers of appellate courts over trial courts.⁷⁶ Depending on the facts and proceedings of the case, the application of law of the case can be discretionary or mandatory.

The law of the case doctrine is discretionary when a court is asked to reconsider its own prior rulings.⁷⁷ Thus, when a party challenges the correctness of a prior decision, the court is not bound to follow its prior

ruling. As long as the matter is still within the court's jurisdiction, the court can decline to follow a previous decision that is no longer sound because of changed conditions of law such that the decision should be reconsidered.⁷⁸ When a judgment is appealed and remanded, the issues actually presented to the appellate court, as well as the rulings logically necessary to sustain those conclusions, constitute the law of the case and its application under these circumstances is mandatory.⁷⁹ However, *dictum* is not the law of the case and is not controlling precedent.⁸⁰

The law of the case doctrine does not bind the Supreme Court:

A decision of an intermediate appellate court in a prior appeal remains subject to review by a higher court even after retrial and a second round of proceedings in the same case.⁸¹

Although the Colorado Supreme Court has not expressly ruled on the issue, the federal courts, including the U.S. Supreme Court, appear to have construed Fed.R.Civ.P. 60(b) as an exception to the doctrine of law of the case and do not require leave of the higher court before vacating a final judgment in a decided case.⁸²

Conclusion

To determine which doctrine of finality applies to a particular judgment, it is necessary to accurately determine the facts and stage of proceedings of the case, and to identify the parties who might or might not be bound by the decision. When one party seeks to bar another from re-litigating an issue resolved in prior litigation, the doctrines of issue preclusion and claim preclusion must be considered. When one party seeks to bind another from re-litigating the issue in the same proceeding, law of the case must be considered.

NOTES

1. *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 196 n.11 (Colo. 1999) (Colorado Supreme Court notes that the use of the

terms “issue preclusion” and “claim preclusion” are preferred, to avoid confusion from use of the term “*res judicata*”).

2. *El Paso County Dep’t of Social Servs. v. Donn*, 865 P.2d 877, 880 (Colo.App. 1993), citing *Pomeroy v. Waitkus*, 517 P.2d 396 (Colo. 1974).
3. *Id.*, citing *Verzuh v. Rouse*, 660 P.2d 1301 (Colo.App. 1982).
4. *Rantz v. Kaufman*, 109 P.3d 132, 138 (Colo. 2005).
5. *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999) (internal citations omitted).
6. *Rantz*, *supra* note 4 at 138-39; *City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824, 831 (Colo. 1991).
7. *Bebo Constr.*, *supra* note 5 at 84, citing C.R.C.P. 8(c).
8. *Id.*
9. *Id.*, citing *People v. Conley*, 804 P.2d 240, 244 (Colo.App. 1990).
10. *Id.* at 85, citing *Carpenter v. Young*, 773 P.2d 561, 564-68 (Colo. 1989).
11. *Dale v. Guaranty Nat’l Ins. Co.*, 948 P.2d 545 (Colo. 1997).
12. *Guaranty Nat’l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo. 1999).
13. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 48 (Colo. 2001), citing *Williamsen v. People*, 735 P.2d 176, 182 (Colo. 1987).
14. *Bebo Constr.*, *supra* note 5 at 84-85.
15. *Michaelson v. Michaelson*, 884 P.2d 695, 702 (Colo. 1994).
16. *Bennett College v. United Bank of Denver*, 799 P.2d 364, 366 (Colo. 1990).
17. *Michaelson*, *supra* note 15 at 701.
18. *Indus. Comm’n v. Moffat County Sch. Dist. Re No. 1*, 732 P.2d 616, 620 (Colo. 1987).
19. *Restatement (Second) of Judgments*, § 27, cmt. d.
20. *Bebo Constr.*, *supra* note 5 at 86.
21. *Quist v. Specialities Supply Co.*, 12 P.3d 863, 867 (Colo.App. 2000).
22. *Public Serv. Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 787 (Colo.App. 1991).

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23. *Bennett College*, *supra* note 16 at 367.
24. *Id.*
25. *In re Marriage of Salby*, 2005 Colo. App. LEXIS 1616 (Colo.App. 2005).
26. C.A.R. 1(a)(1).
27. *Rantz*, *supra* note 4 at 141.
28. *Id.*
29. *Id.*, citing *Carpenter v. Young*, 773 P.2d 561, 565 (Colo. 1989).
30. *Bebo Constr.*, *supra* note 5 at 87.
31. *Maryland Cas. Ins. Co. v. Messina*, 874 P.2d 1058, 1062 (Colo. 1994).
32. *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1166-67 (Colo. 1987).
33. *Id.*
34. *Sunny Acres Villa*, *supra* note 13 at 47-48, citing *In re C.M.*, 675 N.E.2d 1134, 1137-38 (Ind.App. 1997) and *In re Frederick*, 537 N.E.2d 1208, 1211-1212 (Mass. 1989).
35. *Ferris v. Hawkins*, 660 P.2d 1256, 1259 (Ariz.App. 1983) (noting marked difference in available remedies where one was limited in compensation and duration and the other posed much greater degree of liability with long-term consequences).
36. *Sunny Acres Villa*, *supra* note 13 at 48.
37. *Univ. of Illinois Found. v. Blonder-Tongue Labs. Inc.*, 465 F.2d 380 (7th Cir. 1972), *cert. denied*, 409 U.S. 1061 (1972); *see also* 1B *Moore's Federal Practice* P 0.441[2] (2d ed. 1996) (“the fact that the prior judgment was simply incorrect does not affect its conclusiveness”); 18 C. Wright & A. Miller, *Federal Practice & Procedure*, § 4465 (1981) (“preclusion cannot be defeated simply by arguing that the prior judgment was wrong”).
38. *Blonder-Tongue Labs.*, *supra* note 37 at 380.
39. *Central Bank Denver, N.A. v. Mehafty, Rider, Windholz & Wilson*, 940 P.2d 1097, 1101 (Colo.App. 1997).
40. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

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41. *Blonder-Tongue v. Univ. Found.*, 402 U.S. 313, 330 (1971).
42. *Central Bank Denver*, *supra* note 39 at 1101.
43. *Id.* at 1103, *citing Parklane Hosiery*, *supra* note 40 at 330.
44. *Id.*
45. *M&M Mgmt. Co. v. Indus. Claim Appeals Office*, 979 P.2d 574, 576 (Colo.App. 1998).
46. *Central Bank Denver*, *supra* note 39 at 1102-03.
47. *Id.*, *citing Montana v. United States*, 440 U.S. 147 (1979); *Kairys v. Immigration & Naturalization Service*, 981 F.2d 937, 940 (7th Cir. 1992), *cert. denied*, 507 U.S. 1024 (1993) and *Ackerman v. Am. Airlines, Inc.*, 924 F.Supp. 749, 753 (N.D.Tex. 1995).
48. *Id.*
49. *Rantz*, *supra* note 4 at 138.
50. *Lobato v. Taylor*, 70 P.3d 1152, 1166 (Colo. 2003).
51. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 609 (Colo. 2005); *see also Michaelson*, *supra* note 15 at 699.
52. *Super Valu Stores, Inc. v. District Court*, 906 P.2d 72, 78 (Colo. 1995).
53. *Id.*, *citing People v. Conley*, 804 P.2d 240, 244 (Colo.App. 1990).
54. *Argus Real Estate*, *supra* note 51 at 608, *citing Farmers High Line Canal & Reservoir Co.*, *supra* note 1 at 199.
55. *S.O.V. v. People ex rel. M.C.*, 914 P.2d 355, 358 (Colo. 1996).
56. *Id.* at 357.
57. *Id.* at 358-59.
58. *Farmers High Line Canal & Reservoir Co.*, *supra* note 1 at 203.
59. *Argus Real Estate*, *supra* note 51 at 608.
60. *Gavrilis v. Gavrilis*, 116 P.3d 1272, 1273-74 (Colo.App. 2005).
61. *Argus Real Estate*, *supra* note 51 at 609, *quoting Restatement(Second) of Judgments* §24 (1982).
62. *Argus Real Estate*, *supra* note 51 at 609 n.4 (“Given the ability of parties to plead alternative relief and liberally amend pleadings, Argus’ statutory reform claim could have been raised.”); *see also Michaelson*, *supra* note 15 at 699

(whether a claim was or could have been litigated in a prior proceeding is determined by examining the party's injury, not the legal theory on which the party relies).

63. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237-38 (10th Cir. 1992).

64. *Turk. Creek v. Anglo Am. Consol. Corp.*, 43 P.3d 701, 703 (Colo.App. 2002).

65. *Pomeroy*, *supra* note 2 at 399.

66. *Public Serv. Co.*, *supra* note 22 at 787.

67. *People ex rel. M.C.*, 895 P.2d 1098, 1100 (Colo.App. 1994).

68. *Cruz v. Benine*, 984 P.2d 1173, 1176-77 (Colo. 1999).

69. *Argus Real Estate*, *supra* note 51 at 608.

70. *Lobato*, *supra* note 50, *citing Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499 (11th Cir. 1984).

71. *Id.*, *citing Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981).

72. *Id.*, *citing Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir. 1962) (claim preclusion not applied after Supreme Court overruled separate but equal doctrine in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

73. *Id.*; *see also Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633, 638 (Colo.App. 2004).

74. *Kuhn v. State Dept. of Revenue*, 897 P.2d 792, 795 (Colo. 1995); *S.O.V.*, *supra* note 55 at 359.

75. *Giampapa v. Am. Family Mutual Ins. Co.*, 64 P.3d 230, 243 (Colo. 2003), *citing People ex rel. Gallagher v. Dist. Court*, 666 P.2d 550, 553 (Colo. 1983).

76. *People v. Roybal*, 672 P.2d 1003, 1005 n.6 (Colo. 1983).

77. *People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999); *Roybal*, *supra* note 76 at 1005 n.5:

The doctrine of the law of the case is more flexible in its application to reconsideration by the court making the decision, because there the only purpose of the doctrine is efficiency of disposition.

78. *City of Aurora v. Allen*, 885 P.2d 207, 212 (Colo. 1994); *Giampapa*, *supra* note 75 at 243.

79. *Civil Service Comm'n v. Carney*, 97 P.3d 961, 966 (Colo. 2004); *Roybal*, *supra* note 76 at 1005.

80. *Gallagher*, *supra* note 75 at 553, cited in *Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522, 526 (Colo. 1999).

81. *Giampapa*, *supra* note 75 at 243, citing *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) and *City of Pueblo v. Shutt Inv. Co.*, 67 P. 162, 164 (Colo. 1901).

82. *Davidson v. McClellan*, 16 P.3d 233, 239 n.9 (Colo. 2001).