COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED March 7, 2024 4:45 PM
District Court, El Paso County, Colorado The Honorable Eric Bentley Case No. 2023CV31616	
Plaintiff/Appellee: Jaimi J. Mostellar vs. **Defendant/Appellant:** The City of Colorado Springs	
Attorneys for The City of Colorado Springs OFFICE OF THE CITY ATTORNEY Wynetta P. Massey, City Attorney W. Erik Lamphere, Division Chief P.O. Box 1575, Mail Code 510 30 South Nevada Avenue, Suite 501 Colorado Springs, CO 80901 Telephone: (719) 385-5909 Fax number: (719) 385-5535 erik.lamphere@coloradosprings.gov Atty. Reg. #18912, #37887	**□ COURT USE ONLY □** Case No.: 2023CA1908
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 3,955 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

The brief contains, under a separate heading, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ W. Erik Lamphere

W. Erik Lamphere, Colo. Reg. # 37887
Office of the City Attorney
30 S. Nevada Avenue
Colorado Springs, CO 80903
tel: 719-385-5909 / fax: 719-385-5535
e-mail: erik.lamphere@coloradosprings.gov
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES AND RULES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Whether the district court erred when it found that a notice of claim on May 30, 2023 was timely under C.R.S. § 24-10-109(1) for injuries sustained on August 26, 2021.

Whether the district court erred in finding that the City had a burden, as part of a motion raising a lack of timely notice under C.R.S. § 24-10-109(1), to show that a plaintiff "with reasonable diligence, could or should have discovered" an intergovernmental agreement.

STATEMENT OF THE CASE

On August 24, 2023, Plaintiff, Jaimi J. Mostellar, filed the instant action against the City of Manitou Springs ("Manitou Springs"), the City of Colorado Springs ("City" or "Colorado Springs"), Wildcat Construction Co., Inc., John Doe and XYZ Corporation alleging claims for premise liability and negligence. CF 000001-000007.

On September 19, 2023, the City moved to dismiss the complaint pursuant to the CGIA. CF 000010-000013. In the motion, the City asserted one argument, that Mostellar's notice to the City on May 30, 2023 for her injuries sustained on August 26, 2021 was untimely under C.R.S. § 24-10-109(1). CF 000011-000012.

On October 10, 2023, Mostellar responded to the motion. CF 000036. In her response, Mostellar argued that the period to provide notice under C.R.S. § 24-10-

109(1) did not begin to run until she learned of an intergovernmental agreement between the Cities of Manitou Springs and Colorado Springs. CF 000040-000041.

On October 17, 2023, the City filed its reply. CF 000043. In it, the City argued, *inter alia*, that the 182-day clock for notice started on the date Mostellar fell and injured herself, not as she learns of potentially responsible parties. CF 000043-000045.

On October 25, 2023, after briefing, the district court found that Mostellar provided timely notice. CF 000047-000053. The court held that the period to provide CGIA notice did not begin to run until Manitou Springs advised her of an intergovernmental agreement between Manitou Springs and the City. The district court reasoned that Mostellar was "reasonably diligent in investigating the claim . . . [and] [the City] has not demonstrated (or even suggested) that its intergovernmental agreement . . . with Manitou Springs was widely known or that Mostellar, with reasonable diligence, could or should have discovered it . . . ." CF 000052. The City filed its notice of appeal on November 7, 2023. CF 000062-67.

STATEMENT OF THE FACTS

The complaint alleges the following. Mostellar was walking westbound on the south side of Manitou Avenue near the intersection of Beckers Lane in Manitou Springs, Colorado on August 26, 2021. CF 000003, ¶ 15. As she was walking, she

fell and injured her mouth after her foot caught the remnant of an old sign for a nearby bus stop. CF 000002-000003 ¶¶ 7, 15.

After she fell, Mostellar retained counsel and provided a notice of claim under the CGIA to Manitou Springs on January 4, 2022.[1] CF 000037. Manitou Springs informed Mostellar's counsel on April 20, 2023 that Colorado Springs was responsible for the sign pursuant to an intergovernmental agreement between the cities for bus service. CF 000002, ¶ 9. On May 30, 2023, Plaintiff's counsel provided notice of claim to Colorado Springs. *Id.* at ¶ 10. On June 8, 2023, Colorado Springs informed Plaintiff's counsel that Wildcat Construction Co., Inc. performed work at the location of Manitou Avenue and Becker Lane at or near the time of Mostellar's fall. *Id.* at ¶ 11. On August 4, 2023, Wildcat Construction Co., Inc. denied responsibility for removal of the sign. *Id.* at ¶ 12.

SUMMARY OF THE ARGUMENT

I. THE NOTICE WAS UNTIMELY

The district court erred when it found that a notice of claim sent to the City was timely under C.R.S. § 24-10-109(1). Mostellar's trip, fall and injury occurred

[1] In the October 25, 2023 order, the district court found that Mostellar provided notice to the City of Manitou Springs on January 4, 2022. CF 000047. According to the complaint, Mostellar provided notice to Manitou Springs on December 16, 2021. CF 000002. In Mostellar's response to the motion to dismiss, she argued she provided notice on January 4, 2022. CF 000037. For purposes of this appeal, it makes no difference which date controls.

on August 26, 2021. She waited until May 30, 2023 to provide the City with her notice of claim. Plaintiff explains the delay by claiming she did not learn of an intergovernmental agreement between Colorado Springs and Manitou Springs until April 20, 2023. Mostellar claims the agreement made the City responsible for the area where she fell.

A claimant has an obligation under the CGIA to determine if a governmental party was responsible for her injuries and to provide notice within 182 days of her injury. Because the notice requirement of C.R.S. § 24-10-109(1) is a nonclaim provision, a claimant must strictly comply with the notice requirement or risk dismissal of her claims for lack of subject matter jurisdiction. Equitable doctrines do not apply to the notice provision.

The notice provision and the strict compliance standard are supported by strong policy considerations. Timely notice allows governments to investigate, correct dangerous conditions, adjust budgets to satisfy potential liabilities, settle meritorious claims and prepare defenses for unmeritorious claims.

The district court relied on an outdated notice standard. The district court found that *State v. Young*, 665 P.2d 108 (Colo. 1983) was "on point." In relying on *Young*, the district court disregarded the legislative response to *Young* in 1986 when the General Assembly amended § 24-10-109(1). The amendment, as described in *Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187 (Colo. 1996), clarified that the notice

provision is triggered on the date of the claimant's discovery of the injury, not when she discovers the legal theory for her claim. The legislation has effectively overruled *Young* and its "reasonable opportunity to discover" standard.

Under § 24-10-109(1), "knowledge of the identity of the tortfeasor [is] not required for [the] running of [the] notice period." *E. Lakewood Sanitation District v. District Court*, 842 P.2d 233, 235-36 (Colo. 1992). Because a claimant must only know that she has been injured and not the identity of potentially responsible parties, Mostellar's notice, here, was untimely.

The district court's order was out of step with legislative changes and decisional law. It also creates incentives for inaction, ignorance, and delay, and defeats the strong policy considerations of early notice. It invites, if not expressly authorizes, reliance on equitable defenses when notice deficiencies are identified. It improperly shifts a plaintiff's burden to prove subject matter jurisdiction to a governmental defendant to disprove what a claimant "could or should have known."

In sum, the district court misapplied the law. The notice, roughly 602 days after her injury, was well out-of-time. The district court's missteps require reversal.

II. REQUEST FOR ATTORNEY'S FEES

Because the motion to dismiss tort claims should have been granted, the City should be awarded its fees in defending the suit, including its fees incurred on appeal.

ARGUMENT

I. THE NOTICE WAS UNTIMELY

A. Standard of review

Immunity under the CGIA is a matter of subject matter jurisdiction. *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). The plaintiff has the burden of demonstrating jurisdiction. *Id.* "The trial court is the pre-trial fact-finder to determine whether notice was timely filed." *City & Cnty. of Denver v. Crandall*, 161 P.3d 627, 632 (Colo. 2007). "Whether a claimant has satisfied the CGIA timely notice requirement is a mixed question of law and fact." *Id.* at 633. Factual determinations are reviewed under a clearly erroneous standard, while a court's legal conclusions are reviewed *de novo*. *Id.*

B. The CGIA applies to bar the premise liability and negligence claims

The district court relied on outdated law to find the notice of claim was timely. Mostellar's period to notify the City of her claim began to run the day she fell. The district court cast aside controlling precedent when it found that her notice, some 602 days after her trip-and-fall, was timely. It also erred in finding that the City was required to show that the intergovernmental agreement "could or should have been discovered." The errors warrant reversal.

i. The notice provision of C.R.S. § 24-10-109(1).

"The CGIA aims to protect governmental entities and, by extension, taxpayers

from the 'consequences of unlimited liability.' To achieve this goal, the Act generally immunizes public entities from claims for injury that lie or could lie in tort." *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 578 (Colo. 2016) (quoting in part C.R.S. § 24-10-102). "Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment . . . shall file a written notice [of claim] within one hundred eighty-two days after the date of the discovery of the injury . . . ." C.R.S. § 24-10-109(1); *see also Crandall*, 161 P.3d at 632 (The jurisdictional prerequisite of C.R.S. 24-10-109(1) requires a claimant to "give notice of claim to the governmental entity no more than 180[2] days after he or she discovers or should have discovered an injury."). A party claiming injury must strictly comply with the notice provision of section 24-10-109(1). *See Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 298 (Colo. App. 2009); *see also Griswold v. Ferrigno Warren*, 462 P.3d 1081, 1085 n. 2 (Colo. 2020). Failure to provide notice is a jurisdictional bar to suit. C.R.S. § 24-10-109(1); *see also Trinity*, 848 P.2d at 923 ("The [CGIA] is not a tort accrual statute. It is a nonclaim statute, raising a jurisdictional bar if notice is not given within the applicable time period.").

[2] The provision was amended from 180 to 182 days in 2012. 2012 Colo. Legis. Serv. Ch. 208 (S.B. 12-175).

The CGIA "notice period is triggered when a claimant has *only discovered* that he or she has been wrongfully injured." *Gallagher v. Bd. of Trustees for Univ. of N. Colorado*, 54 P.3d 386, 391 (Colo. 2002) *abrogated on other grounds by Martinez v. Estate of Bleck*, 379 P.3d 315 (Colo. 2016) (emphasis in original); *see also* C.R.S. § 24-10-109(1) ("the date of the discovery of the injury [is unaffected by] whether the person knew all the elements of a claim or of a case of action for such injury."). Consequently, the CGIA's "notice period places a burden on the injured party to determine the cause of the injury, to ascertain whether a governmental entity or public employee is the cause, and to notify the governmental entity within 180 days from the time when the injury is discovered." *Trinity*, 848 P.2d at 927. "[E]quitable defenses such as waiver, tolling, or estoppel [do not] overcome the CGIA 180–day notice of claim provision." *Crandall*, 161 P.3d at 633 (internal citation omitted); *see also Mesa Cnty. Valley Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200, 1206 (Colo. 2000) ("subject-matter jurisdiction cannot be waived or conferred by consent, estoppel, or laches.").

"The General Assembly designed the CGIA notice requirements with important policies in mind. Timely notice permits the public entity to conduct an investigation of the claim and abate a dangerous condition, to make fiscal arrangements for satisfaction of potential liability and settle meritorious cases, and

to prepare defenses if it views the claim to be unmeritorious." *Crandall*, 161 P.3d at at 632.

ii. *Young*, the 1986 Amendment, *Trinity* and *Lopez*

Section 24-10-109(1) was amended in 1986. As the Colorado Supreme Court in *Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187 (Colo. 1996) explained:

> Prior to the 1986 amendments to the CGIA, subsection (1) provided that:
>
> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury. Substantial compliance with the notice provisions of this section shall be a condition precedent to any action brought under the provisions of this article, and failure of substantial compliance shall be a complete defense to any such action.

Id. at 1192. After the amendment, subsection (1) read:

> Any person claiming to have suffered an injury by a public entity or by an employe thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, REGARDLESS OF WHETHER THE PERSON THEN KNEW ALL OF THE ELEMENTS OF A CLAIM OR OF A CAUSE OF ACTION FOR SUCH INJURY. ~~Substantial~~ Compliance with the ~~notice~~ provisions of this section shall be a ~~condition precedent~~ JURISDICTIONAL PREREQUISITE to any action brought under the provisions of this article, and failure to ~~substantial~~ compliance shall ~~be a complete defense to~~ forever bar any such action.

Id. at 1192-93 (all editing in original) (footnote omitted).[3] Describing the rationale behind the amendment, The *Lopez* Court continued,

> the legislature intended to clarify that the 180–day notice period is triggered on **the date of the claimant's discovery of the injury and not when the claimant discovers the basis in legal theory for his or her claim**. The legislature was **responding to this court's holding in *State v. Young,* 665 P.2d 108 (Colo. 1983)**, which, the amendments' proponents contended, undermined the intent of the legislature.

Id. at 1193 (emphasis added). In a footnote, the *Lopez* Court expanded,

> In *Young,* we interpreted the 'discovery of the injury' language of subsection (1), as it was then codified, to mean when the claimant discovered the basis for the claim. In order to clarify its intent, the legislature added the following language: 'after the date of the discovery of the injury, *regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury.*'

Id. (emphasis in original). The Supreme Court's explanation in *Lopez* in 1996, after *Young* in 1983, the 1986 amendment and *Trinity* in 1993, makes clear that the district court, here, incorrectly relied on *Young*'s interpretation of an outdated version and interpretation of C.R.S. § 24-10-109(1).

The Supreme Court in *Trinity*, *supra*, rejected the district court's interpretation of the notice provision. The *Trinity* Court found "[w]hile, under tort law, the concept of accrual encompasses both the discovery of the injury *and* the discovery of the cause of that injury, the Governmental Immunity Act notice period

[3] The Court noted "capital letters indicate[d] new material added to [the] existing statute; dashes through words indicate[d] deletions from existing statutes and such material not part of the Act." *Id.* at 1193 (all highlighting in *Lopez*).

is triggered when a claimant has only discovered that he or she has been wrongfully injured." 848 P.2d at 923 (internal citation omitted) (emphasis in original). The Court squarely addressed *Young*. It stated, "[w]e implied [in *Young*], as we now hold, that a plaintiff has a duty of reasonable diligence to determine the basic and material facts underlying a potential claim against a government entity." *Trinity*, 848 P.2d at 928.

While the *Trinity* Court did not see it as necessary to address the contention that *Young* was legislatively overruled, *see id.* at 928 n. 13, one commentator has found just that. *See* § 28:18. Notice—Time—Discovery of injury, 7A Colo. Prac., Personal Injury Torts And Insurance § 28:18 (3d ed.) ("[t]he language of [C.R.S. § 24-10-109(1)] has tightened the notice requirement, effectively overruling a Colorado Supreme Court case[, *State v. Young*, *supra*,] that held that there must be a reasonable opportunity for a claimant to discover the basic and material facts underlying a claim before she is duty-bound to give the statutory notice."). *Young* has been overruled by the 1986 legislation.

The *Trinity* Court also cited with approval *E. Lakewood*, *supra*, for the proposition that "knowledge of the identity of the tortfeasor [is] not required for [the] running of [the] notice period."[4] 842 P.2d at 235-36. In *East Lakewood*, a motorcyclist hit an uncovered manhole and sustained injuries on August 14, 1989.

[4] The district court, too, cited *East Lakewood* for this proposition. *See* CF 000049. The district court's analysis did not address *East Lakewood*. CF 000049-000052.

Id. at 233. On January 22, 1990, notices of injury were served on the City of Lakewood and the State of Colorado. *Id.* A little over a month later, and after the expiration of the 180-day notice period on February 27, 1990, a notice was provided to East Lakewood Sanitorial District. *Id.* The sanitation district was not originally named in the lawsuit. *Id.* When Plaintiff sought to amend the complaint, he explained, "Although [Dalinas] was able to contact the City of Lakewood and the State of Colorado within the statutorily designated period, *he was unable to determine that the [Sanitation District] was a potential third party until shortly after the expiration of the notification period.* Upon learning of the [Sanitation District], [Dalinas] immediately notified this entity." *Id.* at 234 (alternations and emphasis in original). The district court in *East Lakewood*, similar to the district court below, held "that 'strictly enforcing the 180–day time limit in this case would be hypertechnical.'" *Id.* (quoting in part the district court's opinion). The Supreme Court rejected the interpretation. It held "under the plain language of the section, when a party fails to strictly comply with the 180-day notice requirement, the party's action must be dismissed." *Id.* at 236.

iii. The notice was untimely and the district court errored in finding that the City was required to show that Mostellar could or should have discovered the intergovernmental agreement

Application of this well-settled Supreme Court precedent is straightforward. Mostellar fell and was injured on August 26, 2021. She was aware of the mechanism

of injury and her injuries the day she fell. *See* CF 000002-000003 at ¶¶ 7, 15. She asserted tort claims against the City.[5] *See City & Cnty. of Denver v. Dennis*, 418 P.3d 489, 493 (Colo. 2018) (applying the CGIA to premise liability and negligence claims). Her time began to run on August 26, 2021. Recognizing her duty under the CGIA, she provided timely notice to Manitou Springs on January 4, 2022. CF 000037 at ¶ 2. She did not, however, provide notice to the City until May 30, 2023. *Id.* at ¶ 4. Her time, by that point, had long since expired. Her lack of knowledge of an intergovernmental agreement does not excuse the delay. *See Abrahamson v. City of Montrose*, 77 P.3d 819, 821 (Colo. App. 2003) ("[T]o start the running of the CGIA notice period, a claimant need only have discovered that he or she has been wrongfully injured, *and need not yet know the cause of the injury* or the extent of the damage." (emphasis added)).

Nor did the City have a burden when it moved to dismiss the complaint for failure to comply with C.R.S. § 24-10-109(1) to show that the intergovernmental agreement was "widely known or that Mostellar, with reasonable diligence, could or should have discovered it before Manitou Springs' counsel informed her of it." CF 000052. The district court cited no authority to support this assertion. Such a requirement upends a governmental entity's ability to seasonably "investigate and

[5] The Response to the Motion to Dismiss did not challenge the application of the CGIA to her claims. CF 000036.

remedy dangerous conditions, to settle meritorious claims without incurring the expenses associated with litigation, to make necessary fiscal arrangements to cover potential liability, and to prepare for the defense of claims." *Kelsey*, 8 P.3d at 1204; *see also Crandall*, 161 P.3d at 634 (rejecting a recurring symptoms theory and finding the delay "would defeat the CGIA notice of claim purposes that include investigating and abating a dangerous condition, settling a meritorious claim, preparing a defense to a perceived unmeritorious claim, and limiting the government's fiscal exposure to potential liability and the payment of damages."). It also shifts the burden from the plaintiff "to determine the cause of the injury, to ascertain whether a governmental entity or public employee is the cause, and to notify the governmental entity within 18[2] days from the time when the injury is discovered[,]" *Trinity*, 848 P.2d at 927[,] to governments to prove what an injured party "could or should have known." It invites, if not expressly authorizes, equitable defenses such as waiver, tolling, or estoppel. Rather than encouraging early diligence, detection and resolution, the interpretation incentivizes inaction, ignorance, and delay. This formulation of the notice requirements runs afoul of well-settled Supreme Court precedent in *E. Lakewood*, *Trinity*, *Gallagher,* and *Crandall*, among others. As such, it must be rejected.

When a plaintiff suspects that she was injured by a governmental actor, she must identify any responsible parties for her injuries early. *Trinity*, 848 P.2d at 927.

Otherwise, she risks that the 182-day "time limit may expire if she waits to discover the cause of her injury before filing pursuant to the CGIA." *Gallagher*, 54 P.3d at 391. That, ultimately, is what happened here—Mostellar waited until Manitou Springs completed its investigation before she notified any other possibly responsible governmental parties. The time for Mostellar to provide notice expired. Accordingly, the claims against the City must be dismissed.

II. REQUEST FOR ATTORNEY'S FEES

The City should be awarded its fees. C.A.R. 39.1 allows for consideration of a fee award. Section 13-17-201(1) provides:

> [i]n all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other persons, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

Id. "The purpose of section 13–17–201 is to discourage the institution or maintenance of unnecessary tort claims." *Monell v. Cherokee River, Inc.*, 347 P.3d 1179, 1184 (Colo. App. 2015) (internal quotation marks omitted).

The complaint alleges claims for negligence and premise liability. CF 000006-000007. Both are torts. *See Dennis*, 418 P.3d at 493. The motion before the district court was brought pursuant to Rule 12(b). CF 000011. The City is entitled to its attorney fees. *See Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No.*

1, 474 P.3d 1231, 1245 (Colo. App. 2018) (finding reversal of a denial of a CGIA motion to dismiss tort claims merited a fee award including fees incurred on appeal).

CONCLUSION

The trial court erred when it found the notice of claim to the City was timely. It erred when it found that the City was required to show that Mostellar could or should have known about the intergovernmental agreement.

WHEREFORE, the trial court's order denying the City's motion to dismiss should be reversed.

Dated this 7th day of March, 2024.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY,
CITY OF COLORADO SPRINGS,
COLORADO
Wynetta P. Massey, City Attorney
Reg. No. 18912

/s/ W. Erik Lamphere
W. Erik Lamphere, Colo. Reg. # 37887
Division Chief

Attorneys for Appellant
The City of Colorado
Springs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2024, I electronically filed a true and correct copy of the foregoing **OPENING BRIEF** with the Clerk of the Court through *Colorado Courts E-Filing* system which will send notification of this filing to the following:

Mark H. Kane (mark@kanelawpc.com)
Attorney for Plaintiff-Appellee

/s/ Amy McKimmey
Amy McKimmey
Legal Assistant