COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED June 20, 2024 4:43 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	
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REPLY 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 1,914 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.

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ARGUMENT

I. THE NOTICE WAS UNTIMELY

A. The District Court's Reasonable Diligence Finding is a Legal Conclusion Subject to De Novo Review

The Response argues the district court's determination of "reasonable diligence" was a finding of fact entitled to review under an abuse of discretion standard. Response at 2-3. Ms. Mostellar does not cite any authority in support. *See Id.* at 2 ("The determination of 'reasonable diligence' is a question of fact.").

In the order denying the motion, the district court made five factual findings. CF 000047-000048. The district court found:

1. Mostellar was injured on August 26, 2021 after falling on a public sidewalk in Manitou Springs;
2. Mostellar's attorney provided a notice of claim to Manitou Springs on January 4, 2022;
3. Her attorney learned about an intergovernmental agreement between Manitou Springs and Colorado Springs on April 20, 2023;
4. On May 30, 2023, Mostellar's attorney provided notice to Colorado Springs;
5. On August 24, 2023, Mostellar initiated this action.

Id.[1] Nowhere amongst the five is one that Mostellar was reasonably diligent in discovering her injury. A finding of reasonable diligence is a legal conclusion derived from facts, not a fact itself. *See Mesa Cnty. Valley Sch. Dist. No. 51 v.*

[1] The district court adopted Plaintiff's statement of facts. *Compare* CF 000047-000048 *with* CF 000037. It found no dispute over the facts. CF 000049.

Kelsey, 8 P.3d 1200, 1204 (Colo. 2000) ("When determining whether a plaintiff has complied with the requirements of section 24–10–109(1), the relevant facts include but are not necessarily limited to the persons, dates, and documents associated with the plaintiff's alleged injury and filing of written notice."). As noted in the Opening Brief, legal conclusions are reviewed de novo. Opening Brief at 6. Like legal conclusions, when facts are undisputed, those, too, are reviewed de novo. *City & Cnty. of Denver v. Crandall*, 161 P.3d 627, 633 (Colo. 2007).

B. Precedent Requires Strict Compliance with Subsection (1) Which States Discovery of Injury, Not Identification of Parties, Triggers the Obligation to Provide Notice

Section 24-10-109(1), C.R.S., is a jurisdictional, nonclaim statute which requires strict compliance. *See E. Lakewood Sanitation Dist. v. Dist. Ct. In & For Cnty. of Jefferson*, 842 P.2d 233, 236 (Colo. 1992) ("[U]nder 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."); *City & Cnty. of Denver v. Crandall*, 161 P.3d 627, 634 (Colo. 2007) ("The CGIA notice of claim provision is both a condition precedent and a jurisdictional prerequisite to suit under the CGIA, must be strictly applied, and failure to comply with it is an absolute bar to suit."); *Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187, 1193 (Colo. 1996) ("the legislature pointedly meant to render the 180–day notice provision into a jurisdictional

prerequisite rather than an affirmative defense."). Relying on decisional law addressing other subsections of C.R.S. § 24-10-109, the Response argues "[t]he *Trinity* court d[id] not require strict compliance with the CGIA's notice requirement of 182 days, only a claimant's due diligence to discovery the elements of the claim." Response at 4. The Response is mistaken.

In *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), "[t]he question [was] when Trinity knew or should have known that the building was damaged by the tortious act of another[2] rather than a naturally occurring phenomenon such as pre-existing soil conditions." *Id.* at 926. The Supreme Court made clear that "[t]he [CGIA] does not permit an injured party to ignore evidence which would cause a reasonable person to know that he or she has been injured by the tortious *conduct* of another."[3] *Id.* at 926-27 (emphasis added). Accordingly, the Court concluded, "the date of discovery is not postponed until

[2] The Supreme Court remanded the CGIA notice issue after the district court made conflicting findings as to when Trinity discovered its injury. *See id.* at 926 ("There is an obvious conflict between the trial court's orders of December 18, 1990 and January 28, 1991 regarding when Trinity discovered its injury. In the first order, the trial court held that the injury had been discovered in May 1989 and in the second order it concluded that the injury was discovered in early 1988. The notice given would have been timely under the first ruling but untimely under the second.").

[3] The Response also quotes *Trinity* for the statute of limitations-based discovery rule which governs the identification of "wrongful act[s.]" *See* Response at 3. Notably, the rule does not govern the identification of wrongful *actors*.

Trinity knew or should have known that Westminster was the source of the trespassing water." *Id.* at 927.

Other authorities cited by the Response address other subparts of C.R.S. § 24-10-109, not subsection (1). *Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63 (Colo. 1990) addressed the contents of a notice, rather than the discovery of injuries and the timeliness of the notice. *See*, *e.g.*, *Brock v. Nyland*, 955 P.2d 1037, 1041 (Colo. 1998), *overruled by Finnie v. Jefferson Cnty. Sch. Dist. R-1*, 79 P.3d 1253 (Colo. 2003)[4] (Summarizing *Woodsmall* by stating "we construed section 24-10-109(2) of the [C]GIA, which concerns the contents of the notice, holding that a claimant must substantially comply with that subsection."). *Cassidy v. Reider*, 851 P.2d 286 (Colo. App. 1993) involved an interpretation of subsections (2) and (3). *Id.* at 288. In *Barsham v. Scalia*, 928 P.2d 1381 (Colo. App. 1996), a division of this Court was presented with a question, as relevant here, over who was entitled to receive a notice of claim under subsection (3). *Id.* at 1385. *Dicke v. Mabin*, 101 P.3d 1126 (Colo. App. 2004) addressed subsection (6) and the ninety-day waiting period between filing of a notice of claim and initiating a lawsuit. Finally, *Awad v. Breeze*, 129 P.3d

[4] *Finnie*, *supra*, overruled *Woodsmall*'s construction of C.R.S. § 24-10-109(3). *Finnie* also "characterized section 24-10-109(1) . . . as a jurisdictional prerequisite to suite that therefore requires strict compliance with its terms." *Id.* at 1256.

1039 (Colo. App. 2005) addressed subsection (2) and the contents of a notice. *Id.* at 1041.

Decisional law has uniformly treated subsection (1) differently than other parts of C.R.S. § 24-10-109. *See Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 839 (10th Cir. 2003) ("Colorado courts strictly construe section 24–10–109(1) and consistently hold that complying with the notice of claim as set forth in section 24–10–109(1) is a jurisdictional prerequisite to suit." (internal quotation marks and alterations omitted)). The difference in treatment is explained by subsection (1)'s jurisdictional, nonclaim nature. *Trinity Broad. of Denver, Inc.*, 848 P.2d at 923. No aspect of the CGIA outside of C.R.S. § 24-10-118(1)(a), shares similar jurisdictional language. The Response's reliance on other subsections of C.R.S. § 24-10-109 fails because of this jurisdictional distinction.

Finally, despite the Opening Brief's heavy reliance on *E. Lakewood Sanitation Dist. v. Dist. Ct.*, *supra*, the case is missing from the Response's survey of precedent. *E. Lakewood Sanitation Dist. v. Dist. Ct.* addressed an analogous factual scenario as the one here—the identification and notification of a governmental entity after the expiration of the notice period. 842 P.2d at 233-34. In *E. Lakewood Sanitation Dist.*, the Supreme Court, after emphasizing the language of C.R.S. § 24-10-109(1) and describing the subsection as "unambiguous[,]" *id.* at

236, found "when a party fails to strictly comply with the 180-day notice requirement, the party's action must be dismissed." *Id.* The Supreme Court reversed the district court which, like the district court below, misapplied C.R.S. § 24-10-109(1) and declined to strictly apply the notice provision. *Id.* This Court should follow suit and reverse the district court here.

C. The Policy Considerations Underlying Subsection (1) Support Reversal of the District Court

The Response does not challenge the important policy considerations underlying timely notice to governmental entities under the CGIA. Again, the notice provision was established "to allow a public entity to investigate and 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. The 602-day lapse, here, runs counter to each of these policy considerations behind C.R.S. § 24-10-109(1). No legislatively intended countervailing policies are promoted by the district court's decision. The Response does not identify any. The City was deprived of its ability to timely investigate the claim, take appropriate steps to address it and the condition. The opportunity was lost on account of Mostellar's nearly two-year delay in providing notice. The delayed notice runs afoul of C.R.S. § 24-10-109(1).

It warrants reversal of the district court's order and dismissal of the action consequently.

D. The City is Entitled to an Award of Attorney's Fees

The City should be awarded its attorney's fees because the suit asserts tort claims and the district court's order, below, was in error. In opposition to the City's fee request, the Response argues that the appeal is frivolous. It does so without demonstrating that the appeal is "frivolous as filed" or "frivolous as argued." *See Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006) (Explaining an appeal may be "frivolous as filed" when "the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there is really no appealable issue" and an appeal is "frivolous as argued" based on "the appellant's misconduct in arguing the appeal . . . ."). Additionally, the Response makes no effort to show that the City "can present no rational argument based upon the evidence or law to support it." *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1220 (Colo. App. 2009). The Response fails to meaningfully advance any argument in support of its assertion. It only cites Rule 38(b). It is woefully undeveloped, and this Court should decline to address it. *See Sanchez v. Indus. Claim Appeals Off.*, 411 P.3d 245, 255 (Colo. App. 2017) (listing cases).

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 20th day of June, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2024, I electronically filed a true and correct copy of the foregoing **REPLY BRIEF** with the Clerk of the Court through *Colorado Courts E-Filing* system which will send notification of this filing to the following:

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