SUMMARY
August 1, 2024

**2024COA83**

**No. 23CA1477, *Jacobs Investments, LLC d/b/a Colorado Boring Company v. Fort Collins-Loveland Water District* — Torts — Negligence; Industrial and Commercial Safety — Excavation Requirements — Documentation and Markings; Government — Colorado Governmental Immunity Act — Immunity and Partial Waiver — Operation and Maintenance of a Water Facility**

In a lawsuit for negligence arising out of a water district's alleged violation of the Excavation Requirements Statute, §§ 9-1.5-101 to -108, C.R.S. 2023, a division of the court of appeals considers whether a water district's marking of its water lines under section 9-1.5-103, C.R.S. 2023, constitutes "operation and maintenance of any public water facility" under section 24-10-106(1)(f), C.R.S. 2023, of the Colorado Governmental Immunity Act. The division concludes that because the water district's actions in marking its water lines did not constitute operation and

maintenance of its facilities, the water district did not waive its immunity under the Colorado Governmental Immunity Act.

COLORADO COURT OF APPEALS **2024COA83**

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Court of Appeals No. 23CA1477
Larimer County District Court No. 23CV30319
Honorable Stephen J. Jouard, Judge

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Jacobs Investments, LLC, a Colorado limited liability company d/b/a Colorado Boring Company,

Plaintiff-Appellee,

v.

Fort Collins-Loveland Water District, a Colorado Water District,

Defendant-Appellant.

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ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE MOULTRIE
Dunn and Yun, JJ., concur

Announced August 1, 2024

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Johnson Muffly & Dauster, PC, Daniel C. Muffly, Daniel M. St. John II, Fort Collins, Colorado, for Plaintiff-Appellee

Nathan Dumm & Mayer P.C., Timothy R. Fiene, Denver, Colorado, for Defendant-Appellant

Dianne M. Criswell, Ann Terry, Denver, Colorado, for Amicus Curiae Special District Association of Colorado (SDA) and the Colorado Special District Property & Liability Risk Pool (CSD Pool)

Tatiana G. Popacondria, Denver, Colorado, for Amicus Curiae City and County of Denver, Acting by and through its Board of Water Commissioners (Denver Water)

Samuel J. Light, Denver Colorado, for Amicus Curiae Colorado Intergovernmental Risk Sharing Agency (CIRSA)

Rachel Bender, Robert D. Sheesley, Denver, Colorado, for Amicus Curiae Colorado Municipal League (CML)

¶ 1 Defendant, Fort Collins-Loveland Water District (the District), appeals the trial court's order denying its motion to dismiss the complaint of plaintiff, Jacobs Investments, LLC, d/b/a Colorado Boring Company (Colorado Boring), under the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2023. We reverse and remand with directions.

## I. Background

¶ 2 The facts are largely undisputed.

¶ 3 Colorado Boring is a horizontal-boring contractor that installs utilities and underground conduits. In December 2022, Colorado Boring was excavating an area when its boring equipment struck and ruptured an underground water line owned by the District, causing flooding.

¶ 4 Before excavating, Colorado Boring gave notice of its intent to excavate to the Utility Notification Center of Colorado, which, in turn, notified the District. Upon receipt of that notice, and as required by the Excavation Requirements Statute (ERS), §§ 9-1.5-101 to -108, C.R.S. 2023, the District located and marked its underground water line. However, the District mismarked the line's location.

¶ 5 Colorado Boring filed a complaint against the District alleging negligence, negligence per se, and violation of the ERS. The complaint alleged that the District had a duty to mark the water line with specificity and that Colorado Boring's damage to the water line was caused by the District's failure to properly locate and mark the line.

¶ 6 Arguing that Colorado Boring's claims are barred by the CGIA, the District filed a C.R.C.P. 12(b)(1) motion to dismiss the complaint for lack of subject matter jurisdiction. The District argued it didn't waive its immunity under the CGIA by performing its duties under the ERS because responding to requests to locate water lines isn't a function of operating or maintaining a public water facility. The trial court disagreed and denied the motion to dismiss. The trial court also opined, "[T]he provisions of the ERS do not impose an indemnification obligation under the CGIA, but also, do[] not alter the liability of any public entity that might be expressly provided under the CGIA."

¶ 7 The District then filed this interlocutory appeal.

¶ 8 The District argues that the trial court misapplied the CGIA and reversibly erred by finding that the District's marking of the

water line was part of the operation and maintenance of a public water facility, rather than ancillary to it, and thus concluding that the District waived immunity under the CGIA. The District additionally argues that the trial court reversibly erred by creating "an additional waiver of immunity" under the ERS and requests attorney fees under section 13-17-201, C.R.S. 2023. Because we agree that the trial court misapplied the CGIA, we decline to address the District's argument that the trial court erroneously created "an additional waiver of immunity" under the ERS.

## II. Applicable Law and Standard of Review

¶ 9 The CGIA generally bars actions against public entities for injuries that "lie in tort or could lie in tort." § 24-10-106(1), C.R.S. 2023; *City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n*, 2024 CO 46, ¶ 3 ("Without the CGIA's grant of immunity, exposure to unlimited liability would frustrate the state and its political subdivisions in their efforts to provide essential public services."). However, a public entity's sovereign immunity may be waived in certain circumstances. *Burlingame Ranch*, ¶ 3. As relevant here, a public entity's sovereign immunity is waived in an action for

injuries resulting from "[t]he operation and maintenance of any public water facility." § 24-10-106(1)(f).

¶ 10 Because questions of governmental immunity implicate a court's subject matter jurisdiction, they are determined pursuant to C.R.C.P. 12(b)(1). *Smokebrush Found. v. City of Colorado Springs*, 2018 CO 10, ¶ 17. Under C.R.C.P. 12(b)(1), a plaintiff has the burden of proving the court has subject matter jurisdiction and the burden of demonstrating that governmental immunity has been waived if the defendant is a governmental entity. *Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 85 (Colo. 2003).

¶ 11 We strictly construe the CGIA's provisions granting immunity and broadly construe its provisions waiving immunity to determine whether a plaintiff has satisfied this burden. *Smokebrush Found.*, ¶ 22. Nevertheless, our primary task when construing the CGIA is to ascertain and give effect to the intent of the legislature. *Ceja v. Lemire*, 154 P.3d 1064, 1066 (Colo. 2007). "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant

what it clearly said." *Id.* (quoting *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000)).

¶ 12 Because the material facts are undisputed, and the issue is one of statutory construction, we review the trial court's jurisdictional ruling de novo. *See Smokebrush Found.*, ¶ 17.

## III. Analysis

¶ 13 The District asserts that it hasn't waived its immunity because its actions didn't constitute "operation and maintenance" of a public water facility by a public entity under section 24-10-106(1)(f) of the CGIA.

### A. Operation

¶ 14 The District first asserts that providing information about its facilities in the area of a proposed excavation is ancillary to the water facility's purposes and is not part of the facility's operation. We agree.

¶ 15 The CGIA defines "operation" as

> the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any . . . public water . . . facility. "Operation" does not include any duty to upgrade,

> modernize, modify, or improve the design or construction of a facility.

§ 24-10-103(3)(a), C.R.S. 2023. Sovereign immunity is therefore waived only if the act or omission relates to the facility's purposes. *Richland Dev. Co. v. E. Cherry Creek Valley Water & Sanitation Dist.*, 934 P.2d 841, 843 (Colo. App. 1996). Additionally, a public entity's acts or omissions that are ancillary to the facility's primary purposes don't waive immunity. *Id.* The primary purposes of a public water facility are the "collection, treatment, or distribution of water for domestic and other legal uses." § 24-10-103(5.7).

¶ 16 It's undisputed that the District is a "public entity." See § 24-10-103(5) ("[p]ublic entity" includes political subdivisions organized pursuant to law). It's also undisputed that the water line is part of a "public water facility." § 24-10-103(5.7) ("[p]ublic water facility" includes structures "used in the collection, treatment, or distribution of water" operated and maintained by a public entity). As a public entity that owns its water lines, the District is also an "owner" of "underground facilities" as defined by the ERS. § 9-1.5-102(5)(a), C.R.S. 2023 ("owner" includes public utilities that have the right to bury underground facilities); § 9-1.5-102(7)

("[u]nderground facility" includes items buried below ground for use in connection with conveyance of water).

¶ 17 The ERS imposes duties upon owners, operators, and excavators. §§ 9-1.5-101 to -108. As the owner of underground facilities, the District must respond to an excavator's notice of intent to excavate an area. § 9-1.5-103, C.R.S. 2023. The ERS also requires an owner to "use reasonable care to advise the excavator of the location, number, and size of any underground facilities" in the excavation area by marking the location of the facilities "with clearly identifiable markings within eighteen inches horizontally from the exterior sides of the facilities." § 9-1.5-103(4)(a)(I).

¶ 18 Thus, Colorado Boring alleges that the District had a statutory duty under the ERS to "properly mark" its facilities, and because it has injuries resulting from the District's mismarking of the water line, the District waived immunity. Accepting as true Colorado Boring's allegations about its injuries and the District's duty of care, we conclude the District didn't waive immunity by mismarking its line because the District's duties under the ERS are ancillary to its primary purposes of collecting, treating, or distributing water and not part of its operational duties.

¶ 19 In *Richland*, a division of this court concluded that a water facility's functions of recordkeeping and responding to inquiries about the availability of water and sewer taps were, at most, ancillary to a public water facility's primary purposes. 934 P.2d at 844. Similarly, we conclude the District's actions of locating and marking the water line weren't part of its primary operational purposes. In other words, locating and marking the water line didn't further the District's primary purposes of collecting, treating, or distributing water; those operational purposes would have continued regardless of whether Colorado Boring provided notice of its intent to excavate. Instead, the District's actions in marking the line merely provided information about the existence and understood location of its facilities. *See* § 9-1.5-101 (the legislative purpose of the ERS is for excavators to obtain information regarding the location of underground facilities prior to excavating).

¶ 20 Even assuming without deciding that, by providing incorrect information, the District violated a duty of care imposed upon it by the ERS, its violation of that duty of care isn't sufficient to waive immunity. *See State Dep't of Highways v. Mountain States Tel. & Tel. Co.*, 869 P.2d 1289, 1291-92 (Colo. 1994) (statutory imposition

of a duty of care and authorization for compensable damages alone aren't sufficient to waive sovereign immunity under the CGIA); § 9-1.5-104.5(4), C.R.S. 2023 ("Nothing in this article shall be construed . . . to alter the liability of public entities as provided in [the CGIA].").

¶ 21 Thus, we conclude that, because marking the water line in response to Colorado Boring's notice of intent to excavate wasn't part of the District's primary purposes, the District didn't waive immunity under the "operation" language of section 24-10-106(1)(f).

B. Maintenance

¶ 22 The District also asserts that the trial court erroneously found that locating and marking its water line constituted maintenance of its public water facility. Again, we agree.

¶ 23 The District's immunity is only waived if its actions constituted maintenance of a public water facility. The CGIA defines "maintenance" as

> the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure. "Maintenance" does not include any duty to upgrade, modernize,

> modify, or improve the design or construction of a facility.

§ 24-10-103(2.5).

¶ 24 Colorado Boring argues that marking the location of the water line was part of the District's maintenance duties because it was necessary to preserve the water line from being struck by excavation or otherwise declining or failing.

¶ 25 However, the Colorado Supreme Court has concluded that the duty to maintain "is no more than a duty to hold the status quo." *Medina v. State*, 35 P.3d 443, 458 (Colo. 2001). This duty "was intended by the legislature to mean a duty to restore a facility to the same condition as originally constructed." *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1385 (Colo 1997).

¶ 26 Colorado Boring acknowledges that *Medina* and *Swieckowski*'s definition of "maintenance" was codified in section 24-10-103(2.5) by House Bill 03-1288 (H.B. 1288). *See* Ch. 182, sec. 2, § 24-10-103 (2.5), 2003 Colo. Sess. Laws 1343. But it argues that H.B. 1288's inclusion of language that also defines maintenance as "preserving a facility from decline or failure" evidences the legislature's intent to impose on public entities (like the District) a

present obligation to protect their facilities from damage or failure, in accord with the ERS. We aren't persuaded.

¶ 27 The legislature enacted H.B. 1288 in response to two other supreme court opinions — *City of Colorado Springs v. Powell*, 48 P.3d 561 (Colo. 2002), and *City of Longmont v. Henry-Hobbs*, 50 P.3d 906 (Colo. 2002) — due to its concern that the supreme court had interpreted some of the CGIA's key terms in a way that might "significantly expand the potential liability of governmental entities providing utility services to the public." Sec. 1, 2003 Colo. Sess. Laws at 1342; *see also City of Colorado Springs v. Powell*, 156 P.3d 461, 464 (Colo. 2007) (recognizing H.B. 1288 was enacted in response to *Powell* and *Henry-Hobbs*).

¶ 28 Section 9-1.5-104.5, which governs liability under the ERS, was in effect when the legislature adopted H.B. 1288's "preserving a facility from decline or failure" language. *See* Ch. 170, sec. 4, § 9-1.5-104.5, 2000 Colo. Sess. Laws 688 (adopting the liability section of the ERS). And that section explicitly states that it doesn't alter public entities' liability under the CGIA. Furthermore, the supreme court's holding in *Mountain States Telephone* — that a statutory duty of care and authorization for compensatory damages aren't

sufficient to waive sovereign immunity — had been in effect for nearly a decade before the passage of H.B. 1288. *See* 869 P.2d at 1291-92. We presume the legislature is aware of its own enactments and existing case law precedent, *LaFond v. Sweeney*, 2015 CO 3, ¶ 12, and where, as here, the legislature hasn't expressly indicated its intent to repeal or abrogate existing law, we presume it has "accepted and ratified" prior judicial construction of a statute. *Fisher v. Indus. Claim Appeals Off.*, 2021 COA 27, ¶ 27 (citation omitted).

¶ 29 Additionally, we note that the concept of maintenance is included within the broad definition of operation. *Lopez v. City of Grand Junction*, 2018 COA 97, ¶ 22. When considered in this context, the "preserving a facility from decline or failure" clause in the CGIA's definition of maintenance, § 24-10-103(2.5), suggests that maintenance encompasses acts or omissions intrinsic to the operation of a facility to preserve it from decline or failure, rather than an affirmative obligation to protect against third-party actions or events. *See S. Fork Water & Sanitation Dist. v. Town of South Fork*, 252 P.3d 465, 468 (Colo. 2011) (noting appellate courts consider statutory language within the context of the statute as a

whole and construe the statutory scheme to give harmonious and sensible effect to all its parts).

¶ 30 Colorado Boring relies on *Galef v. University of Colorado*, 2022 COA 91, in support of its assertion that locating and marking water lines is an affirmative act of maintenance. In that case, a division of this court determined that the University of Colorado had waived immunity under the CGIA by failing to warn of a dangerous condition — wet, slippery dormitory stairs — created by mopping a dormitory staircase. *Id.* at ¶ 35. Colorado Boring contends that locating and marking water lines under the ERS is akin to mopping the dormitory stairs because both actions preserve the public facilities from decline. Again, we aren't persuaded.

¶ 31 In *Galef*, the University didn't dispute that mopping the dormitory stairs was part of its maintenance plan. *Id.* at ¶ 33. There was no similar undisputed admission here. To the contrary, the District vigorously disputed that it locates and marks water lines to maintain its facilities. Thus, Colorado Boring's reliance on *Galef* is misplaced.

¶ 32 The District undertook the repair of the water line only after Colorado Boring struck it. Because the District's need to repair or

restore the water line to its original condition didn't arise until Colorado Boring excavated the area, Colorado Boring's claimed injuries didn't arise from the District's maintenance of a public water facility.

¶ 33 And because marking the water line wasn't part of the District's maintenance obligations, the trial court erred in concluding that the District waived its immunity under the CGIA.

## IV. Whether the Trial Court Erroneously Created an Additional Waiver of Immunity

¶ 34 The District also contends that — contrary to the plain language of the ERS — the trial court erroneously created an additional waiver of immunity by finding that "performing a locate [under the ERS] constitutes operation and maintenance of a public water facility." We need not address this argument, however, because we have determined the trial court erroneously applied the CGIA's waiver provisions for injuries resulting from the operation and maintenance of public water facilities and are reversing the trial court's order on that basis. *See Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 2018 COA 65, ¶ 38 ("An issue is moot when the

relief sought, if granted, would have no practical effect on an existing controversy.").

## V. Attorney Fees

¶ 35 The District seeks an award of the attorney fees it incurred in defense of this action, including this appeal, under section 13-17-201. That section mandates that a defendant be awarded reasonable attorney fees when a court dismisses a plaintiff's tort claims under C.R.C.P. 12(b) before trial. *Crandall v. City & Cnty. of Denver*, 238 P.3d 659, 665 (Colo. 2010); *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 873 (Colo. App. 1996) (an award of attorney fees is mandatory when a trial court dismisses an action under the CGIA for lack of subject matter jurisdiction).

¶ 36 Colorado Boring concedes that it is liable for reasonable attorney fees if we reverse the trial court's order. Because we conclude the trial court erred, we grant the District's request and remand to the trial court to determine the District's reasonable attorney fees, and to award such fees to the District. *See* C.A.R. 39.1; *Camelot Invs., LLC v. LANDesign, LLC*, 973 P.2d 1279, 1281 (Colo. App. 1999). Further, because the District has prevailed on

appeal, we deny Colorado Boring's request for an award of attorney fees under section 9-1.5-104.5(1)(d)(I).[1]

## VI. Disposition

¶ 37 The order is reversed, and the case is remanded for dismissal of Colorado Boring's complaint and calculation of the District's reasonable attorney fees, consistent with this opinion.

JUDGE DUNN and JUDGE YUN concur.

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[1] Under that section, an owner or operator of an underground facility is liable for "[a]ny cost or damage incurred by the excavator as a result of any delay in the excavation project while the underground facility is restored, repaired, or replaced, together with reasonable costs and expenses of suit, including reasonable attorney fees" if the facility owner or operator failed to use "reasonable care" in marking an underground facility. § 9-1.5-104.5(1)(d)(I), C.R.S. 2023.