The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
August 8, 2024

2024COA89

No. 23CA1704, *Grand Junction Peace Officers' Ass'n v. City of Grand Junction* — Civil Procedure — Class Actions — Determination by Order Whether Class Action to be Maintained; Government — Colorado Governmental Immunity Act — Sovereign Immunity a Bar — Actions Against Public Employees

A division of the court of appeals considers whether a court errs by deferring a ruling on a plaintiff's motion to certify a class pursuant to C.R.C.P. 23 until the court has first adjudicated the defendants' motion to dismiss for lack of subject matter jurisdiction under the Colorado Governmental Immunity Act (the CGIA), sections 24-10-101 to -120, C.R.S. 2023. The division holds that the court did not abuse its discretion by deferring adjudication of the class certification motion because issues of sovereign immunity are jurisdictional, and the plaintiff did not show that class action

certification would have aided the court in determining whether it could exercise subject matter jurisdiction over the case.

The division further concludes that the court did not err by dismissing the plaintiff's claims for breach of contract, unjust enrichment, and breach of fiduciary duty under the CGIA because such claims could lie in tort or were otherwise time barred; that the court applied the correct legal standard under *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), and its progeny; and that the court's admission of testimony from a certified public accountant does not warrant reversal. Accordingly, the division affirms the court's order dismissing the plaintiff's amended complaint as it pertains to the claims governed by the CGIA.

COLORADO COURT OF APPEALS **2024COA89**

Court of Appeals No. 23CA1704
Mesa County District Court No. 21CV30108
Honorable Valerie J. Robison, Judge

Grand Junction Peace Officers' Association, a/k/a Grand Junction Police Officers' FOP Lodge 68, on behalf of its members and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

City of Grand Junction; Claudia Hazelhurst, in her individual and official capacity; Jodilyn Romero, n/k/a Jodilyn Welch, in her individual and official capacity; and Gregory Caton, in his individual and official capacity,

Defendants-Appellees.

APPEAL DISMISSED IN PART, JUDGMENT AFFIRMED,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE LIPINSKY
Schutz and Bernard*, JJ., concur

Announced August 8, 2024

Wegener Lande & Evans, PC, Benjamin Wegener, Meaghan Fischer, Grand Junction, Colorado, for Plaintiff-Appellant

Nathan Dumm & Mayer PC, J. Andrew Nathan, Ashley Hernandez-Schlagel, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Courts are required to address certain issues at the preliminary stages of a civil case. They must consider a public entity's or a public employee's assertion of sovereign immunity "at the earliest possible stage" of a case because courts lack subject matter jurisdiction over claims barred by sovereign immunity. *City & Cnty. of Denver v. Dennis*, 2018 CO 37, ¶ 10, 418 P.3d 489, 494. In addition, courts must determine whether a case may proceed as a class action "[a]s soon as practicable after the commencement of an action brought as a class action." C.R.C.P. 23(c)(1).

¶ 2 This case presents the novel issue of whether a court abuses its discretion by deferring adjudication of the plaintiff's motion for class certification until it has resolved the defendants' assertion of sovereign immunity. We hold that, under the facts of this case, the court did not err by deciding that the Colorado Governmental Immunity Act (the CGIA), sections 24-10-101 to -120, C.R.S. 2023, barred the plaintiff's claims before considering whether the case could proceed as a class action.

¶ 3 Plaintiff, Grand Junction Peace Officers' Association a/k/a Grand Junction Police Officers' FOP Lodge 68 (the Association), on behalf of its members and all others similarly situated, appeals the

district court's orders dismissing its amended complaint against defendants, the City of Grand Junction (the City) and Claudia Hazelhurst, Jodilyn Welch f/k/a Jodilyn Romero, and Gregory Caton (collectively, the individual defendants), in their individual and official capacities. We affirm the judgment, dismiss the appeal in part, and remand the case with directions.

I. Background and Procedural History

¶ 4 In 1998, the City instituted a Retiree Health Program (the program) to pay the health insurance premiums for certain retired City employees. At the times relevant to this appeal, Hazelhurst was the City's Human Resources Director, Welch was the City's Finance Director, and Caton was the City Manager.

¶ 5 The program was originally funded through bi-weekly, nonrefundable deductions from eligible employees' paychecks. The deductions were mandatory for all City employees enrolled in the City's health insurance plan. Due to concerns about the program's ongoing financial viability, however, over a multiyear period the City changed the program's funding structure, enrollment and eligibility requirements, and benefits.

¶ 6 The Association filed a class action complaint against the defendants, alleging that, "[d]ue to the mismanagement of the [program], . . . the [program] may no longer be financially viable, and . . . the participating members of the [program] may lose all of their contributions, and the earnings that should have been made had the funds been invested and managed properly." As relevant to this appeal, the Association pleaded claims against the City for breach of contract, unjust enrichment, and a "request for accounting"; and claims against the individual defendants for breach of fiduciary duty, negligent misrepresentation, and "interference with the performance of a contract." In their answer, the defendants asserted, among other defenses, that the Association's "requested relief, if any, may be barred and/or limited by the provisions of the [CGIA] as some or all of [the Association's] claims are torts or could lie in tort."

¶ 7 About two months after commencing this action, the Association filed a motion for certification of a class composed of "all current and former employees of the City . . . who contributed to the [program] from 1998 to the present who are subject to the

[program] policy or affected by the defendants' mismanagement of the [program]" (the certification motion).

¶ 8 The defendants filed a motion to stay the litigation and for leave to conduct limited discovery to determine whether the Association's claims were barred under section 24-10-108, C.R.S. 2023 (pertaining to actions against public entities), and section 24-10-118(2.5), C.R.S. 2023 (pertaining to actions against public employees), of the CGIA (the stay motion). In the stay motion, the defendants asked the court to stay the case, including discovery unrelated to the applicability of the CGIA and "all other matters related to this litigation, such as [the Association's] request for briefing on the class certification issue." In addition, the defendants said that, "following limited discovery related to immunity," they would submit a dismissal motion to allow the court to "rule on whether it has subject matter jurisdiction." The defendants requested that the court maintain the stay "until the motion is finally determined." They further asserted that, upon the court's determination of such a motion, the court and the parties would "be in a position to decide how to proceed, particularly with

respect to any class certification, as to any claims that may remain."

¶ 9 In its response to the stay motion, the Association argued that "a blanket stay of the proceedings is unwarranted and the invocation of immunity should not be a bar to [the Association's request for] class certification." Among other things, the Association asserted that a "stay of the proceedings would cause [it] hardship," and that it should "be allowed to simultaneously proceed" with the certification motion.

¶ 10 In their reply, the defendants maintained that the Association's request to certify a class was "premature, particularly because [the court's] determination as to whether any or all of [the Association's] claims are barred under the CGIA is essential to the class issue."

¶ 11 The court granted the stay motion and said it would reserve ruling on the certification motion until it had ruled on whether the Association's claims were barred under the CGIA.

¶ 12 After the parties conducted discovery regarding the applicability of the CGIA, the defendants filed a motion to dismiss the Association's claims pursuant to C.R.C.P. 12(b)(1) (the dismissal

motion). In it, the defendants argued that the court lacked subject matter jurisdiction over the case because the CGIA barred all the Association's claims. The Association opposed the dismissal motion and requested a hearing on the applicability of the CGIA, pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) (a *Trinity* hearing).

¶ 13 The court entered an order granting the dismissal motion in part and denying it in part (the dismissal order). The court dismissed the Association's claims for breach of contract, negligent misrepresentation, and "interference with the performance of a contract." However, the court determined that the Association's "request for an accounting" is not subject to the CGIA and, for that reason, did not dismiss such claim in the dismissal order. Finally, the court concluded that a *Trinity* hearing was necessary to determine whether the CGIA bars the Association's breach of fiduciary duty and unjust enrichment claims.

¶ 14 Following the *Trinity* hearing, the court entered an order dismissing the Association's breach of fiduciary duty and unjust enrichment claims (the *Trinity* order). The court did not refer to the accounting claim in the *Trinity* order. At the conclusion of the

Trinity order, the court concluded that the Association's "Complaint must be dismissed under the CGIA," and that "the City is entitled to recover its reasonable attorney fees and costs" under section 13-17-201, C.R.S. 2023.

II. Analysis

¶ 15 The Association contends that the court erred by (1) failing to certify this case as a class action before ruling on whether the CGIA barred the Association's claims; (2) dismissing its breach of contract, unjust enrichment, and breach of fiduciary duty claims; (3) applying the incorrect standard under *Trinity* and its progeny by "[e]ssentially" having the Association "prove their entire case at the *Trinity* hearing"; (4) admitting expert testimony from an individual whom the defendants had not previously designated or disclosed as an expert; and (5) awarding the defendants their attorney fees and costs. We discern no basis for reversal.

A. The Conflict in Requiring Expedited Determinations of Both Whether the CGIA Bars a Plaintiff's Claims and Certification of a Class Action

¶ 16 The central issue in this appeal is whether, in a putative class action against public entities, a court must first determine whether

the CGIA bars the plaintiff's claims or decide whether a class should be certified. The Association argues that the court had no basis for deferring a ruling on the certification motion until it had resolved the applicability of the CGIA because "the elements for certification under C.R.C.P. 23(a) were present," and "the court's failure to certify the matter as a class action hindered the Association's pre-*Trinity* discovery." We agree with the court that resolution of the CGIA issues took precedence over class certification.

1. Relevant Law and Standard of Review

a. The CGIA

¶ 17 The General Assembly enacted the CGIA to limit the potential liability of public entities for compensatory damages in tort. *City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n,* 2024 CO 46, ¶ 29, ___ P.3d ___, ___. Unless the CGIA waives immunity, "[a] public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant." § 24-10-106(1), C.R.S. 2023; *see also* § 24-10-108. Public employees are similarly immune from "liability in any claim for

injury . . . which lies in tort or could lie in tort" and which arises "during the performance of [the employee's] duties and within the scope of [the employee's] employment unless the act or omission causing such injury was willful and wanton." § 24-10-118(2)(a).

¶ 18 Through the CGIA, "the General Assembly sought to protect the government from 'excessive fiscal burdens,' which include not only the costs of judgments against the government but the costs of unnecessary litigation as well." *Finnie v. Jefferson Cnty. Sch. Dist. R-1*, 79 P.3d 1253, 1260-61 (Colo. 2003) (quoting § 24-10-102, C.R.S. 2023). "Therefore, the [C]GIA acts 'to shield public entities and employees from being forced to trial or exposed to the other burdens of extended litigation, when the viability of the proceedings is dependent on the resolution of an essentially legal question.'" *Id.* at 1261 (quoting *Bresciani v. Haragan*, 968 P.2d 153, 157 (Colo. App. 1998)).

¶ 19 "[W]hether the government is immune from suit is a jurisdictional question." *Dennis*, ¶ 9, 418 P.3d at 494. Thus, "[s]overeign immunity must be dealt with at the earliest possible stage because '[t]he sovereign cannot be forced to trial if a

jurisdictional prerequisite has not been met.'" *Id.* at ¶ 10, 418 P.3d at 494 (quoting *Trinity*, 848 P.2d at 924).

¶ 20 Accordingly, if a defendant that is a public entity or a public employee asserts sovereign immunity, "the court shall suspend discovery," except for "any discovery necessary to decide the issue of sovereign immunity." § 24-10-108 (regarding actions against public entities); § 24-10-118(2.5) (regarding actions against public employees). We review orders limiting discovery to issues germane to the applicability of sovereign immunity — like other discovery rulings — for an abuse of discretion. *See Colo. Special Dists. Prop. & Liab. Pool v. Lyons*, 2012 COA 18, ¶¶ 52, 56, 277 P.3d 874, 883-84.

b. Class Actions

¶ 21 The purpose of a class action is "to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." *Mountain States Tel. & Tel. Co. v. Dist. Ct.*, 778 P.2d 667, 671 (Colo. 1989). "This purpose is realized by permitting one or more members of the class to sue or

be sued on behalf of all class members." *Id.*; *see* C.R.C.P. 23(a) (specifying the requirements for a class action). "C.R.C.P. 23 provides trial courts with a procedural tool for consolidating claims into a class action" and gives courts "ample powers" to "treat common things in common and to distinguish the distinguishable." *Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011) (quoting *Goebel v. Colo. Dep't of Insts.*, 764 P.2d 785, 794 (Colo. 1988)).

¶ 22 The court "shall determine" whether to maintain a class action "[a]s soon as practicable after the commencement of an action brought as a class action." C.R.C.P. 23(c)(1). An order certifying a class action "may be conditional, and [it] may be altered or amended before the decision on the merits." *Id.* Moreover, we are not aware of any statute, rule, or published case in this jurisdiction providing that, like a judicial determination that the CGIA bars a plaintiff's claims, a court's decision to certify, or not to certify, a class is jurisdictional.

¶ 23 Due to "the case management nature of C.R.C.P. 23," the supreme court has "consistently held that trial courts have 'a great deal of discretion in determining whether to certify a class action.'" *Jackson*, 262 P.3d at 880 (quoting *Goebel*, 764 P.2d at 794).

Accordingly, we review a court's decision on class certification for an abuse of discretion. *BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 108 (Colo. 2011). Under this standard of review, we will not disturb a court's ruling on class certification unless it is "manifestly arbitrary, unreasonable, or unfair, or when the trial court applies the incorrect legal standards." *Id.* However, if "the certification decision rests on a purely legal question of law, we review that legal issue de novo." *Id.*

2. The Court Did Not Err by Reserving Ruling on the Certification Motion Until It Had First Determined Whether the CGIA Barred the Association's Claims

¶ 24 We reject the Association's argument that the court violated C.R.C.P. 23(c)(1) by determining whether the CGIA barred the Association's claims before considering the certification motion.

¶ 25 Even assuming, as the Association argues, that sections 24-10-108 and 24-10-118(2.5) require a court to suspend *discovery* but not also suspend adjudication of a pending motion for class certification, the court possessed the discretion to defer its ruling on the certification motion until it had first resolved whether it had subject matter jurisdiction under the CGIA. The court's determination was consistent with the supreme court's admonition

that courts must address immunity under the CGIA "at the earliest possible stage" of the case. *Dennis*, ¶¶ 9-10, 418 P.3d at 494.

¶ 26 Although C.R.C.P. 23(c)(1) compels courts to determine "[a]s soon as practicable after the commencement of an action" whether a case "is to be" maintained as a class action, the court has the discretion to determine that moment in each case brought as a class action. *See Jackson*, 262 P.3d at 882 & n.5 (analogizing a court's case management discretion under C.R.C.P. 23 to a court's discretion when staying proceedings). Contrary to the Association's argument, the fact that C.R.C.P. 23(c)(1) authorizes a court to certify a class conditionally does not necessarily mean that doing so "was the appropriate next step" in this case. After all, without subject matter jurisdiction, a court lacks authority to act, and any judgment entered without subject matter jurisdiction is void. *See Black v. Black*, 2020 COA 64M, ¶ 95, 482 P.3d 460, 481; *In re Water Rts. of Columbine Assocs.*, 993 P.2d 483, 488 (Colo. 2000); *see also Associated Gov'ts of Nw. Colo. v. Colo. Pub. Utils. Comm'n*, 2012 CO 28, ¶ 30, 275 P.3d 646, 652 (defining subject matter jurisdiction as "a court's power to resolve a dispute in which it renders judgment"). A court that devoted time and effort to

determining the appropriateness of class certification, only to conclude later in the proceedings that it lacked subject matter jurisdiction because the plaintiff's claims were barred under the CGIA, would have expended judicial resources — and the parties would also have expended their resources — unnecessarily. *See Finnie*, 79 P.3d at 1260-61 (explaining that the General Assembly intended the CGIA to protect the government from excessive fiscal burdens stemming from unnecessary litigation).

¶ 27 We are also not persuaded by the Association's argument that the court's "failure to certify the class action unfairly and prejudicially limited the Association's discovery" while the case was stayed. The Association specifically asserts that the court erred by limiting the scope of its C.R.C.P. 30(b)(6) deposition of the City to the impact of the defendants' acts and omissions on the Association's members and not on other members of the putative class.

¶ 28 We do not see how the Association was unfairly prejudiced simply because the court limited discovery to issues "pertain[ing] only to the [Association's] 126 members, and not to all 1,300 [City employees] who contributed." The relevant inquiry is whether the

court precluded the Association from taking the discovery necessary to determine whether the CGIA barred the Association's claims. The Association has failed to make such a showing because it presents only the conclusory argument that the court did not allow it to conduct discovery that was "highly relevant . . . to demonstrate willful and wanton conduct." We decline to consider such an undeveloped, bald assertion. *See Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 44, 490 P.3d 598, 611, *aff'd*, 2021 CO 56, 489 P.3d 735. Moreover, in its response to the stay motion, the Association represented to the court that, "[e]ven without further discovery, [the Association] can easily demonstrate that Defendants acted willfully and wantonly in their actions."

¶ 29 In sum, the court did not abuse its discretion by reserving ruling on class certification until it had first determined whether it could exercise subject matter jurisdiction over the Association's claims under the CGIA. The court's decision to rule on the CGIA issues first was not manifestly arbitrary, unreasonable, or unfair because the immunity issues were jurisdictional, and the Association did not show that class action certification would have aided the court in determining whether it could exercise subject

matter jurisdiction over the case. (Because this conclusion rests on the facts presented, we need not consider whether, once a public entity or public employee defendant raises the issue of sovereign immunity, a court would violate the CGIA by certifying a class action before deciding whether the court lacks subject matter jurisdiction under the CGIA.)

B. Dismissal of Claims

¶ 30 The Association contends that the court erred by dismissing its claims against the City for breach of contract and unjust enrichment, and its claim against the individual defendants for breach of fiduciary duty. We agree with the court that the CGIA barred these claims.

1. Standard of Review

¶ 31 We apply the highly deferential "clearly erroneous" standard when reviewing the factual findings in an order dismissing claims under the CGIA. *Bresciani*, 968 P.2d at 159. "Once the questions of fact are resolved, we review questions of governmental immunity de novo," *Dennis*, ¶ 12, 418 P.3d at 494, including "whether the CGIA bars a particular claim," *City of Arvada ex rel. Arvada Police*

Dep't v. Denver Health & Hosp. Auth., 2017 CO 97, ¶ 14, 403 P.3d 609, 612.

2. The Association's Claims Against the City

a. Law Governing a Public Entity's Immunity Under the CGIA

¶ 32 In considering whether, for purposes of the CGIA, a claim lies in tort or could lie in tort, a court "is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff *could* argue." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1005 (Colo. 2008) (emphasis added). Because "the form of the complaint is not determinative of the claim's basis in tort or contract," the court must instead consider "the nature of the injury and the relief sought" when determining whether the CGIA bars a claim. *Id.* at 1003.

> When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA.

Id.

¶ 33 Tort obligations generally arise from duties imposed by law without regard to any agreement or contract. *See Town of Alma v.*

AZCO Constr., Inc., 10 P.3d 1256, 1262 (Colo. 2000); *Carothers v. Archuleta Cnty. Sheriff*, 159 P.3d 647, 656 (Colo. App. 2006). For example, a claim premised on the misrepresentation of facts is "fundamentally a tort theory." *Berg v. State Bd. of Agric.*, 919 P.2d 254, 259 (Colo. 1996). The supreme court has recognized that "a claim that is supported by allegations of misrepresentation or fraud is likely a claim that could lie in tort." *Robinson*, 179 P.3d at 1005.

¶ 34 "We assess the nature of the injury and the relief requested on a case-by-case basis through a close examination of the pleadings and undisputed evidence." *Id.* at 1004. Whether a breach of contract claim could have been brought as a tort — in other words, whether a claim arising from a tort duty is independent of a contractual duty — is a question of law. *See Bd. of Cnty. Comm'rs v. Colo. Dep't of Pub. Health & Env't*, 2021 CO 43, ¶ 42, 488 P.3d 1065, 1073.

b. The Association's Breach of Contract Claim Could Lie in Tort

¶ 35 After closely examining the pleadings and undisputed evidence, we agree with the court that the Association's breach of contract claim against the City is, at its essence, premised on

allegations of misrepresentation and fraud and, thus, could lie in tort.

¶ 36 The Association's amended complaint is rife with such allegations. For example, the Association alleged as follows:

- The defendants "continuously misrepresented to [program] participants and the public that a trust had been created" to hold the money they contributed to the program, and "no trust was ever created."
- The program fund "appears to have been purposefully misrepresented on the City's annual budgets."
- The City falsely represented that it maintained the program funds in a separate auditable account and comingling the program funds with monies in the City's general fund "resulted in gross underperformance or non-performance of fund investments . . . which has exacerbated the losses associated with the mismanagement of the [program] by Defendants."
- "Such conduct constitutes a breach of contract."

Moreover, the Association asserted that the questions of law or fact common to the putative class (and that predominate) included

"whether Defendants intentionally concealed that the [program] funds were not being held in trust" for participants in the program.

¶ 37 The Association attempts to disassociate these allegations from the allegations supporting its breach of contract claim. The Association makes the conclusory argument that "these are not the allegations the [breach of contract] claim was premised on" and cites the paragraphs of its breach of contract claim. But the Association disregards the statements in the "general allegations" section of its amended complaint, quoted above, that directly link the alleged breach of contract to the City's and the individual defendants' alleged misrepresentations. As counsel for the Association conceded at oral argument, the breach of contract claim must be read in conjunction with the general allegations.

¶ 38 Thus, the Association alleged that its breach of contract injury arose in large part from the City's and individual defendants' alleged misrepresentations. Specifically, the alleged injury of "withholding [program] participants from their rightful contributions and earnings" was attributable to the defendants' misrepresentations regarding where the program contributions were being held and how they were being managed, as well as the

defendants' alleged "willfull[] and wanton[]" intention to "disseminate inaccurate information" to "conceal the mismanagement and intentional misuse of the [program] fund from its participants." The Association's allegations demonstrate that its breach of contract claim was a repackaged fraudulent concealment claim and therefore sounded in tort.

¶ 39 Consequently, regardless of whether the City also allegedly breached contractual duties, "the essence of the injury here is tortious in nature and would support a claim for the breach of a duty arising in tort." *Robinson*, 179 P.3d at 1005. We therefore need not reach the Association's additional arguments regarding the existence of a contract between the members of the Association and the City, or that the City's obligations to the members arose from such a contract.

¶ 40 We also reject the Association's argument that its breach of contract claim "cannot sound in tort because the economic-loss rule extinguishes all such tort claims." The economic loss rule provides that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for

such a breach *absent* an independent duty of care under tort law." *AZCO Constr., Inc.*, 10 P.3d at 1264 (emphasis added).

¶ 41 In *Burlingame Ranch* the supreme court held that the economic loss rule plays no role in determining whether a claim against a public entity is subject to the CGIA. "Quite simply, the economic loss rule is irrelevant in the CGIA context." *Burlingame Ranch*, ¶ 60, ___ P.3d at ____. "[T]he economic loss rule has no bearing on whether the CGIA bars a plaintiff's claims" because the economic loss rule and the CGIA have "disparate origins, purposes, and operations" and "are separated by dint of their respective geneses and aims." *Id.* at ¶¶ 1-2, 5, ___ P.3d at ___.

¶ 42 The court explained that, "[w]hereas the economic loss rule serves to enforce the boundary between tort and contract law, the CGIA confers immunity to public entities even 'where there is such overlap.'" *Id.* at ¶ 44, ___ P.3d at ___ (quoting *Robinson*, 179 P.3d at 1004). "Thus, incorporating the economic loss rule into the jurisdictional analysis under the CGIA [would] improperly curb[] the scope of the immunity afforded by the statute." *Id.*

¶ 43 In addition, in *Burlingame Ranch*, the supreme court rejected the reasoning of *Casey v. Colorado Higher Education Insurance*

Benefits Alliance Trust, 2012 COA 134, 310 P.3d 196, that courts may apply the economic loss rule to determine whether a claim lies in tort or could lie in tort for purposes of the CGIA. "[O]ur CGIA jurisprudence lays out a freestanding, self-sufficient framework for applying the grant of governmental immunity. Courts, therefore, need not call upon the economic loss rule to determine whether the CGIA bars a plaintiff's claims." *Burlingame Ranch*, ¶ 60, ___ P.3d at ___.

¶ 44 For all these reasons, the court correctly dismissed the Association's breach of contract claim against the City as barred by the CGIA.

c. The Association's Unjust Enrichment Claim Could Lie in Tort

¶ 45 The Association asserted its unjust enrichment claim against the City as the alternative to its breach of contract claim. "Unjust enrichment is a form of quasi-contract or contract implied in law that does not depend in any way upon a promise or privity between the parties." *Robinson*, 179 P.3d at 1007. Like a claim for breach of contract, unjust enrichment can "cut[] across both contract and tort law." *Id.* We must look to the factual basis underlying the claim to determine whether it sounds in tort or contract, assessing

the nature of the injury and the relief requested on a case-by-case basis. *See id.*

¶ 46 To prevail on its unjust enrichment claim, the Association would need to prove that, (1) at the Association members' expense, (2) the City received a benefit (3) under circumstances that would make it unjust for the City to retain the benefit without paying it to the Association members. *See id.* In its amended complaint, the Association alleged that the City was unjustly enriched because it (1) "received contributions from the Association . . . members to fund the [program] through bi-weekly deductions from their paychecks"; (2) the City "has failed to pay the Association . . . members the premiums and benefits owed under the [program]; and (3) the City "accepted the benefit under such circumstances that it would be inequitable for [the City] to retain the benefit without payment of its value."

¶ 47 The Association did not specify why, under the circumstances, it would be inequitable for the City to retain the payments the subject employees made to participate in the program. But like its breach of contract claim, the Association's unjust enrichment claim cannot be read in isolation from the extensive misrepresentation-

type allegations peppered throughout the general allegations section of its amended complaint. Thus, the injustice prong relies on allegations that

- the defendants made "blatant misrepresentations" in which "they promised that [program] funds were being held in Trust and managed by a Trust Board";
- the defendants "have known for years that the [program] was insolvent and unviable but have intentionally withheld and concealed such information from [program] participants, presumably to utilize [program] funds for other City projects/needs"; and
- the defendants "should have reasonably expected that these promises and misrepresentations would induce action by plan participants, or their forbearance."

¶ 48 Matthew Mecum's testimony at the *Trinity* hearing further highlights why the Association's alleged injury lies in tort. Mecum is an Association member who "ultimately disenrolled from the [program]" and decided to "forego the contributions that he had already paid into the [program] since 2016" because he could not

afford the "large lump sum payment" he needed to make if he wished to remain in the program.

¶ 49 Regardless of whether Mecum "suffered or will suffer in some way after making decades long contributions to the [program]" after "reasonably rel[ying] on these promises," the manner in which the Association pleaded its unjust enrichment claim (as well as its other claims) attributes Mecum's injuries not to a broken promise, but to the defendants' representations that "have been misleading [program] participants . . . for at least a decade."

¶ 50 The Association relies on *City of Arvada ex rel. Arvada Police Department*, ¶ 42, 403 P.3d at 617, for the proposition that courts "will not shoehorn contractual facts into a tort theory." But *City of Arvada* is distinguishable. In that case, the supreme court rejected the defendant's "implausible hypothetical" that the plaintiff hospital *could have* argued that the city misrepresented its intention to pay for the subject patient's care and thereby induced the hospital to care for the patient. *Id.* at ¶ 41, 403 P.3d at 617. The court explained that the hospital could not have argued misrepresentation because federal law *required* the hospital to treat the patient, and "the facts do not disclose misrepresentation." *Id.*

It thus concluded that the claim "more closely resembles one sounding in contract and cannot lie in tort." *Id.* at ¶ 42, 403 P.3d at 617.

¶ 51 By contrast, it is not "implausible" that the Association could argue misrepresentation in this case — it *expressly* argued misrepresentation. As explained above, the Association pleaded in the general allegations section of its amended complaint that its members were victims of the City's misrepresentations and other tortious acts described in considerable detail.

¶ 52 We need look no further than its own pleadings to conclude that the Association's unjust enrichment claim "lies in tort or could lie in tort for the purposes of the CGIA." *Robinson*, 179 P.3d at 1008.

3. The Association's Claim for Breach of Fiduciary Duty Against the Individual Defendants

¶ 53 The Association contends that the district court erred by dismissing its breach of fiduciary duty claim against the individual defendants because (1) the court did not analyze whether a breach of fiduciary duty claim premised on section 24-18-103, C.R.S. 2023 — the public trust statute — is subject to the CGIA; (2) it presented

"ample evidence . . . at the *Trinity* hearing to maintain [the breach of fiduciary duty claim] on other grounds"; and (3) the Association proved that the individual defendants acted willfully or wantonly. We are not persuaded for three reasons.

¶ 54 First, section 24-18-103(2) provides that "[t]he district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people." The Association does not cite any authority for the proposition that, despite this language, a private entity may also file a civil action for an alleged violation of the statute. Moreover, the statute further provides that "[a]ny moneys collected in such actions shall be paid to the general fund of the state or local government." § 24-18-103(2). This language makes clear that a private actor may not assert a claim under the statute to recover monies from a "public officer" or other person identified in section 24-18-103(1).

¶ 55 Second, even if the Association had the right to bring an action for an alleged violation of section 24-18-103(1), a breach of fiduciary duty claim premised on section 24-18-103 would be subject to the CGIA because it "lies in tort or could lie in tort." § 24-10-118(1). Generally, a "breach of fiduciary duty cause of action is a tort to

remedy economic harm suffered by one party due to a breach of duties owed in a fiduciary relationship." *Accident & Inj. Med. Specialists, P.C. v. Mintz*, 2012 CO 50, ¶ 21, 279 P.3d 658, 663. We see no reason why a claim based on an alleged violation of section 24-18-103 is any different. That statute merely provides that holding public employment "is a public trust," § 24-18-103(1), and it establishes that "a breach of the public trust constitutes a breach of fiduciary duty." *Gessler v. Smith*, 2018 CO 48, ¶ 31, 419 P.3d 964, 972.

¶ 56 "[E]ven if a duty is imposed upon the State pursuant to a statute or the common law, the State is liable for a breach of that duty 'only if first it is determined that sovereign immunity is waived for the activity in question.'" *Yonker v. Thompson*, 939 P.2d 530, 535 (Colo. App. 1997) (quoting *State Dep't of Highways v. Mountain States Tel. & Tel. Co.*, 869 P.2d 1289, 1292 (Colo. 1994)). Because the Association has shown no such waiver, its breach of fiduciary duty claim is subject to the CGIA regardless of whether it arises from a breach of the duty established by section 24-18-103 or a breach of implied fiduciary duties. *See* § 24-10-118(1) (imposing requirements and limitations on "[a]ny action against a public

employee, whether brought pursuant to . . . the common law[] *or otherwise*, which lies in tort or could lie in tort”) (emphasis added).

¶ 57 Third, we agree with the court that the Association’s breach of fiduciary duty claim fails because it is time barred. Under the CGIA, a court lacks jurisdiction to consider a claim against a public entity or official if the plaintiff did not provide notice to such entity or official within 182 days “after the date of the discovery of the injury, regardless of whether the [plaintiff] then knew all of the elements of a claim or of a cause of action for such injury.” § 24-10-109(1), C.R.S. 2023; *see also Trinity*, 848 P.2d at 923.

¶ 58 The CGIA’s

> use of the term ‘discovery’ in the context of tortious injury implicates the ‘discovery rule’ of tort law which provides that a statute of limitations does not start to run until the time when the plaintiff knew or, through the exercise of reasonable diligence, should have known (or, alternatively, discovered or should have discovered), the wrongful act.

Trinity, 848 P.2d at 923.

¶ 59 The parties agree that, under section 24-10-109(1), the Association’s claims arising from any injury that the Association’s members discovered before March 1, 2019 — one hundred eighty-

two days before the date of the Association's amended notice of claim — would be untimely. In its written closing argument following the *Trinity* hearing, the Association alleged that the individual defendants breached their fiduciary duties by "(1) failing to manage the [program], (2) failing to maintain adequate and accurate records for the [program], (3) failing to timely provide information to [program] participants, (4) failing to properly invest the [program] funds, and (5) comingling the [program] funds." The court found that the Association members "discovered the alleged injury, even if they did not know all of the elements of their claim, as of 2017 at least." For this reason, it concluded that the Association's breach of fiduciary duty claim was untimely.

¶ 60 The record supports the court's finding. The court primarily relied on the Association members' admission at the *Trinity* hearing that, on July 28, 2017, they received an email from Hazelhurst to the program participants discussing the program's precarious financial position. Among other things, the email notified the Association members of the following:

- "Since inception the solvency of the [program] has been a concern."

- “In spite of the recent changes to contributions and retiree premiums, fund reserves have continued to decline.”
- In May 2016, the City Council discussed strategies to address the solvency issues. “Council agreed to the formation of a trust so that the retiree health insurance fund assets could be separately reported and to allow for less restrictive investment options,” but “the Trust has not been officially formed.”
- The results of an actuarial study “revealed that the total unfunded liability as of 12/31/16 is $10.86 million with an annual required contribution of $524,963.”
- “Given that information, the Board decided not to hire a financial advisor or establish a trust until more information from the actuary was provided.”
- “It has become clear that the benefit cannot be sustained under the current funding model and that significant changes must occur. Those changes could include anything from increased funding of the benefit by active

> employees and retirees to phasing out the benefit altogether."

¶ 61 Additionally, the Association's amended notice of claim itself shows that its members had discovered the facts concerning their injuries by January 2019. For example, the Association alleged in the amended notice that Hazelhurst, Welch, and the City engaged in actions that "constitute[d] a breach of [their] fiduciary duty owed . . . to the plan participants" by attempting "to initiate a 'mandatory irrevocable election' program *in January 2019*." (Emphasis added.)

¶ 62 Further, the Association's amended notice of claim shows that its members had been complaining about the City's alleged inadequate recordkeeping and information-sharing to participants in the program as early as January 2019. Specifically, the Association asserted, based on January and February 2019 emails, that "the City has been unable to produce a 'Plan Document' which sets forth the responsibilities of the City as the Plan Manager; where and how [program] funds are to be held, invested or disbursed; and how [program] funds are to be disbursed in the event of Plan failure." In support of this assertion, the Association

attached emails between police union board member Stan Ancell and Hazelhurst. In a January 31, 2019, email, Ancell told Hazelhurst that the City's response to his Colorado Open Records Act request for documents relating to the program led him to believe "there may be no governing plan document."

¶ 63 We reject the Association's argument that the court's finding that the breach of fiduciary duty claim was untimely "was manifestly unreasonable because testimony was presented that although changes to the [program] were beginning to be discussed in 2017-2018, those proposed changes were not finalized until after March of 2019." Even if the Association members did not know the damage element of their breach of fiduciary claim until after March 2019, the record shows that they "knew or, through the exercise of reasonable diligence, should have known . . . *the wrongful act[s]*" underlying the claim before that time. *Trinity*, 848 P.2d at 923. Thus, the Association's argument regarding the timeliness of its breach of fiduciary duty claim fails.

¶ 64 Moreover, the Association provides no legal authority to support its assertion that "it is unlikely the [Association] would have standing to pursue a claim until these changes were finalized."

We reject the Association's standing argument in the absence of a developed argument or a citation to supporting authority. *See Sinclair Transp. Co. v. Sandberg*, 2014 COA 76M, ¶ 74, 350 P.3d 924, 936 (explaining that the court of appeals will not consider a bald legal proposition presented without argument or development).

¶ 65 Thus, the court's finding that the Association "knew, or should have known, the factual allegations in support of [the breach of fiduciary duty] claim before March 1, 2019," is not clearly erroneous, and we discern no basis to reverse its dismissal of such claim. *See Adams Cnty. Hous. Auth. v. Panzlau*, 2022 COA 148, ¶ 39, 527 P.3d 440, 448 ("When reviewing a jurisdictional issue pertaining to governmental immunity resting on disputed facts, we employ 'the clearly erroneous standard of review in considering the trial court's findings of jurisdictional fact.'" (quoting *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 798 (Colo. 2000))).

C. The Legal Standard the Court Applied in Analyzing the Applicability of the CGIA

¶ 66 The Association contends that the court "applied the incorrect legal standard in the *Trinity* order by requiring that the Association

prove causation in the tort sense and not the minimal causal connection that is required." We are not persuaded.

1. Relevant Law and Standard of Review

¶ 67 The CGIA requires trial courts to "resolve all issues pertaining to sovereign immunity prior to trial, including factual issues, regardless of whether those issues pertain to jurisdiction." *Martinez v. Est. of Bleck*, 2016 CO 58, ¶ 27, 379 P.3d 315, 322. One of those issues is whether a public employee's conduct was "willful and wanton." § 24-10-118(2)(a) ("A public employee shall be immune from liability in any claim for injury . . . which lies in tort or could lie in tort . . . unless the act or omission causing such injury was willful and wanton . . . ."). "For willful and wanton conduct to subject a public employee to liability for a tort claim, the conduct must be more than merely negligent; the conduct must exhibit a conscious disregard of the danger to another." *Duke v. Gunnison Cnty. Sheriff's Off.*, 2019 COA 170, ¶ 31, 456 P.3d 38, 44.

¶ 68 By contrast, a court does not decide issues of negligence or causation at the *Trinity* hearing stage because those issues are distinct from immunity. *See City of Colorado Springs v. Powell*, 48 P.3d 561, 567 (Colo. 2002); *see also Dennis*, ¶ 11, 418 P.3d at 494

("[B]ecause *Trinity* hearings are limited in nature, and because tort concepts are naturally subjective, the district court should not fully resolve the issue of *whether* the government has committed negligence; rather, the court should only satisfy itself that it has the ability to hear the case.").

2. The Court Did Not Decide Causation

¶ 69 We disagree with the Association's characterization of the court's analysis as "requiring the Association prove, i.e., establish causation and damages." The Association points to three specific statements in the *Trinity* order allegedly showing how the court went astray when analyzing the breach of fiduciary duty claim:

- "[T]he court determines that the [Association] has not shown that funds went missing or that funds were wrongfully comingled."
- "The [Association] also failed to prove that [program] money was improperly comingled with City [funds], or that accounting practices for the [program] monies separately from other City held money was improper or harmful to the [program]."

- "[I]t is significant to the Court that no eligible person has been denied [program] benefits."

¶ 70 The court made these statements in the context of analyzing whether the Association "demonstrated that any of the Individual Defendants willfully and wantonly breached a fiduciary duty." Although the court's findings may overlap with the issue of whether the individual defendants caused the Association members' injuries, the findings are also relevant to determining whether the individual defendants acted willfully and wantonly by exhibiting "a conscious disregard of the danger to another." *Duke*, ¶ 31, 456 P.3d at 44. As part of its CGIA analysis, the court was required to determine prior to trial whether the individual defendants engaged in willful and wanton conduct. *See Martinez*, ¶ 27, 379 P.3d at 322.

¶ 71 Relying on *Tidwell v. City & County of Denver*, the Association asserts that plaintiffs are not required "to show that [their] injuries were 'caused by' the public entity's conduct in the tort sense" when responding to a defendant's immunity argument. 83 P.3d 75, 86 (Colo. 2003). While this may be true, the Association fails to recognize that the court did not decide causation issues in the *Trinity* order. As explained above, the court focused on whether the

Association had shown that the individual defendants engaged in willful and wanton conduct. Moreover, *Tidwell* addressed the burden a plaintiff must satisfy when seeking to prove a waiver of immunity under the CGIA for "'injuries resulting from' conduct enumerated by subparts (a) through ([j]) [of section 24-10-106(1)]." *Tidwell*, 83 P.3d at 86. *Tidwell*'s waiver analysis is inapposite because the Association never alleged that its injuries "resulted from" the conduct enumerated in section 24-10-106(1)(a)-(j). Regardless of the standard courts must use when analyzing causation at the *Trinity* stage (if they analyze it at all), the court here did not analyze causation.

¶ 72 We also reject the Association's argument that the court's *Trinity* order was "unjust" because the court did not permit the Association to take discovery related to its "damages and records reflecting the contributions/payments out of the [program]." Specifically, in its written closing argument following the *Trinity* hearing, the Association asserted that the defendants did not produce "various documents" that are "highly pertinent to the claims raised," including investment records of a third-party

investment company, backup records for a general ledger report, and the City's annual audit reports.

¶ 73 However, in granting the stay motion, the court allowed the parties to conduct discovery "on the issue of sovereign immunity." As noted above, this necessarily encompassed discovery into the individual defendants' allegedly willful and wanton conduct. As we note in Part II.A.2 above, the Association fails to articulate, apart from conclusory assertions, how the discovery limits the court did impose precluded the Association from submitting discovery requests exploring the individual defendants' allegedly willful and wanton conduct.

¶ 74 In any event, the court's analysis of whether the individual defendants willfully and wantonly breached a fiduciary duty was of no consequence because the court determined — correctly — that the breach of fiduciary duty claim was time barred.

¶ 75 Thus, we hold that the court did not apply an incorrect legal standard in reviewing the Association's breach of fiduciary duty claim.

D. The Court's Admission of Undisclosed Expert Testimony

¶ 76 The Association contends that the court erred by permitting the defense witness Tyson Holman to provide expert testimony at the *Trinity* hearing because the City had not disclosed him as an expert. Holman, a certified public accountant, was the lead partner of the accounting firm that conducted the City's audits. The Association asserts that the court improperly relied on Holman's previously undisclosed expert testimony that the City consistently had "clean" audits; that, in Holman's opinion, the City's Finance Department had "above average" audits; and that Holman had no concerns regarding the City's investment policies.

¶ 77 "[I]n determining whether testimony is lay testimony under CRE 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion." *Venalonzo v. People*, 2017 CO 9, ¶ 23, 388 P.3d 868, 875.

> If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

Id. Pursuant to C.R.C.P. 26(a)(2)(A), parties must disclose "the identity of any person who may present evidence at trial" as an expert. A party that fails to disclose such information "without substantial justification" may not present "the nondisclosed evidence at trial unless the failure to disclose is harmless." *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 597 (Colo. App. 2007).

¶ 78 Even if the court erred by relying on Holman's previously undisclosed testimony based on his specialized experience, knowledge, or training, we conclude that such reliance was harmless. Although the Association broadly argues that the court "put weight in Mr. Holman's testimony to support the dismissal of the Association's claims," the only portion of the court's analysis in the *Trinity* order that refers to his testimony is the section addressing "whether the individual defendants willfully and wantonly breached any alleged fiduciary duty." As we explain in Part II.B.3 above, the court properly dismissed the Association's breach of fiduciary duty claim as time barred and thus did not need to reach whether the individual defendants' conduct was willful and wanton. Moreover, the court did not rely solely on Holman's

testimony in adjudicating the breach of fiduciary duty claim. In its ruling on such claim, the court also noted that it relied on the testimony of Jay Valentine, the City's Director of General Services, which the Association did not oppose.

¶ 79 The record does not indicate that the court relied on Holman's testimony when deciding whether the Association's unjust enrichment claim against the City lies or could lie in tort and, in any event, we do not discern how the testimony would have been relevant for that purpose. Similarly, the court did not rely on Holman's testimony in dismissing the breach of contract claim before the court conducted the *Trinity* hearing.

¶ 80 Accordingly, we hold that reversing the court's dismissal of the Association's amended complaint is unwarranted based on the court's admission of Holman's testimony.

E. Attorney Fees and Costs

¶ 81 In their motion to dismiss, the defendants requested their attorney fees and costs pursuant to section 13-17-201. In the *Trinity* order, the court concluded that "the Complaint is dismissed for lack of subject matter jurisdiction" and found that the "City is entitled to recover its reasonable attorney fees and costs" because

the court had dismissed the Association's "complaint" under the CGIA. It ordered the defendants to file a request for an award of attorney fees and costs within thirty-five days.

¶ 82 The Association filed a motion for clarification that the Association's "claim for accounting was not dismissed" or, in the alternative, "if the Court dismissed the claim for accounting in the [*Trinity*] Order, further clarification of the Order is also warranted as the Order does not state such." The defendants opposed the motion, arguing that "the court's order dismissing [the Association's] amended complaint unambiguously dismisses [the Association's] request for an accounting."

¶ 83 The defendants subsequently filed a motion specifying that they incurred $190,998.90 in attorney fees and $12,853.14 in costs, to which the defendants said they were entitled because the court had dismissed all of the Association's claims. *See* § 13-17-201(1) ("In all actions brought as a result of . . . 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."); *Smith v. Town of Snowmass Village*, 919 P.2d 868, 873 (Colo. App. 1996) (An award of attorney fees under section 13-17-201 "is mandatory when a trial court dismisses an action under the [CGIA] for lack of subject matter jurisdiction."). An attorney fee award is proper under section 13-17-201 only if the court dismisses all of the plaintiff's claims. *See Jaffe v. City & Cnty. of Denver*, 15 P.3d 806, 814 (Colo. App. 2000) ("[B]ecause the entire action against plaintiffs was not dismissed pursuant to C.R.C.P. 12(b), we conclude the trial court erred in awarding attorney fees under § 13-17-201.").

¶ 84 The court did not rule on the motion for clarification or the defendants' motion for an award of their attorney fees and costs.

¶ 85 Although the court indeed said in the *Trinity* order that it was dismissing "the Complaint," we agree with the Association that the record is unclear whether the court intended to dismiss the Association's accounting claim, together with the Association's other claims. (Even if the court did not dismiss the accounting claim, the court's determination concerning sovereign immunity under the CGIA was a final judgment subject to interlocutory appeal. *See* § 24-10-108; § 24-10-118(2.5), C.R.S. 2023.) In its

dismissal order, the court noted that a request for an accounting is not a claim subject to the CGIA, but the *Trinity* order did not mention the accounting claim at all except in a recitation of the claims alleged in the Association's amended complaint.

¶ 86 In any event, the court never addressed the fundamental issue of whether a prayer for an accounting can be pleaded as a discrete claim for relief. The parties do not direct us to any reported Colorado case holding that a party may, or may not, plead a separate claim for an accounting, and we are not aware of one. (Defendants cite an unpublished federal case, *Allred v. Innova Emergency Medical Associates, P.C.*, No. 18-cv-03097, 2020 WL 3259249, at *6 (D. Colo. June 16, 2020) (unpublished opinion), to support their argument that, under Colorado law, a request for an accounting is not a standalone claim. But the case that *Allred* cites in support of this statement — *Virdanco, Inc. v. MTS International*, 820 P.2d 352, 354 (Colo. App. 1991) — does not contain such a sweeping assertion. Rather, in *Virdanco*, the division merely stated that "[a]n accounting claim, though generally equitable in nature, here was simply a means by which to arrive at an accurate calculation of compensatory damages." *Id.*)

¶ 87 On appeal, the Association contends that the court erred by deciding that the defendants were entitled to an award of their attorney fees and costs under section 13-17-201 because, it alleges, the court did not dismiss its accounting claim; therefore, the court did not dismiss its entire case. However, because the court did not determine the amount of attorney fees and costs to which the defendants were entitled, no attorney fee order is ripe for appellate review. *See Kreft v. Adolph Coors Co.*, 170 P.3d 854, 859 (Colo. App. 2007). We therefore dismiss the portion of the appeal challenging the court's decision to award attorney fees and costs to the defendants. *See Guy v. Whitsitt*, 2020 COA 93, ¶ 34, 469 P.3d 546, 555.

¶ 88 The defendants also requested an award of their appellate attorney fees and costs, pursuant to section 13-17-201.

¶ 89 We remand the case with directions for the court to rule on the motion for clarification, and to enter final orders on the defendants' pending motion for an award of attorney fees and costs and on their request for an award of their appellate attorney fees and costs. The court's ruling on the motion for an award of attorney fees and costs will inform its decision on the defendants' request for appellate

attorney fees and costs. *See Dubray v. Intertribal Bison Coop.*, 192 P.3d 604, 608 (Colo. App. 2008) (noting that the defendants were entitled to an award of appellate attorney fees under section 13-17-201 "[b]ecause they were successful in defending [the] appeal"); *Walker v. Van Laningham*, 148 P.3d 391, 398 (Colo. App. 2006) ("Because [the appellees] were awarded attorney fees by the district court pursuant to § 13-17-201, they are entitled to reasonable attorney fees for defending the appeal."). Lastly, we express no opinion on the merits of the motion for clarification or any other motion that may still be pending before the court.

III. Disposition

¶ 90 The Association's challenge to the court's award of attorney fees and costs to the defendants is dismissed, the judgment is affirmed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE SCHUTZ and JUDGE BERNARD concur.