COLORADO COURT OF APPEALS 2 East 14th Ave., Denver, CO 80203 Appeal from El Paso County District Court Hon. Eric Bentley, Case No. 2023CV31616	DATE FILED May 16, 2024 4:42 PM
Plaintiff-Appellee: **JAIMI J. MOSTELLAR** v. **Defendant-Appellant:** **CITY OF COLORADO SPRINGS**	**▲COURT USE ONLY▲**
Attorney for Plaintiff-Appellee: Mark H. Kane, #11355 KANE LAW FIRM, P.C. 911 S. 8th Street, Suite 100 Colorado Springs, CO 80905 Phone: 719-471-1650 E-mail: mark@kanelawpc.com	Case Number: 2023CA1908

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, 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) or C.A.R. 28.1(g).

☑ It contains 1,789 words (principal brief does not exceed 9,500 words).

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

☑ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, 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.

❑ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/Mark H. Kane
Mark H. Kane, #11355

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES . . . . iv, v

I. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

II. SUMMARY OF THE ARGUMENT 1

III. ARGUMENT 2

A. The District Court's Order Finding Plaintiff's Notice Of Claim Dated May 30, 2023 Was Timely Under C.R.S. § 24-10-109(1) 2

1. Standard of Review 2

2. Plaintiff complied with the notice requirement under C.R.S. § 24-10-109(1) 3

3. The CGIA does not bar Plaintiff's premises liability claim nor negligence claims 7

IV. ATTORNEY'S FEES 8

V. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Awad v. Breeze, 129 P.3d 1039 (Colo. App. 2005) 5

Barham v. Scalia, 928 P.2d 1381 (Colo. App. 1996) 5

Cassidy v. Reider, 851 P.2d 286 (Colo. App. 1993) 5

Dickie v. Mabin, 101 P.3d 1126 (Colo. App. 2004) 5, 6

DiPaolo v. Boulder Valley School Dist.,
902 P.2d 439 (Colo. App. 1995) 2

Peterson v. Arapahoe County Sheriff,
72 P.3d 440 (Colo. App. 2003) 6

Regional Transp. Dist. v. Lopez, 916 P.2d 1187 (Colo. 1996) 6

Shandy v. Lunceford, 886 P.2d 319 (Colo.App. 1994) 2

State v. Young, 665 P.2d 108 (Colo. 1983) 3, 4, 7, 8

Trinity *Broadcasting of Denver, Inc. v. City of Westminster*,
848 P.2d 916, 925-27 (Colo. 1993) 2, 3, 4, 7

Woodsmall v. Regional Transp. Dist.,
800 P.2d 63 (Colo. 1990) 5, 6

Other Authorities

C.R.S. § 13-21-115 2

C.R.S. § 24-10-109 . . . . passim

C.R.C.P. 12(b)(1) 2, 3, 8

C.A.R. 38(b) 8

I. Counter-statement of the Issues Presented for Review

Whether the district court's order denying Defendant Colorado Springs' motion to dismiss, on the basis proper notice was timely under C.R.S. §24-10-109, should be affirmed.

II. Summary of the Argument

In order to comply with the requirements of C.R.S. § 24-10-109, Plaintiff must demonstrate reasonable diligence in advancing her claim. Once Plaintiff had demonstrated reasonable diligence, notice was proper to the City of Colorado Springs ("City") pursuant to *Young* and *Trinity*. The General Assembly's 1986 amendment to the Colorado Governmental Immunity Act ("CGIA") does not require strict compliance. Rather it requires substantial compliance pursuant to *Woodsmall*. The district court properly held Plaintiff substantial complied with the requirements of the CGIA, according to *Lopez* and *Woodsmall*, by providing notice to the City within 182 days after discovery of the intergovernmental agreement with Manitou Springs.

The content of Plaintiff's notice under C.R.S. § 24-10-109 was never at issue. The City argues Plaintiff was required to file notice of her claim within 182 days after she was injured. However, *Young* and *Trinity* allow Plaintiff to file notice of her

claim 182 days of the date she discovered the City was potentially liable for her injuries pursuant to C.R.S. § 13-21-115.

III. ARGUMENT

A. The District Court's Order Finding Plaintiff's Notice Of Claim Dated May 30, 2023 Was Timely Under C.R.S. § 24-10-109(1).

1. Standard of Review.

Plaintiff disagrees with the City's statements concerning standard of review. A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). The standard is far less stringent than the standard for summary judgment and it allows the trial court to receive and hear evidence, then issue its findings even when based on disputed facts. *See Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925-27 (Colo. 1993).

"Appellate review of such a factual determination is on a clearly erroneous basis." *Trinity*, at 925. The determination of "reasonable diligence" is a question of fact. Also, the "clearly erroneous" standard is a highly deferential standard where the court's findings are only found clearly erroneous if those findings are not supported by adequate or competent evidence in the record. *See DiPaolo v. Boulder Valley School Dist.*, 902 P.2d 439, 441 (Colo. App. 1995) and *Shandy v. Lunceford*, 886

P.2d 319, note 11 at 322 (Colo.App. 1994). "Under Rule 12(b)(1), the court is 'free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Trinity*, at 925. If all relevant evidence has been presented to the trial court, the application of the standard under C.R.C.P. 12(b)(1) is appropriate. The district court considered the evidence and found Plaintiff met the relatively lenient burden of demonstrating that notice to the City of Colorado Springs was timely.

2. Plaintiff complied with the notice requirement under C.R.S. § 24-10-109(1).

Colorado's Governmental Immunity Act ("CGIA") requires a person claiming to have suffered an injury by a public entity to file written notice within 182 days after the discovery of the injury. In *Trinity*, the court stated:

> The Governmental Immunity Act does not define "discovery". However, the Act'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 (emphasis added). The *Trinity* court in analyzing *State v. Young*, 665 P.2d 108 (Colo. 1983) states, "[w]e implied, as we now hold, that a plaintiff has a duty of reasonable **diligence** to determine the basic and material facts

underlying a potential claim against a government entity. From the information before us, it appears that Trinity was not at all **diligent** prior to April or May 1989." *Trinity,* at 928 (emphasis added). The district court also in its ruling stated,

> The *Trinity* Court repeated *Young's* holding ("there must be a reasonable opportunity for a claimant to discover the basic and material facts underlying a claim before she is duty-bound to give the statutory notice required by section 24-10-109(1)"); held that "a plaintiff has a duty of reasonable diligence to determine the basic and material facts underlying a potential claim against a governmental entity"; and then went on to distinguish the case on its facts. *Id*. at 928 (finding that Trinity had not been diligent).

CF, pp 51-52. The *Trinity* court does not require strict compliance with the CGIA's notice requirement of 182 days, only a claimant's due diligence to discover the elements of their claim. In this case, the district court found Plaintiff was reasonably diligent in investigating her claim. At that point, *Young* became controlling in this case and the CGIA's "182-notice period as to Colorado Springs did not begin to run until Manitou Springs informed her of the intergovernmental agreement that, in its view, made Colorado Springs, and not it, the responsible party." CF, p 51.

The issue here is compliance with the CGIA. "Compliance" means substantial not strict compliance. The 1986 amendment did not intend to create a standard of

absolute or literal compliance with the notice requirement, but rather intended a degree of compliance that was considerably more than minimal but less than absolute. The only fair characterization of such a degree is substantial compliance. *See Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63 (Colo. 1990); *Cassidy v. Reider*, 851 P.2d 286 (Colo. App. 1993); *Barham v. Scalia*, 928 P.2d 1381 (Colo. App. 1996); *Dickie v. Mabin*, 101 P.3d 1126 (Colo. App. 2004).

In determining whether a claimant has substantially complied with the notice requirement, a court may consider whether and to what extent the public entity has been adversely affected in its ability to defend against the claim by reason of any omission or error in the notice. *See Woodsmall*, 800 P.2d 63; *Cassidy*, 851 P.2d 286; *Dickie*, 101 P.3d 1126; *Awad v. Breeze*, 129 P.3d 1039 (Colo. App. 2005). In this case, there is no allegation by the City that the notice was in any way inadequate. Nor does the City argue that Plaintiff knew or should have known about the intergovernmental agreement between Manitou Springs and Colorado Springs.

The district court found that Plaintiff was reasonably diligent in investigating her claim and giving notice to Manitou Springs within 131 days of the accident. CF, p 49. The City has not demonstrated or even suggested that the intergovernmental agreement regarding busing with Manitou Springs was widely known or that Plaintiff

with reasonable diligence could have discovered such an agreement. CF, pp 51-52. The district court determined the Plaintiff was reasonably diligent in her claim and upon discovering Manitou Springs and the City had an intergovernmental agreement, promptly placed the City on notice of its potential liability. CF, p 52.

The City improperly relies on *Regional Transp. Dist. v. Lopez*, 916 P.2d 1187 (Colo. 1996). *Lopez* is not on point. The strict compliance required in that case concerned only the method of sending the notice, which was done by regular mail not certified mail. *Lopez* also discusses *Woodsmall*, noting strict compliance with the notice requirements for content purposes was not mandated by the General Assembly in its amendment to the CGIA in 1986. Rather, the court held that the proper standard was substantial compliance. *Lopez,* at 1190.

Whether a claimant has satisfied the requirements of subsection (1) presents a mixed question of law and fact. *Peterson v. Arapahoe County Sheriff*, 72 P.3d 440 (Colo. App. 2003); *Dickie*, 101 P.3d 1126. The factual determination by the district court must be shown to have been clearly erroneous to be overruled. The City has not met this burden, thus its appeal fails.

3. The CGIA does not bar Plaintiff's premises liability claim nor negligence claims.

The City does not cite any authority to support its position that the district court relied on outdated law. As the district court noted, *Young*, 665 P.2d 108, is squarely on point on this issue and nowhere does the court in *Trinity* say it is overruling or disapproving of *Young*. CF, p 51.

It is undisputed that Plaintiff properly notified the City of Manitou Springs ("Manitou Springs") under the CGIA after being injured within its city limits. Plaintiff then notified the City within 40 days upon being notified by Manitou Springs of the intergovernmental agreement. CF, p 37. The *Trinity* court held a "plaintiff has a duty of **reasonable diligence** to determine the basic and material facts underlying a potential claim against a government entity." *Trinity*, 848 P.2d at 928 (emphasis added). The district court found the City had not demonstrated (or even suggested) that its intergovernmental agreement regarding busing with Manitou Springs was widely known or that Plaintiff, with reasonable diligence, could or should have discovered it. CF, p 51. There must be a reasonable opportunity for a claimant to discovery the basic and material facts underlying a claim before the claimant is duty-

bound to give the statutory notice required by section 24-10-109(1). *See Young*, 665 P.2d at 111.

IV. ATTORNEY'S FEES

Plaintiff opposes the City's request for attorney's fees as the district court correctly denied the City's motion to dismiss under C.R.C.P. 12(b)(1) and that ruling should be upheld.

Further, Plaintiff requests her attorney's fees and costs for this appeal.

C.A.R. 38(b) provides:

> If the appellate court determines that an appeal or cross-appeal is frivolous, it may award damages it deems appropriate, including attorney fees, and single or double costs to the appellee or cross-appellee.

The City's appeal is frivolous because the City can advance no rational argument to support its claim that Plaintiff was not reasonably diligent in advancing her claim and the City was not timely placed on notice pursuant to the CGIA.

V. CONCLUSION

The standard of review in this case is "clearly erroneous". That is, if the district court's ruling is supported by adequate or competent evidence, the ruling will stand. The district court ruled that Plaintiff was reasonably diligent in advancing her

claim. By so ruling, compliance with CGIA is then analyzed in terms of substantial compliance. The *Trinity* and *Young* cases provide guidance. Specifically, *Young* allows a tolling of the CGIA until the identity of the tortfeasor in this case, the City of Colorado Springs, is discovered. The facts in this case demonstrate that notice under the CGIA was timely and appropriate. The ruling of the district court is both consistent and in compliance with the CGIA and should be affirmed.

Respectfully submitted this 16th day of May, 2024.

KANE LAW FIRM, P.C.

/s/ Mark H. Kane
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Answer Brief was electronically filed via Colorado Courts E-Filing this 16th day of May, 2024 and served on the following:

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In accordance with C.R.C.P. 121, §1-26(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.