

<p>COLORADO COURT OF APPEALS</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED October 1, 2024 11:54 AM</p>
<p>Appeal from:</p> <p>Douglas County District Court, Case No. 2023CV30570 District Court Judge: The Hon. Andrew Baum</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiff/Appellant : OBED RIVERA</p> <p>v.</p> <p>Defendant/Appellee : PAUL R. FORT</p>	<p>Court of Appeals Case Number: 2024CA856</p>
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<p>ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g)(3): It contains 4,999 words.

The brief complies with C.A.R. 28(k) It contains, under a separate heading, a statement of whether Appellee agrees with Appellant's statement 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 and C.A.R. 32.

*Duly signed original on file at the office of
the undersigned pursuant to C.A.R. 30(f)*

/s/ Taylor A. Clapp
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ISSUES PRESENTED FOR REVIEW

Pursuant to C.A.R. 28(b), Appellee Paul R. Fort believes the following issues are presented for review:

1. Whether C.R.S. § 13-80-102(1)(a)'s two-year statute of limitations barred Appellant Obed Rivera's claims?
2. Whether Mr. Rivera's filing of 2021CV30695 tolled the applicable statute of limitations?
3. Whether the trial court correctly declined to apply the doctrine of equitable tolling in this case?

STATEMENT OF THE CASE

Appellant Obed Rivera allegedly suffered a house fire at his residence on May 2, 2020 in Parker, Colorado. Mr. Rivera alleged that Appellee Paul Fort and a company owned by his brother, T.R. Fort LLC, were responsible and instituted a lawsuit against both: Case No. 2021CV30695. Mr. Rivera filed the complaint before the expiration of the two-year statute of limitations under C.R.S. § 13-80-102(1)(a). Despite multiple extensions, Mr. Rivera failed to personally serve Mr. Fort and voluntarily dismissed him from the case. The statute of limitations for Mr. Rivera's claims against Mr. Fort expired on May 2, 2022.

On July 27, 2023, over a year after the expiration of the applicable statute of limitations, Mr. Rivera re-filed the same claims with the same predicate facts as 2021CV30695 against Mr. Fort in this case: Case No. 2023CV30570. Mr. Fort moved to dismiss, arguing that the statute of limitations barred plaintiff's claims. Mr. Rivera argued that the filing of his first lawsuit tolled the statute of limitations or that equitable tolling should apply. The trial court considered and rejected both of Mr. Rivera's arguments and dismissed the underlying case on the grounds that it was barred by the statute of limitations. Upon de novo review of this case, this Court should affirm.

STATEMENT OF FACTS

A. The Prior Action: 2021CV30695.

Mr. Rivera initiated 2021CV30695 by filing a complaint in the District Court for Douglas County against Mr. Fort and another defendant, T.R. Fort LLC. CF, p 61. Mr. Rivera asserted a claim of negligence against Mr. Fort for faulty plumbing work that allegedly resulted in a fire at his residence. CF, pp 61-63. Mr. Rivera alleged that the fire at his home occurred on May 2, 2020. CF, p 62. Mr. Rivera filed his complaint on September 30, 2021. CF, p 62. Mr. Rivera had difficulty obtaining personal service on Mr. Fort and requested several enlargements of time for service. CF, pp 47-8; 57-59.

Being unable to serve Mr. Fort, Mr. Rivera voluntarily moved to dismiss him from 2021CV30695 without prejudice on May 26, 2022. CF, pp 41-3. Subsequently, Mr. Rivera asked the trial court to re-open the case against Mr. Fort, as he had learned Mr. Fort's residential address. CF, pp 32-34. The trial court granted Mr. Rivera's request on the condition that Mr. Rivera serve Mr. Fort within 21 days, noting that it had given Mr. Rivera 18 months and four extensions of time to serve Mr. Fort. CF, p 28. Based on the register of actions for 2021CV30695, it appears that Mr. Rivera never served Mr. Fort, as no return of service was filed.

B. Mr. Rivera Files this Action.

After the conclusion of 2021CV30695—and over a year after the applicable statute of limitations had expired—Mr. Rivera filed a second complaint against Mr. Fort in this case on July 27, 2023. CF, pp 1-4. Mr. Rivera alleged the same facts and claims against Mr. Fort in the new complaint. CF, pp 1-4. Mr. Rivera achieved service on Mr. Fort on July 23, 2023.

C. Mr. Fort Moves to Dismiss on the Grounds that the Statute of Limitations Expired.

Mr. Fort moved to dismiss Mr. Rivera’s action pursuant to C.R.C.P. 12(b)(5) on the grounds that C.R.S. § 13-80-102(1)(a) required Mr. Rivera to file his claims within two years of his cause of action accruing. CF, p 13. Mr. Fort argued that Mr. Rivera’s cause of action accrued on May 2, 2022, two years after the fire at his home, which Mr. Rivera alleged was caused by defective plumbing work performed by Mr. Fort. CF, p 13. Mr. Rivera commenced this action on July 27, 2023, more than a year after the limitations period had expired, and thus Mr. Fort argued that his complaint was time-barred. CF, p 14.

Mr. Rivera filed his response and advanced two arguments. CF, p 69. First, Mr. Rivera argued that the statute of limitations was tolled by his filing of 2021CV30695 and that Mr. Fort’s dismissal from that case did not amount to a dismissal of the entire action. CF, pp 74-5. Second, Mr. Rivera argued that the statute of limitations should be equitably tolled. CF, p 75. Mr. Rivera argued that equitable tolling of the statute of limitations was appropriate because Mr. Fort had notice of

the claims against him and he “managed to avoid formal service.” CF, pp 74-5. The basis of this argument was that Mr. Fort had communicated with TR Fort LLC’s counsel, executed an affidavit, and was served with a trial subpoena in the prior action. CF, p 75.

In his reply, Mr. Fort countered that, absent a specific statutory provision, the filing of a case does not toll the statute of limitations. CF, p 87. Mr. Fort further stated that, even if 2021CV30695 tolled the statute of limitations, it was tolled only from September 30, 2021 to May 26, 2022—a period of 238 days. CF, p 87. Thus, the statute of limitations would have expired on January 19, 2023, and Mr. Rivera’s case still would be untimely because it was not filed until July 27, 2023. CF, 87.

Mr. Fort also argued that equitable tolling did not apply in this case. CF, p 89. He stated that Mr. Rivera failed to show reasonable grounds for why—after four extensions, 18 months, and having Mr. Fort’s phone number and residential address (the same address where Mr. Fort was served with a trial subpoena)—he could not serve Mr. Fort. CF, p 89. Mr. Fort argued that the circumstances did not amount to an extraordinary situation that prevented Mr. Rivera from serving Mr. Fort. CF, p 89. Moreover, Mr. Fort argued that Mr. Rivera’s arguments that Mr. Fort was attempting to evade service were without merit and offered as a “smoke screen” to cloud the fact that he slept on his own rights. *Id.*

D. The Trial Court's Order Dismissing Mr. Rivera's Action.

On February 27th, 2024, the trial court dismissed Mr. Rivera's action, granting Mr. Fort's Motion to dismiss. CF. 103. The trial court determined that, absent a specific statutory provision, Colorado law does not allow for the tolling of a statute of limitations during the pendency of a prior action. Thus, the trial court found that 2021CV30695 did not toll the statute of limitations. *Id.* Further, the trial court determined that equitable tolling of the statute of limitations did not apply, as Mr. Rivera showed no wrongful conduct on behalf of Mr. Fort that prevented him from asserting his claims against Mr. Fort in a timely manner. *Id.* Additionally, the trial court also found that Mr. Rivera did not show exceptional circumstances that prevented him from filing his claims despite diligent efforts. *Id.*

The trial court amended its Order of Dismissal upon motion from Mr. Fort to allow for recover of attorney's fees pursuant to C.R.S. § 13-17-201(1). CF. 108.

Mr. Rivera now brings this appeal.

STATEMENT OF THE ARGUMENT

As Mr. Fort prefaced his brief in his Statement of the Case, this appeal is simple and straightforward. The simple reality is that Mr. Rivera slept on his rights and attempted to file the same claim twice against Mr. Fort. However, C.R.S. § 13-80-102(1)(a) does not allow for Mr. Rivera to have two (or multiple) bites at the proverbial apple. Statutes of limitation exist for a reason: to prevent the very thing that happened in this case by allowing for plaintiffs to file stale or time-barred claims. Mr. Rivera had more than ample opportunity to serve Mr. Fort in 2021CV30695 and failed to do so. Thus, when he refiled and served Mr. Fort *again* in this case, it was clearly outside of the bounds of C.R.S. § 13-80-102(1)(a)'s two-year statute of limitations for negligence actions.

This Court, under de novo review, should determine that the trial court correctly dismissed Mr. Rivera's action under C.R.C.P. 12(b)(5) as being time-barred. The record clearly reflects that Mr. Rivera's cause of action accrued on May 2, 2022. Thus, his filing of this case was time-barred by well over a year. Moreover, this Court should conclude that equitable tolling does not apply in this case, as there are no exceptional circumstances that warrant tolling the statute of limitations. Mr. Rivera had 18-months, 4 extensions of time, and knew Mr. Fort's whereabouts during the pendency of 2021CV30695, including having his home address available after the trial court in 2021CV30695 gave him one final shot at service. As equitable

tolling does not apply, this Court should affirm dismissal of Mr. Rivera's cause of action.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED MR. RIVERA'S CAUSE OF ACTION AS TIME-BARRED BY THE STATUTE OF LIMITATIONS.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant a C.R.C.P. 12(b)(5) motion to dismiss. *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007). In evaluation a 12(b)(5) motion to dismiss, this Court accepts as true the factual allegations in the complaint and, viewing them in the light most favorable to the plaintiff, determine whether the complaint states a plausible claim for relief. *Barnes v. State Farm Mut. Auto. Ins. Co.*, 2021 COA 89, ¶ 24. Motions under C.R.C.P. 12(b)(5) should only be granted when the plaintiff's allegations cannot support a claim as a matter of law. *Wagner*, 166 P.3d at 307.

Generally, a defendant can only raise a statute of limitations defense under C.R.C.P. 12(b)(5) where the bare allegations of the complaint reveal the action was not brought within the required statutory period. *Wagner*, 166 P.3d at 307.

B. Preservation of the Issue.

Mr. Fort agrees that Mr. Rivera adequately preserved this issue for appeal.

C. Argument

It is undisputed and abundantly clear that Mr. Rivera filed his claim beyond the applicable statute of limitations. Mr. Rivera did not and does not dispute that his claim accrued on May 2, 2020. Therefore, per C.R.S. § 13-80-102(1)(a), his time to file any claims against Mr. Rivera for negligence ran on May 2, 2022. However, Mr. Rivera's arguments that the statute of limitations is tolled during the pendency of a case is unsupported by Colorado law.

Before, the trial court, Mr. Rivera argued under *Mascitelli v. Giuliano & Sons Coal Co.*, 402 P.2d 192 (Colo. 1965), that his filing of 2021CV30695 tolled the applicable statute of limitations. However, *Mascitelli* is inapposite to the posture of this case. *Mascitelli* involved whether a workman's compensation claimant's petition for increased benefits was untimely. *Mascitelli*, 402 P.2d at 192. In *Mascitelli*, the claimant (Mascitelli) was injured in a coal mining accident and was granted a 35% disability. *Id.* 6-years after the accident, he petitioned the Industrial Commission to increase his disability to 50%. *Id.* He wrote his letter, which the Colorado Supreme Court deemed a petition, on March 3, 1962 and his accident was on March 5, 1956. *Id.* Therefore, under the workman's compensation statute in effect at the time, the commission could review a petition within 6-years of an accident. *Id.* at 193. The court determined that Mascitelli's petition effectively stopped the statute of limitations, as the purpose of *that* statute was to allow the commission to

make equitable adjustments to disability awards where time has shown a changed condition. *Id.*

This case has no similarity to *Mascitelli*. It involves a concrete statute of limitations to a general negligence claim, not to a workman's compensation statute in effect in 1965. The law in Colorado states that, absent a specific statutory provision, there is no tolling of the statute of limitations during the pendency of a prior action. *SMLL, LLC v. Peak Nat'l Bank*, 111 P.3d 563, 565 (Colo. App. 2005). This Court's decision in *SMLL, LLC* is instructive. In *SMLL, LLC*, SMLL filed claims against a variety of construction professionals related to issues with the construction and financing of its townhome project. *SMLL, LLC*, 111 P.3d at 564. Two days before trial, one of the defendants moved the trial court to dismiss the case on the grounds that SMLL lacked capacity under C.R.C.P. 17 to go forward with the lawsuit, as its status as a limited liability company had been suspended for failing to file its annual report. *Id.* The trial court agreed and dismissed the claims against all parties without prejudice. *Id.*

Two months later, SMLL filed another claim after it was reinstated. *Id.* The defendants moved to dismiss, arguing that SMLL's claims were time-barred. *Id.* SMLL argued under the remedial revival statute its claims could be timely. *Id.* The trial court disagreed and dismissed SMLL's claims in the second lawsuit. This Court affirmed, noting that the first case did not toll the specific statute of limitations and

the remedial revival statute only applied to lack of jurisdiction or improper venue. *Id.* at 565.

Critically, Mr. Rivera never pointed to, and does not point out on appeal, any specific statutory provisions that toll C.R.S. § 13-80-102(1)(a) for failing to serve a defendant. Nor can Mr. Fort point this Court to any specific provision. Therefore, the pendency of 2021CV30695 did not toll the two-year statute of limitations for a negligence claim.

The purpose of the statute of limitations is to promote justice, discourage unnecessary delay, and preclude the prosecution of stale claims. *Gunderson v. Weidner Holdings, LLC*, 2019 COA 186, ¶ 9. It would be manifestly unjust to permit individuals, like Mr. Rivera, to file successive lawsuits in order to “toll” the statute of limitations when they are unable to achieve personal service as required by C.R.C.P. 4. If the Court were to accept that argument, statutes of limitation would be meaningless. A plaintiff could have a theoretically infinite amount of time to not only achieve service on a defendant, but also beat the statute of limitations by continuously filing lawsuits where the first lawsuit would “toll” the statute of limitations until a defendant was served. That argument renders C.R.C.P. 4’s requirement to personally serve a defendant and C.R.S. §§ 13-80-101 et. seq utterly

meaningless and leads to an illogical or absurd result.¹ See e.g. *Bilderback v. McNabb*, 2020 COA 133, ¶ 14 (stating “we will not adopt an interpretation leading to an illogical or absurd result”).

The simple truth is that Mr. Rivera filed his second lawsuit against Mr. Fort after the statute of limitations ran as prescribed in C.R.S. § 13-80-102(1)(a) and is thus time-barred. Under de novo review, this Court should reach the same conclusion and affirm the trial court’s dismissal of Mr. Rivera’s action.

II. THE TRIAL COURT CORRECTLY DECLINED TO EQUITABLY TOLL THE STATUTE OF LIMITATIONS.

A. Standard of Review

This Court reviews de novo a trial court’s decision to grant a C.R.C.P. 12(b)(5) motion to dismiss. *Wagner v. Grange Ins. Ass’n*, 166 P.3d 304, 307 (Colo.

¹ Assuming *arguendo*, that the filing of a lawsuit tolled the applicable statute of limitations, the proverbial clock would begin to run a particular defendant was dismissed in this case. Mr. Rivera voluntarily dismissed Mr. Fort from 2021CV30695 on May 26th, 2022 after filing his lawsuit on September 30th, 2021. Therefore, Mr. Rivera only added essentially 238 days for which he could have re-filed any claims against Mr. Fort and the clock began to run on May 26th, 2022. Therefore, Mr. Rivera was required to file any claims against Mr. Fort by January 19th 2023. As Mr. Rivera waited until July 27th, 2023 to file his new case against Mr. Fort, it was well time-barred. Further, any argument that the clock would only run when a *case* instead of a particular *defendant* was dismissed is ludicrous for the same reasons Mr. Fort argued in the body of this Answer Brief. It would essentially allow a plaintiff to file case after case with the same defendants and if a plaintiff could not serve a particular defendant, he or she could simply dismiss them from the action and then refile a new action against that defendant until they were served. Such an argument renders the statute of limitations and C.R.C.P. 4 meaningless.

App. 2007). In evaluation a 12(b)(5) motion to dismiss, this Court accepts as true the factual allegations in the complaint and, viewing them in the light most favorable to the plaintiff, determine whether the complaint states a plausible claim for relief. *Barnes v. State Farm Mut. Auto. Ins. Co.*, 2021 COA 89, ¶ 24. Motions under C.R.C.P. 12(b)(5) should only be granted when the plaintiff's allegations cannot support a claim as a matter of law. *Wagner*, 166 P.3d at 307.

Generally, a defendant can only raise a statute of limitations defense under C.R.C.P. 12(b)(5) where the bare allegations of the complaint reveal the action was not brought within the required statutory period. *Wagner*, 166 P.3d at 307. Once raised, the plaintiff bears the burden to establish the necessary requirements for equitable tolling. *See e.g. Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007) (stating “once the statute of limitations has been raised as a defense, the burden is on the plaintiff to establish the defendant’s actions prevented him or her from filing a timely claim”).

B. Preservation of the Issue.

Mr. Fort agrees that Mr. Rivera adequately preserved this issue for review.

C. Argument.

Statutes of limitation recognize that eventual repose creates desirable security and stability in human affairs. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996). By penalizing unreasonable delay, statutes of limitation

compel litigants to pursue their claims in a timely manner. *Id.* In this case, Mr. Rivera argues that the trial court erred by not equitably tolling the statute of limitations. However, de novo review by this Court shows that the trial court correctly declined to equitably toll the statute of limitations. The record in this case shows that, in 2021CV30695, Mr. Rivera had over 18-months, was granted several extensions by the trial court in that case to serve Mr. Fort, and had Mr. Fort's contact information and personal address and an opportunity to serve Mr. Fort at that address. All the while, Mr. Rivera never served Mr. Fort before (and subsequently after) the statute of limitations ran on his claims against Mr. Fort.

At times, equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice. *Dean Witter*, 911 P.2d at 1096. Our Supreme Court in *Dean Witter* recognized two situations where a statute of limitations may be equitably tolled. The first is where a defendant's wrongful conduct prevented the plaintiff from asserting his or claims in a timely manner. *See Id.* at 1097 (finding the equitable tolling in cases where a defendant assaulted a plaintiff and incapacitated them, a defendant fraudulently concealed facts, or withheld key information needed for filing a claim). The second is where extraordinary circumstances make it impossible for the plaintiff to file his or her claims within the statutory period. *See Id.* (finding extraordinary circumstances in situations where courthouses were closed due to the American Civil War, the

erroneous enforcement of an unconstitutional statement which barred the plaintiff from filing claims in a timely manner, or a plaintiff's internment in a Japan during World War II). The rationale behind finding extraordinary circumstances is that it would be unfair to penalize the plaintiff for circumstances beyond his or her control, so long as the plaintiff makes a good faith effort to pursue the claims when possible. *Id.*

The Colorado Supreme Court's reasoning in *Dean Witter* is also instructive. In *Dean Witter*, the plaintiff Laurence Hartman and his business partner opened a joint bank account with defendant Dean Witter Reynolds, Inc. ("Dean Witter") for a real estate transaction. *Dean Witter*, 911 P.2d at 1095. As part of the deposit, both Hartman and his business partner executed a letter of instruction with Dean Witter that required both parties authorize a withdrawal. *Id.* Hartman and his business partner found themselves embroiled in a lawsuit and part of that lawsuit involved the partner allegedly fraudulently withdrawing the deposit from Dean Witter. Nine years after filing suit against his partner and three-years after the suit was concluded after multiple appeals, Hartman sued Dean Witter and another bank related to the withdrawal of the deposit by his partner. *Id.* Both Dean Witter and the bank argued the statute of limitations barred Hartman's claims. *Id.* Hartman argued that the statute of limitations should be equitably tolled because of his lawsuit against his partner and that he was precluded from asserting his claims against Dean Witter

because the trial court initially determined that the did not have an interest in the escrow funds. *Id.* The trial court agreed with Dean Witter and did not apply equitable tolling and granted Dean Witter’s motion for summary judgment. *Id.* The Court of Appeals reversed, determining that the statute of limitations should have been equitably tolled. *Id.*

The Colorado Supreme Court reversed. The court determined that there was no evidence that Dean Witter acted in any way that impeded Hartman from bringing an action against Dean Witter in the original lawsuit against his partner. *Id.* at 1097. The court further determined that Hartman knew that Dean Witter allowed the money to be withdrawn in violation of the letter of instruction when he filed his suit against his partner. *Id.* The court found that Hartman could have brought his claims against Dean Witter and his failure to do so created no reason in equity for tolling the statute of limitations. *Id.* The court concluded that Hartman could have brought a separate action against Dean Witter and attempted to join them for multiple reasons, and instead he slept on his rights. *Id.* at 1098-9.

Much of the court’s reasoning in *Dean Witter* is persuasive here and defeats Mr. Rivera’s arguments. Mr. Rivera does not argue that exceptional circumstances prevented him from serving Mr. Fort. Rather, he devotes his brief to desperately arguing that Mr. Fort’s “wrongful attempt to evade service” warrants equitably tolling the applicable statute of limitations. *Opening Brief*, pgs. 14-18. These

arguments are unavailing for several reasons. First, they raise facts not put before the trial court. Nowhere did Mr. Rivera argue before the trial court that he made 19 attempts to try and serve Mr. Fort. Further, Mr. Rivera presented no evidence before the trial court his attempts at service, such as presenting affidavits of non-service. Therefore, he cannot raise those facts on appeal and has waived the ability to argue those facts. *See e.g. U.S. v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (stating that appellate courts will not consider material outside the record and facts not presented before the trial court are not considered). Second, those are the fanciful arguments of his counsel, not any actual facts that support any supposed effort to evade service. *See e.g. McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008) (explaining, in the context of a C.R.C.P. 56 Motion for Summary Judgment, a party cannot raise a dispute of material fact through the arguments or statements by attorneys). As the record is devoid of any argument that supports Mr. Rivera's arguments that Mr. Fort "actively evaded" service of process.

Moreover, our courts have repeatedly held that the inability to locate a named defendant, no matter how extensive efforts may be, is not grounds to equitably toll a statute of limitations. *Malm v. Villegas*, 2015 CO 4, ¶ 17; *McGee v. Hardina*, 140 P.3d 165, 168 (Colo. App. 2005). Additionally, Mr. Rivera fails to explain why he could not serve Mr. Fort when the trial court in 2021CV30695 granted him a last extension when he had Mr. Fort's residential address (which was the same address

he was able to serve him with a trial subpoena). Mr. Rivera's arguments also ring flat when Mr. Fort *voluntarily agreed* to be served in this case. It is illogical to argue that Mr. Fort attempted to evade service in the prior case when he agreed to be served for this case. Lastly, Mr. Rivera makes no other argument that he utilized other attempts to effectuate service or make any efforts for appropriate substituted service as allowed by Rule 4 *such as mailing the complaint to his home address*. C.R.C.P. 4(f) (emphasis added).

As the Colorado Supreme Court explained in *Dean Witter*, the inability to effectuate service is not wrongful conduct that warrants equitably tolling the statute of limitations. The conduct must be of such nature that is tantamount to fraudulent concealment, deliberately withholding required information, assaulting somebody that prevents them from filing a lawsuit, or other such evidence of misconduct. *Dean Witter*, 911 P.2d at 1093. Mr. Rivera's reliance on *Garret v. Arrowhead Improv. Ass'n*, 826 P.2d 850 (Colo. 1992) is misplaced. In *Garrett*, our Supreme Court determined that a company's failure to disclose as statutorily required medical report was grounds to equitably toll a statute of limitations. *Garrett*, 826 P.2d at 854-5. There is nothing similar in this case. In Colorado (or anywhere else) there is no requirement that an individual being served with a lawsuit disclose any such information to allow him to be served. It is incumbent on a party attempting to serve a defendant to diligently discover such information and effectuate service.

Further, there is absolutely no record before this Court that supports any conclusion that Mr. Fort acted in a fraudulent manner, concealed his identity, or attempted to flee the jurisdiction of the Court that would have made service impossible. Rather, it appears that Mr. Rivera slept on his own rights and employed an inept process server. He had full knowledge and awareness of how to locate and serve Mr. Fort, had 18-months, and four separate extensions by which to achieve service. He also offers *no* explanation of how he could not achieve service when the trial court in 2021CV30695 permitted a final shot at serving Mr. Fort when he had Mr. Fort's residential address. Additionally, Mr. Rivera offers no explanation of why he waited over a year after he voluntarily dismissed Mr. Fort to file another action to achieve service. There are simply no exceptional circumstances that prevented Mr. Rivera from affecting service on Mr. Fort that were beyond his control.

The trial court correctly determined that no exceptional circumstances were found and this Court should conclude the same. Mr. Fort respectfully argues that this Court should affirm the dismissal on the grounds that the statute of limitations was not equitably tolled.

III. MR. FORT REQUESTS HIS ATTORNEY'S FEES AND COSTS FOR DEFENDING THIS APPEAL.

Pursuant to C.A.R. 39.1 and C.R.S. § 13-17-201(1), Mr. Fort requests this Court award him his attorney's fees and costs on appeal. C.A.R. 39.1 requires Mr. Fort to articulate a legal and factual basis for an award of attorney's fees. Before the

trial court, Mr. Fort argued that he was entitled to attorney's fees and costs under C.R.S. § 13-17-201(1) as Mr. Rivera's cause of action was dismissed on a C.R.C.P. 12(b)(5) motion. The trial court agreed and awarded Mr. Fort attorney's fees and costs.

A party who successfully defends a dismissal order under C.R.C.P. 12(b) is also entitled to recover reasonable attorney fees incurred on appeal. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1988); *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005). Therefore, should this Court affirm the trial court's dismissal of Mr. Rivera's cause of action, Mr. Fort respectfully requests this Court award him his reasonable attorney's fees as well.

CONCLUSION

As this Court can tell, this case is fairly straightforward. Mr. Rivera filed claims against Mr. Fort in 2021CV30695, within the statute of limitations. Because Mr. Rivera never served Mr. Fort, Mr. Rivera voluntarily dismissed him after the statute of limitations expired on May 2, 2022. Over a year later, Mr. Rivera filed the same claims against Mr. Fort, even though the statute of limitations had expired. Under de novo review, this Court should affirm the trial court's dismissal of Mr. Rivera's cause of action against Mr. Fort as being barred by the applicable statute of limitations, C.R.S. § 13-80-102(1)(a). Further, this Court should conclude that the

filing of Mr. Rivera's first action did toll the statute of limitations nor does the doctrine of equitable tolling apply in this case.

WHEREFORE, Appellee-Defendant Paul R. Fort respectfully requests this Court affirm the trial court's dismissal of appellant-plaintiff Obed Rivera's cause of action, award him his reasonable attorney's fees and costs, and for any other relief the Court deems just and proper.

Respectfully submitted this 1st day of October, 2024

JACHIMIAK PETERSON KUMMER LLC

/s/ Taylor A. Clapp

Andrew D. Peterson, No. 33081

Taylor A. Clapp, No. 52800

Attorneys for Defendant-Appelle Paul R. Fort.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2024, a true and correct copy of the foregoing **ANSWER BRIEF** was electronically filed with the Court and served via Colorado Courts E-Filing to all counsel of record:

*Pursuant to C.R.C.P. 121 §1-26 the
duly signed original remains on file at*

*the office of Jachimiak Peterson
Kummer, LLC*

/s/ Taylor A. Clapp