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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

District Court, City and County of Denver
The Honorable Robert L. McGahey, Jr.
Case No. 2019CV32714

Plaintiff/Appellant: ELIZABETH MORIN,

v.

Defendants/Appellees: ISS FACILITY SERVICES, INC., and CITY AND COUNTY OF DENVER

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Case No.: 2020CA216

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).

_X_ It contains 4,931 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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.

_X_ **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/Malcolm S. Mead
Signature of attorney or party

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STATEMENT OF ISSUES

When the period of limitations expires on a Saturday, may Plaintiff file her complaint on the following Monday?

Does this Court have jurisdiction to consider the order of dismissal, when Plaintiff filed her notice of appeal more than 84 days after the trial court dismissed her complaint while reserving a question concerning the amount of attorney fees to award Defendants under C.R.S. §13-17-201 for time spent defending this case?

STATEMENT OF FACTS

The facts are simple and undisputed. The City and County of Denver ("Denver") owns a parcel of real estate consisting of land and commercial buildings known as Denver International Airport ("DIA"). (CF 2) Denver contracted with ISS Facilities Services, Inc. ("ISS") to provide janitorial services at DIA, in particular floor cleaning services. (CF 2, 3)

On July 13, 2017, Elizabeth Morin ("Plaintiff") slipped and fell while walking along a concourse at DIA. (CF 36, 37, 42; Opening Brief at 8, 12) On July 15, 2019, Plaintiff filed a complaint against Denver and ISS ("Defendants"), asserting claims for premises liability and negligence, but omitting any reference to the date of the July 13, 2017 accident. (CF 1-8) Defendants filed a motion to dismiss, arguing that the complaint was barred by the two-year statute of

limitations set out in C.R.S. §13-80-102(1)(a). (CF 26-32) Defendants also requested an award of attorney fees under C.R.S. §13-17-201. (CF 32-34)

When responding to the motion to dismiss, Plaintiff agreed that her claim arose on July 13, 2017; that C.R.S. §13-80-102(1)(a) was the applicable statute of limitations, allowing her two years to file her complaint; and that she did not file her complaint until July 15, 2019. (CF 42; *see also* Opening Brief at 8) Nonetheless, Plaintiff argued that because July 13, 2019, was a Saturday, she was allowed to file her complaint on the following Monday. (CF 41-44)

On October 29, 2019, the trial court issued an order granting Defendants' motion to dismiss. (CF 53-55; the "October Order") The court held that the period of limitations expired on Saturday July 13, 2019, and Plaintiff was not allowed to file her complaint on the following Monday. (CF 54) The court also found that Defendants were entitled to recover their attorney fees under C.R.S. §13-17-201 and directed Defendants to file a motion for attorney fees within 14 days. (CF 55)

On November 12, 2019, Defendants filed their motion for attorney fees, seeking to recover $4,000 for the fees and costs incurred in defending this action. (CF 56-66) Plaintiff did not respond to this motion. (*See* CF 68) On December 20, 2019, the court awarded Defendants $4,000 in fees and costs. (CF 68-71; the

"December Order") Plaintiff filed her notice of appeal on February 3, 2020. (CF 72-78) Plaintiff did not seek an extension of time to file her notice of appeal.

SUMMARY OF ARGUMENT

Plaintiff undisputedly filed her complaint two days after the period of limitations expired, barring her claim. In ***Williams v. Crop Prod. Servs.***, 361 P.3d 1075 (Colo. App. 2015), a division of this Court held that the statute of limitations is measured by calendar years, requiring that an action be filed on or before the statutorily specified anniversary date; here, two years after the accident. The statute of limitations requires an action be filed on or before the anniversary date and does not extend time when the anniversary date happens to fall on a weekend. This Court should not abrogate the plain language of the statute, wherein the General Assembly has said that a tort action must be filed by the second anniversary of the tort. It is undisputed that Plaintiff failed to do so here, and the trial court therefore properly applied ***Williams*** to dismiss her claims.

The statute upon which Plaintiff relies to allow a weekend extension, C.R.S. §24-11-110, does not apply to the courts, nor has the General Assembly (or any court) applied it to extend a statute of limitations as Plaintiff asks the Court to do here. Even if that statute applied as Plaintiff contends, it would require that Denver District Court be closed on the anniversary date. C.R.C.P. 77(a), reflecting

the modern realities of electronic filing, specifies that courts "shall be deemed always open for the purposes of filing any pleading . . ." This Court should follow the plain language of the statute of limitations and the ***Williams*** holding, reject Plaintiff's attempt to apply an unrelated statute, and uphold the trial court's order finding Plaintiff's claims time-barred.

Alternatively, this Court does not have jurisdiction to consider the October Order. Plaintiff filed her notice of appeal more than 84 days after the trial court dismissed her complaint. Although the court reserved ruling on the amount of attorney fees to award Defendants under C.R.S. §13-17-201, an issue concerning fees incurred in defending the action does not make an otherwise final order non-final. Nor can the doctrines of excusable neglect or unique circumstances salvage this appeal, because Plaintiff did not seek an extension of time and did not file her notice of appeal within 35 days after the initial period to appeal had expired.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFF DID NOT FILE HER COMPLAINT ON TIME.

Standard of Review: Defendants agree that an order granting a motion to dismiss is reviewed *de novo* on appeal. ***Hemman Management Services v. Mediacell, Inc***., 176 P.3d 856, 859 (Colo. App. 2007); ***Williams*** at 1076.

Defendants also agree that matters of statutory interpretation are reviewed *de novo*. (Opening Brief at 10-11)

Raised and Ruled On: Defendants moved to dismiss the complaint on the basis of the statute of limitations. (CF 26-33, 47-52) The court accepted Defendants' argument and dismissed the complaint as barred by the statute of limitations. (CF 53-55)

A. The Undisputed Facts Show that the Complaint Is Barred by the Statute of Limitations.

Statutes of limitation are enacted to promote justice, prevent unnecessary delay, and preclude stale claims. ***Gunderson v. Weidner Holdings***, 2019 COA 186 at ¶9. If the basic facts are undisputed, "then the issue of whether the statute of limitations bars a particular claim may be decided as a matter of law." ***Trigg v. State Farm Mut. Auto. Ins. Co.***, 129 P.3d 1099, 1101 (Colo. App. 2005), *criticized in part on other grounds in* ***Rider v. State Farm Mut. Auto. Ins.***, 205 P.3d 519, 522 (Colo. App. 2009). "[T]he defense of limitations may be raised by a motion to dismiss when the time alleged in the complaint shows that the action was not brought within the statutory period." ***Wasinger v. Reid***, 705 P.2d 533, 534 (Colo. App. 1985), *superseded in part by statute as explained in* ***Gunderson*** at ¶24, n.5

Colorado law provides a two-year limitations period in which to commence civil actions for torts, including claims of negligence and premises liability. "The following civil actions, regardless of theory upon which suit is brought, or against whom suit is brought, must be commenced within two years after the cause of action accrues, and not thereafter: (a) Tort actions, including but not limited to actions for negligence." C.R.S. § 13-80-102(1)(a).

Here, Plaintiff allegedly slipped and fell on July 13, 2017. (CF 36, 37, 42; Opening Brief at 8, 12). This fact is not disputed. Nor is it disputed that Plaintiff filed her complaint on July 15, 2019 – two days after the period of limitations had expired. Thus, Plaintiff's complaint is barred by the statute of limitations, and the court correctly granted Defendants' motion to dismiss.

B. The Trial Court Properly Relied on ***Williams*** To Find That Plaintiff's Claims are Time-Barred.

A division of this Court has previously rejected an effort to contravene the plain language of the statute of limitations to save a complaint filed a day late. While ***Williams*** rejected the application of C.R.C.P. 6(a)(1)[1] to extend the tort claims statute of limitations, ***Williams'*** fundamental holding — that a cause of action must be filed on or before the statutorily specified anniversary date

[1] Plaintiff concedes that C.R.C.P. 6(a)(1) does not apply to extend the statute of limitations in this case. (Opening Brief at 12-13)

following accrual of the action — was properly applied by the trial court to reject Plaintiff's novel argument and determine that her claims were time barred. ***Williams*** at 1078-1079. This Court should follow ***Williams*** and uphold the trial court's order.

In ***Williams***, it was undisputed that a terminated employee's wrongful discharge claim sounded in tort and was subject to the two-year statute of limitations. ***Id.*** at 1077. The terminated employee claimed, however, that under C.R.C.P. 6(a)(1), the day of his termination (October 7, 2011) is not counted, thereby extending the statute of limitations to file his complaint until two years and one day after his termination (October 8, 2013). ***Id.*** This Court rejected Plaintiff's contention for two reasons: (1) it was contrary to the plain language of the statute of limitations; and (2) although a prior version of C.R.C.P. 6(a)(1) purported to extend statutes of limitation in the manner suggested by Plaintiff, that language had been removed from the rule and, importantly here, the Court questioned whether the Rules of Civil Procedure could be properly applied to abrogate the plain language of the statute of limitations by extending it. ***Id.*** at 1077-1078.

The ***Williams*** Court emphasized the plain language of the statute of limitations, beginning its analysis by noting that "actions 'must be commenced

within two years after the cause of action accrues, and not thereafter." ***Id.*** at 1077 (quoting §13-80-102(1), C.R.S.) (emphasis in original). The Court held that:

> the word 'year' as used in Colorado statutes 'means a calendar year' and we conclude that the statute therefore precludes a method of computation of years that would require counting of days. Thus, a cause of action must be filed on or before the statutorily specified anniversary date following accrual of the action.

Id. at 1077-1078 (quoting § 2-4-104, C.R.S.). The Court noted that this "simple method of computation eliminates uncertainty caused by not knowing which days to count and which to leave out of the computation, and how to calculate periods that include 'leap years' containing 366 days." ***Id.*** at 1078 (citations omitted). The Court concluded that "the action had to be filed no later than the second anniversary of accrual date" (October 7, not October 8) and upheld the trial court's order dismissing the action as untimely filed. ***Id.*** at 1079.

Although application of C.R.C.P. 6(a)(1) is not at issue here, the ***Williams*** Court's reasoning concerning the amendment of that rule reinforces its fundamental holding — that the General Assembly has plainly said tort claims must be filed within two years after accrual — and is therefore instructive here. The Court held that the removal of prior language in C.R.C.P. 6(a)(1) purportedly applying that provision to statutes of limitation time computations was appropriate given that "Colorado's rules [unlike federal rules of civil procedure] are not subject

to legislative approval, and a court rule governing statutory construction creates an issue of separation of powers between the branches of government." ***Id.*** at 1078-1079 (citations omitted). In reaching that conclusion, the Court noted that it was "questionable whether the supreme court, by creating a rule of civil procedure, would be able to effectively amend a statute passed by the General Assembly. . ." ***Id.*** at 1078 (citations omitted).

The General Assembly enacted a two-year statute of limitations for tort claims, requiring that actions be filed on or before the second anniversary of the accrual date. The accrual date is not in dispute in this case, nor is the fact that Plaintiff filed the action after the accrual date. There is no provision in the statute of limitations or elsewhere extending the period of limitations if it happens to expire on a weekend. As ***Williams*** makes clear, had the General Assembly wished to extend the statute of limitations when the anniversary date falls on a weekend, it could have done so. The General Assembly has not, and the tortured construction of unrelated statutes urged by Plaintiff would result in exactly the type of overreach ***Williams*** cautioned against — a computation effectively abrogating the plain language of a properly enacted statute. ***See Dove Valley Bus. Park Assocs., Ltd. v. Bd. of County Comm'rs***, 945 P.2d 395, 403 (Colo. 1997) (holding that "[a]bsent constitutional infringement, it is not our province to rewrite the

statutes."). This Court should follow ***Williams*** and reject Plaintiff's efforts to rewrite the statute of limitations.

C. Plaintiff is Not Entitled to a Free Extension of Time for Weekends.

Relying on C.R.S. §24-11-110 and two cases construing that statute, Plaintiff argues that because the period of limitations expired on a Saturday, she was allowed to file her complaint on the following Monday. Plaintiff's reliance on these authorities is misplaced.

The statute upon which Plaintiff relies, titled "Effect of closing public offices," provides as follows:

> If, on any day when the public office concerned is closed, or on a Saturday, any document is required to be filed with any public office of the state of Colorado, its departments, agencies, or institutions, or with any public office of any political subdivision of the state, or any appearance or return is required to be made at any such public office, or any official or employee of such public office is required to perform any act or any duty of his office, then any such filing, appearance, return, act, or duty so required or scheduled shall neither be abated nor defaulted, but the same shall stand continued to the next succeeding full business day at such public office at the same time and place.

C.R.S. §24-11-110. This statute applies to "public offices" such as a city hall or a records office. Plaintiff cites no authority applying this statute to the courts. The cases upon which Plaintiff relies involve the filing of notices of claim with the

appropriate governmental entity under the Colorado Governmental Immunity Act. ***Matthews v. City & County of Denver***, 20 P.3d 1227 (Colo. App. 2000) (notice of claim filed with City of Denver); ***Austin v. Weld County***, 702 P.2d 293 (Colo. App. 1985) (notice of claim filed with Weld County).

The issue raised here concerns a question of statutory interpretation. The court's primary task when construing a statute is to determine and give effect to the intent of the General Assembly. ***Kern v. Gebhardt***, 746 P.2d 1340, 1344 (Colo. 1987). In determining the meaning of a statute, the court may look to familiar principles of statutory construction. ***State v. Hartsough***, 790 P.2d 836, 837 (Colo. 1990). Words should be given their ordinary meaning. ***People v. District Court***, 713 P.2d 918, 920 (Colo. 1986). A word's commonly accepted meaning should be preferred over a strained or forced interpretation. ***See Kern*** at 1344. In commonly accepted and ordinary speech, a court is not a "public office."

In addition, a long-accepted convention of statutory interpretation dictates that a term with more than one meaning, or nuance of meaning, appearing in a series should be understood to have a meaning commensurate with or in the general nature of the things with which it has been grouped. ***People v. Opana***, 395 P.3d 757, 761 (Colo. 2017). The meaning of an ambiguous statutory term may be ascertained by reference to the meaning of words associated with it — that is,

context. ***Hartsough*** at 838; ***St. Vrain Valley School District v. A.R.L.***, 325 P.3d 1014, 1019 (Colo. 2014).

The statute at issue here refers to "any public office of the state of Colorado, its departments, agencies, or institutions, or … any public office of any political subdivision of the state." C.R.S. §24-11-110. The terms used all refer to administrative entities. Thus, if there is any ambiguity in the phrase "public office," that ambiguity is resolved when the phrase is considered in relation to the words with which it is used. It is no surprise, then, that this statute has been applied to cities, counties, and administrative entities such as the Public Utilities Commission. ***Matthews (City of Denver)***; ***Austin (Weld County)***; ***Denver Clean-Up Service, Inc. v. Public Utilities Commission***, 483 P.2d 974 (Colo. 1971) (Public Utilities Commission); ***Fleming v. Lakewood***, 723 P.2d 166 (Colo. App. 1986) (Lakewood city clerk).

Notably absent from the statute is any reference to courts, courthouses, complaints, pleadings or statutes of limitation. This omission is significant. ***See Winter v. People***, 126 P.3d 192, 195 (Colo. 2006) ("Given the relative abundance of lockers and their frequent use for safekeeping valuables, the omission of lockers from the list strikes us as significant."). If the General Assembly had intended this statute to encompass courts, it would have said so. ***Id***. ("In particular, if the statute

were intended to cover all structures designed to hold property, the statute would have been written more broadly to specifically include lockers or similar containers with the mere potential to contain money or valuables by virtue of their design.").

Another reliable guide to legislative intent is the context in which a statutory provision appears. ***Stamp v. Vail Corp.***, 172 P.3d 437, 443 (Colo. 2007); ***St. Vrain School District*** at 1019. Here, the statute in question, C.R.S. §24-11-110, appears in Title 24 of the Colorado Revised Statutes. This title pertains to all matters of state government. If the General Assembly intended this statute to cover matters filed in court, the statute would more logically be contained in Title 13, addressing all matters of "Courts and Court Procedure." Recognizing the "Distribution of Powers" under the Colorado Constitution, it is unlikely that the General Assembly would place a statute pertaining to the courts in the title of the Colorado Revised Statutes pertaining to state government. Colorado Constitution, Article III.

In short, the phrase "public offices" in 24-11-110 refers to public offices maintained by the State of Colorado or political subdivisions of the State, such as cities and counties. It does not refer to courts. And even if this statute did apply to courts, Plaintiff has not shown that the court in question was closed.

Plaintiff's argument is premised on the assertion that Denver District Court was closed on Saturday July 13, 2019. (CF 41-42; Opening Brief at 8-9) But

Plaintiff submitted nothing to establish that Denver District Court was closed on July 13, 2019, or that it is closed on any other Saturday. C.R.C.P. 77(a) provides just the opposite: "Courts shall be deemed always open for the purpose of filing any pleading or other proper paper." Further, in light of C.R.S. §13-1-118 it does not appear that Denver District Court would be closed on Saturdays as a matter of law. To the contrary, this statute provides that courts are closed on *Sundays* but does not mention *Saturdays*. Again, this omission is significant. ***Winters*** at 195.

D. Plaintiff Could Have Filed Her Complaint on July 13, 2019.

Even if Denver District Court was closed to the public on July 13, 2019, because that day was a Saturday, Plaintiff could have filed her complaint nonetheless, because the complaint could have been filed electronically. C.R.C.P. 121, §1-26. A civil action is commenced by filing a complaint with the court. C.R.C.P. 3(a). A complaint may be E-filed through the court's electronic filing system. C.R.C.P. 121, § 1-26.4; ***Maslak v. Town of Vail***, 345 P.3d 972 (Colo. App. 2015). Moreover, a document transmitted to the court's E-filing system by 11:59pm "shall be deemed to have been filed with the clerk of the court on that date." C.R.C.P. 121, § 1-26.5. Plaintiff thus could have filed her complaint up until 11:59 p.m. on July 13, 2019, even if Denver District Court was closed to the public that day.

Colorado's courts have accepted electronic filing since 2000. ***See*** 31 COLORADO LAWYER 41 (April 2002) "Electronic Filing's First Year in Colorado." Electronic filing has been mandatory in Denver District Court since either 2006 or 2010. ***See*** 35 COLORADO LAWYER 21 (May 2006) "2006 Amendments to the Civil Rules: Modernization, New Math and Polishing" ("Presently, the E-Filing/E-Service system has been mandated in a number of districts, including all the Denver metropolitan districts"); Colorado Judicial Branch, official website, "Mandatory E-Filing Courts" (listing Denver District Court as requiring E-filing for "All civil cases effective January 2, 2010").

The Rules of Civil Procedure provide that Colorado's courts are never deemed closed for purposes of filing pleadings; the judicial holiday statute speaks only of Sundays and legal holidays, not Saturdays. C.R.C.P. 77(a); C.R.S. §13-1-118. Denver District Court was therefore not closed on July 13, 2019 for purposes of filing a complaint. In light of electronic filing, there is no need to strain the language of §24-11-110 and apply to the courts this statute concerning public offices. Moreover, when Plaintiff filed her complaint on July 15, 2019, she filed it *electronically* at 5:12pm. (CF 1)

II. THIS COURT LACKS JURISDICTION TO CONSIDER THE OCTOBER ORDER BECAUSE PLAINTIFF DID NOT FILE HER NOTICE OF APPEAL ON TIME.

Standard of Review: There is no underlying order to review. Nonetheless, the interpretation of court rules is reviewed *de novo*. ***Maslak*** at 975.

Raised and Ruled On: This matter was not raised below because it concerns the Court of Appeals' jurisdiction.

A. Plaintiff Did Not File Her Notice of Appeal on Time.

In civil actions, a notice of appeal must be filed within 49 days of the "judgment, decree or order from which the party appeals." C.A.R. 4(a). The timely filing of a notice of appeal is mandatory and jurisdictional. ***Chapman v. Miller***, 476 P.2d 763 (Colo. App. 1970); ***Councelman v. Ray***, 538 P.2d 1343 (Colo. App. 1975). Here, the trial court entered its order dismissing the complaint on October 29, 2019. (CF 53-55) Plaintiff did not file her notice of appeal until February 3, 2020 – well beyond the 49 days she was allowed. (CF 72-77) This Court therefore lacks jurisdiction to consider the October Order.

B. The October Order Is a Final Judgment.

A final judgment ends the action, "leaving nothing further for the court . . . to do . . . to completely determine the rights of the parties." ***Reyher v. State Farm***, 280 P.3d 64, 68 (Colo. App. 2012); ***Pham v. State Farm***, 70 P.3d 567, 571 (Colo.

App. 2003). Similarly, an *order* is a final judgment if it ends the action and leaves nothing further for the court to do to completely determine the rights of the parties. ***Scott v. Scott***, 136 P.3d 892, 896 (Colo. 2006). In determining whether an order is final, the court should look to the legal effect of the order rather than its form or title. ***Luster v. Brinkman***, 250 P.3d 664, 666 (Colo. App. 2010); ***Cyr v. District Court***, 685 P.2d 769, 770 (Colo. 1984).

"An order of dismissal is considered a final judgment for purposes of taking an appeal if it finally disposes of the particular action and prevents further proceedings as effectively as would any formal judgment." ***Levine v. Empire Savings and Loan Association***, 557 P.2d 386, 387 (Colo. 1976); ***Luster*** at 666. The "fundamental question to be asked is whether the action of the court constitutes a final determination of the rights of the parties in the action." ***Cyr*** at 770. Here, the order of October 29, 2019 dismissed the complaint and left nothing further for the court to do, other than determining the attorney fees incurred by Defendants in defending this case. It therefore constitutes a final judgment from which an appeal would lie.

Further, the fact that the October Order does not expressly state whether the complaint is dismissed with prejudice does not affect its finality. Although the dismissal of a complaint without prejudice is generally not a final, appealable

order, if the circumstances of the case reveal that the action cannot be saved by amending the complaint, the dismissal is a final, appealable order. ***Wilbourn v. Hagan***, 716 P.2d 485 (Colo. App. 1986); ***Carter v. Small Business Administration***, 573 P.2d 564, 566 (Colo. App. 1977). The most common situation in which a complaint cannot be saved occurs when further proceedings would be barred by the statute of limitations. ***Dia Brewing Co. v. MCE-DIA, LLC***, 2020 COA 21 at ¶14; *see also* ***B.C. Investment Co. v. Throm***, 650 P.2d 1333, 1334 (Colo. App. 1982); ***Harris v. RTD***, 155 P.3d 583, 585 (Colo. App. 2006).

Here, the complaint was dismissed as barred by the statute of limitations. In the circumstances of this case, the complaint could not be salvaged by amendment. That is probably why both the court and Plaintiff referred to the October Order as dismissing the complaint with prejudice. CF 71, 74-75.

C. The Question of Attorney Fees Does Not Salvage Plaintiff's Appeal.

A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees. ***Baldwin v. Bright Mortgage Co.***, 757 P.2d 1072, 1074 (Colo. 1988). A pending motion for attorney fees does not affect the finality of the judgment when the attorney fees are sought pursuant to a fee-shifting provision in a statute, whereby the defendant is awarded his fees incurred in defending the action, rather than as a component of damages in the action.

Goodwin v. Homeland Century Ins. Co., 172 P.3d 938, 944 (Colo. App. 2007); ***Roa v. Miller***, 784 P.2d 826, 829 (Colo. App. 1989).

Here, Defendants sought an award of fees under C.R.S. §13-17-201 for time spent defending this action. (CF 32, 6-61) Therefore, the October Order "was a final, appealable judgment, even though the issue of attorney fees remained unresolved." ***Kennedy v. King Soopers, Inc.***, 148 P.3d 385, 387 (Colo. App. 2006); ***see also Goodwin*** at 944; ***Roa*** at 829-830.

D. Jurisdiction Over the October Order Cannot Be Salvaged by the Doctrines of Excusable Neglect or Unique Circumstances.

Plaintiff may argue that her appeal should be considered timely because, when entering its order dismissing the complaint, the trial court said: "The time for filing [a] post-judgment motion and/or notice of appeal shall not run until I enter a final order including fees." (CF 55) If made, this argument should be rejected as unavailing.

A court cannot convert what is not a judgment into a judgment. ***Aurora v. Powell***, 383 P.2d 798 (Colo. 1963); ***McNight v. Ballif***, 100 P. 433 (Colo. 1909). By the same token, a court cannot convert a final judgment into a non-final judgment. ***Dill v. County Court***, 541 P.2d 1272, 1273 (Colo. App. 1975) ("Compliance with the rules of court is prerequisite to appellate jurisdiction, and actions taken to avoid application of those rules, whether by the parties or by the

trial court, cannot operate to confer jurisdiction."). The trial court here, therefore, could not convert its order dismissing the complaint into a non-final judgment.

Nor may this Court enlarge the time for filing Plaintiff's notice of appeal beyond that allowed by Rule 4(a). C.A.R. 26(b). Under that Rule:

> Upon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed 35 days from the expiration of the time otherwise prescribed by this section (a). Such an extension may be granted before or after the time otherwise prescribed by this section (a) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

C.A.R. 4(a) last paragraph.

The trial court's comment about not needing to appeal until the matter of attorney fees was resolved could support at most a motion for extension of time grounded on excusable neglect. Plaintiff, however, filed no motion for extension of time to file the notice of appeal and has never argued excusable neglect. And even if Plaintiff had filed such a motion, it would have extended her time to appeal only to January 21, 2020. Plaintiff's notice of appeal would still not have been filed in time to give this Court jurisdiction over the October Order.

Nor can the doctrine of unique circumstances salvage this appeal. This case does not involve a fundamental interest such as the parent-child relationship, and

even the doctrine of unique circumstances cannot enlarge the time to appeal beyond the 35-day grace period allowed by C.A.R. 4(a). ***Heotis v. Department of Education***, 375 P.3d 1232, 1236-1238 (Colo. App. 2016); ***Canton Oil Corp. District Court***, 731 P.2d 687, 693 (Colo. 1987).

E. The December Order Should Be Affirmed.

Although this Court has jurisdiction to consider the December Order regarding fees and costs, Plaintiff has raised no issue concerning that order. In the trial court, Plaintiff did not respond to Defendants' motion for attorney fees. (*See* CF 68) Nor does Plaintiff challenge the December Order in her Opening Brief. Therefore, the court's award of attorney fees and costs to Defendants should be affirmed.

III. DEFENDANTS ARE ENTITLED TO THEIR ATTORNEY FEES INCURRED IN THIS APPEAL.

When attorney fees are awarded to a defendant in the trial court under C.R.S. §13-17-201, and the plaintiff appeals, the defendant is entitled to an award of fees for the time spent defending the appeal. ***Williams*** at 1079; ***Kennedy*** at 390-391. Defendants are therefore entitled to an award of attorney fees for the time spent defending this appeal.

CONCLUSION

"This is a case in which nearly everything has been done too late." ***Dill*** at 1273. For the reasons explained above, this Court should either dismiss Plaintiff's appeal from the October Order for lack of jurisdiction or affirm the October Order on the ground that Plaintiff failed to file her complaint within the time allowed by the statute of limitations. In either event, the Court should remand this case to Denver District Court for a determination of the amount attorney fees to be awarded Defendants for time spent defending this appeal.

Respectfully submitted this 17th day of June, 2020.

HALL & EVANS, L.L.C.

s/ Malcolm S. Mead
Clinton L. Coberly, #38903
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ATTORNEYS FOR DEFENDANTS-APPELLEES ISS FACILITY SERVICES, INC and CITY AND COUNTY OF DENVER

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2020, I served a copy of the foregoing **ANSWER BRIEF** on the following via the Colorado Courts E-Filing System:

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