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Tort and Insurance Law

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Sovereign Immunity in Colorado: A Look at the CGIA

This article analyzes the Colorado Governmental Immunity Act, which provides immunity to government entities and their employees in certain personal injury cases.

The Colorado Governmental Immunity Act (CGIA), CRS §§ 24-10-101 et seq., grants immunity to government entities and their employees in many types of personal injury cases, and limits recoverable damages in others. By the General Assembly's own admission, the denial or reduction of monetary compensation available to injured victims can yield "inequitable" results.[1] Nonetheless, the CGIA was enacted to protect Colorado's government and taxpayers from bearing an excessive monetary burden for damages suffered by personal injury claimants in tort cases.[2] The CGIA explicitly recognizes that "the state and its political subdivisions provide essential public services and functions," that "unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions," and that "the taxpayers would ultimately bear the fiscal burdens of unlimited liability."[3]

This article analyzes various provisions of the CGIA.

CGIA Application

Because the CGIA is in derogation of Colorado's common law, the CGIA provisions that grant immunity must be strictly construed, and the provisions that withhold immunity must be construed broadly.[4]

The CGIA applies to all actions that "lie in tort or could lie in tort,"[5] but does not apply to actions grounded in contract.[6] Neither the form of the claim itself nor the relief requested determines whether the claim is one that lies or could lie in tort.[7] Rather, the inquiry focuses on the nature of the injury, the relief sought, and the source of the government's liability.[8] On numerous occasions, Colorado appellate courts have found that purported contract claims were, in fact, tort claims that were subject to the immunity provisions of the CGIA.[9]

The CGIA applies only to acts or omissions that have already occurred and does not apply to claims for prospective relief to prevent future injury.[10]

Government employees, like government entities, enjoy the CRS § 24-10-106(1) immunity limitations.[11] When immunity is waived, government entities are statutorily obligated to pay any judgment obtained against an employee, where the grounds for employee liability are based on negligent acts committed within the course and

scope of employment.[12] Government employees may also be held individually liable for tortious misconduct that is willful and wanton.[13]

CGIA Definitions

The CGIA specifically defines certain terms differently from their common definitions. These definitions may impact the determination of whether the government entity is immune from suit. For example:

- "Dangerous condition" means either a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility. For the purposes of this subsection (1.3), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. A dangerous condition shall not exist solely because the design of any facility is inadequate. The mere existence of wind, water, snow, ice, or temperature shall not, by itself, constitute a dangerous condition.[14]
- "Injury" means death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would 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 a claimant.[15]
- "Maintenance" means the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure. It does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.[16]
- "Operation" means the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital, jail, or public water, gas, sanitation, power, or swimming facility. It excludes "any duty to upgrade, modernize, modify, or improve the design or construction of a facility."[17]

CRS § 24-10-106 Immunity Waivers

CRS § 24-10-106(1) provides that "[a] public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort, . . . except as provided otherwise in this section." CRS §§ 24-10-106(1)(a) through (i) provide for waiver of sovereign immunity in nine situations:[18]

1. when a motor vehicle that is owned or leased by a public entity is operated by a public employee while in the course of employment, except emergency vehicles operating under CRS §§ 42-4-108(2) and (3);
2. for the operation of a public hospital, correctional facility, or jail by a public entity;
3. when a dangerous condition exists in a public building;
4. when a dangerous condition exists on a public highway, road, or street that physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within a municipality's corporate limits, or other specified highway. Dangerous conditions include certain situations involving the accumulation of snow, ice, sand, or gravel, and specified conditions regarding traffic signs and traffic control signals;
5. when a dangerous condition exists in a public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. But a public entity may assert sovereign immunity for an injury caused by the natural condition of unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way.
6. for the operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by a public entity;

7. for the operation and maintenance of a qualified state capital asset that is the subject of a leveraged leasing agreement under CRS Art. 82 Part 10;
8. for failure to perform a required CRS § 13-80-103.9 education employment background check; and[19]
9. for an action brought under CRS § 13-21-128.[20]

These waiver provisions are not mutually exclusive, but provide alternative avenues for exposing a public entity to liability, and more than one waiver provision may be triggered by a given factual scenario.[21]

CRS §§ 24-10-106(1)(a) through (f) are analyzed in detail below.

CRS § 24-10-106(1)(a): Operation of a motor vehicle that is owned or leased by a public entity by a public employee while in the course of employment, except emergency vehicles

The terms "operation," "motor vehicle," "public employee," "owned or leased," and "emergency vehicles" under CRS § 24-10-106(1)(a) have been construed by courts.

The Colorado Court of Appeals held that the CGIA's definition of "operation" does not apply to a motor vehicle, and that the alleged negligent failure of an RTD bus driver to ensure that passengers board and disembark safely is included in the waiver of immunity under CRS § 24-10-106(1)(a).[22] Likewise, negligently stopping to discharge a passenger at an improper place is part of the "operation" of a bus for which immunity has been waived by the CGIA.[23] Immunity is also waived when a deputy sheriff fails to secure handcuffed juveniles with seatbelts.[24]

However, the waiver of immunity does not apply to a driver's negligent supervision of students on a school bus.[25] Nor does it apply to a public entity's negligent supervision of a bus driver.[26]

The CGIA explicitly states that the definition of "motor vehicle" in the Uniform Motor Vehicle Law, CRS § 42-1-102(58), applies to the CGIA, and the term also includes a light rail car.[27] Under the Uniform Motor Vehicle Law, a "motor vehicle" is a self-propelled vehicle designed primarily for travel on public highways that is generally used to transport persons and property over public highways, or a low-speed electric vehicle; the term does not include "low-power scooters, wheelchairs, or vehicles moved solely by human power."[28]

The term "motor vehicle" has been construed to include a snow plow,[29] but not a street sweeper.[30]

The Colorado Supreme Court has held that an independent contractor employed by a private company and driving a bus for RTD is not a public employee, and thus there are no immunity issues surrounding negligent acts committed by such a person.[31]

Both the government entity and the individual public employee have immunity when an accident is caused by a public employee driving a private vehicle that is not owned or leased by a public entity.[32]

Under CRS § 42-4-108 the drivers of emergency vehicles are entitled to certain privileges and are thus immune from suit "when responding to an emergency call, or when in pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm."[33] Among other privileges, the driver of an emergency vehicle may exceed lawful speeds "so long as said driver does not endanger life or property."[34] The Colorado Supreme Court has held that a deputy sheriff was not entitled to immunity where he was driving 60 miles per hour in a 35 mile per hour zone, an overgrowth of trees and bushes on the median created line-of-sight problems at a traffic intersection, and the intersection was in a residential area.[35]

CRS § 24-10-106(1)(b): Operation by a public entity of a public hospital, correctional facility, or jail

The "operation" of a facility is an act that furthers the purposes of that facility.[36] Thus, the term "operation" is strictly limited by the CGIA and is narrower than the definition of that term as applied to motor vehicles.[37] The "operation" of a public hospital or other facility within the meaning of CRS § 24-10-106(1)(b) does not include the performance of functions that are only ancillary to, or remotely related to, the primary purpose of the facility.[38]

Applying this definition of "operation" to public hospitals, Colorado appellate courts have held that an employee's wrongful discharge claim was barred by governmental immunity, because it arose from a personnel action only remotely related to the hospital's primary purpose, which was to provide medical or surgical care to sick or injured persons.[39] However, the term "operation" encompasses a medical residency program that trains physicians to assist in patient care, and thus furthers the purpose of a public hospital, even when that hospital's residents are performing services at private facilities.[40]

With regard to correctional facilities, the Colorado Court of Appeals has held that maintenance of a visitor's parking lot at a correctional facility was ancillary to the primary purpose of the correctional facility, which was to confine persons convicted of crimes; therefore, there was no waiver of immunity for claims by a visitor who slipped and fell on ice in a prison parking lot.[41] However, the provision of a secure area within the facility for visitation of inmates is part of the operation of a correctional facility as defined under the CGIA.[42]

The Colorado Court of Appeals has held that "the General Assembly's use of the term 'hospital' without enumeration of other types of facilities, as it has done in other statutes involving health care, suggests that it intended the waiver of immunity for the 'operation of a public hospital' to be limited."[43] Thus, Colorado appellate courts have held that a medical clinic is not a "public hospital."[44] Likewise, a state-run nursing home does not constitute a "hospital" for purposes of the CGIA waiver of immunity for operation of a public hospital,[45] nor does a state-run foster home[46] or government veterinary hospital.[47]

CRS § 24-10-106(1.5) provides that the waiver of sovereign immunity for a correctional facility or jail, as set forth in CRS §§ 24-10-106(1)(b) and (e), "does not apply to claimants who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction" and that "such correctional facility or jail shall be immune from liability . . . ."

CRS § 24-10-106(1)(c): A dangerous condition of any public building

"Dangerous condition" has a very specific definition under CRS § 24-10-106(c).[48] Governmental immunity is waived for a dangerous condition of a public building where the claimant shows that (1) a physical condition of a public facility or the use thereof (2) constituted an unreasonable risk to the health or safety of the public (3) that was known to exist or should have been known to exist in the exercise of reasonable care and (4) was proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility.[49]

A public entity does not have governmental immunity when it constructs a public building through the services of an independent contractor and a dangerous condition arises from that construction. Rather, under Colorado's premises liability statute, a public entity/landowner owes a nondelegable duty to protect invitees from an unreasonable risk to their health and safety due to a negligent act or omission in constructing or maintaining the facility.[50] Thus, immunity was waived where the government hired a private contractor who installed a threshold plate that protruded approximately one inch above the surrounding floor, thereby causing the claimant to suffer injuries when her wheelchair stopped abruptly and she was thrown to the floor.[51]

Other conditions related to construction and maintenance have been found to be dangerous. For instance, it has been held that a dry erase board that fell on a public school student and pinned her to a desk constituted a dangerous condition of a public building.[52] Likewise, a combination of a slippery floor, use of a portable ladder,

and inaccessibility of a storage space in which maintenance was performed constituted a dangerous condition of a public building.[53] In addition, the Colorado Court of Appeals has held that an unpadded wall of an elementary school gymnasium constituted a dangerous condition.[54] Likewise, a jointer machine in gun-smithing class also constituted a dangerous condition.[55]

In contrast, immunity has been granted for those conditions unrelated to construction or maintenance. Thus, a city's failure to post warning signs about the dangers of lifting heavy weights does not constitute a dangerous condition of a public building.[56] In addition, a school's use of a windowless storage closet as a seclusion room for a disabled child was not sufficiently connected to any negligence by the public entity in constructing or maintaining the public facility to constitute a dangerous condition.[57] And the City of Colorado Springs was not "constructing" or "maintaining" a building when it demolished that building; thus the CGIA exception for injuries resulting from the dangerous condition of a public building did not apply.[58]

Because the term "dangerous condition" is limited to physical conditions, it does not refer to activities conducted within the building.[59] Thus, Colorado appellate courts have held that the alleged negligent failure to provide security in a courthouse, which resulted in one victim being shot and another being killed, did not constitute a dangerous condition of a public building.[60] Similarly, the use of a probation office to dispense alcoholic beverages during a party did not bring a motorist's claims within the dangerous-condition-of-public-building exception to sovereign immunity.[61]

Design defects are also explicitly excluded from the definition of dangerous condition. Thus, it has been held that where the venting of air caused ice formation that resulted in a claimant's injury, the ice formation was at most an indirect effect of the design of the building, and thus the venting was not a "dangerous condition."[62]

CRS § 24-10-106(1)(d)(I): Dangerous conditions of public highways, roads, or streets that physically interfere with the movement of traffic on that portion of such highway, road, street, or sidewalk that was designed and intended for public travel or parking thereon. "Physically interferes with the movement of traffic" does not include traffic signs, signals, or markings, or the lack thereof.

CRS § 24-10-106(1)(d)(I) waives immunity for only four categories of roads: (1) "any public highway, road, street, or sidewalk within the corporate limits of any municipality"; (2) "any highway which is a part of the federal interstate highway system or the federal primary highway system"; (3) "any highway which is a part of the federal secondary highway system"; or (4) "any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon."[63] Because this statutory provision makes no reference to county roads, immunity for counties is not waived in actions arising from injuries resulting from dangerous conditions on county roads.[64]

By the explicit terms of this statutory provision, immunity is not waived for dangerous conditions caused by traffic signs, so claims against the government related to negligent placement of traffic signs are not viable.[65]

Regarding the thoroughfares to which this statutory provision applies, it has been held that a pedestrian overpass constitutes a "sidewalk," such that immunity is waived under the CGIA.[66] However, a school driveway does not constitute a public highway, road, or street.[67] Nor does this statutory provision apply to the paved surface of a fenced, street-level municipal employee parking lot with restricted access.[68]

The CRS § 24-10-103(1.3) definition of "dangerous condition" applies to physical conditions that pose an unreasonable risk of harm to the public and are caused by the government's negligent construction or maintenance, rather than the government's negligent design, of the condition.[69]

The Colorado Supreme Court has held that the failure to "maintain," as applied to a roadway or facility, means "a failure to keep a [roadway or] facility in the same general state of being, repair, or efficiency as initially constructed."[70] In contrast, the word "design" means "to conceive or plan out in the mind."[71]

Using this distinction between maintenance and design, the Colorado Supreme Court has held that the government was not liable to a bicyclist who was injured because a roadway abruptly transitioned into a ditch, where this condition was arguably caused by negligent design, but not by negligent construction or maintenance.[72] Similarly, where the lack of median barriers was the result of the Colorado Department of Transportation's design of a temporary road during a highway upgrade, rather than the maintenance of that temporary road, immunity from liability for accident-related injuries was not waived.[73]

Liability for dangerous conditions that "physically interfere" with traffic has been found for a depression or "pothole,"[74] an uneven roadway surface,[75] failure to maintain street lights,[76] and failure to maintain barricades at the end of a road.[77] In addition, the government was found liable, or potentially liable, for hazards adjacent to the road that created dangerous conditions for drivers traveling the road. Thus, liability may be imposed for maintenance-related injuries from falling rocks or boulders.[78] Similarly, the state was found potentially liable for the failure to maintain a right-of-way fence through which a cow gained access to the road.[79]

In contrast with the cases cited above, overgrown trees and bushes in the road median do not constitute a dangerous condition that "physically interferes" with movement of traffic.[80]

CRS § 24-10-106(1)(d)(II): A dangerous condition caused by the failure to realign a stop sign or yield sign that was turned, without authorization of the public entity, in a manner that reassigned the right-of-way upon intersecting public highways, roads, or streets, or the failure to repair a traffic control signal on which conflicting directions are displayed

The Colorado Court of Appeals has held that, under this CGIA provision, the term "conflicting" means "being in conflict, collision, opposition," and that the verb conflict means "to show variance, incompatibility, irreconcilability, or opposition."[81] This statutory provision was found to apply where a police officer erected and failed to timely remove a temporary stop sign that conflicted with the traffic light.[82] This provision was found inapplicable where a pedestrian signal failed to provide sufficient time for a pedestrian to cross the intersection before the cross traffic received a green light, because no evidence established that the signal for the cross traffic was green at the same time that the pedestrian signal indicated that it was permissible for plaintiff to cross the intersection.[83]

CRS § 24-10-106(1)(d)(III): A dangerous condition caused by an accumulation of snow and ice that physically interferes with public access on walks leading to a public building open for public business when a public entity had notice of the condition and failed to mitigate

This exception was applied where accumulated ice covered a majority of the sidewalk leading to a public school on the night of a winter program, such that a person who attended the program was required to traverse the ice in a dimly lit area to get into the school.[84]

CRS § 24-10-106(1)(e): A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. But a public entity may assert sovereign immunity for an injury caused by the natural condition of unimproved property, whether such property is located in a park or recreation area or on a highway, road, or street right-of-way

Before 2014, Colorado appellate courts struggled with the term "public facility located in any park or recreation area."[85] In May 2014, the Colorado Supreme Court simultaneously issued two opinions that clarified this term, *St. Vrain Valley School Dist. RE-1J v. A.R.L.* and *Daniel v. City of Colorado Springs*.

In *A.R.L.*,[86] the Colorado Supreme Court addressed whether a "zip line" apparatus on a public playground qualified as a public facility located in a recreation area. The Court held that the term "facility" is "something that promotes the ease of any action, operation, transaction or course of conduct."[87] Based on this definition, the Court concluded that "the legislature did not intend the term to apply to individual items on public land, because such individual items merely represent alternative avenues for promoting the broader, common purposes that characterize facilities."[88] Rather, "the term 'facility' applies to permanent, bricks-and-mortar structures (e.g., classroom buildings that promote graduate study), as well as to collections of individual items that, considered together, promote a broader, common purpose (e.g., a collection of individual pieces of playground equipment that together promote children's play)."[89]

Regarding whether a facility is "public," the Court held that "for a facility to be 'public' under section 24-10-106(1)(e), it must be accessible to the public and maintained by a public entity to serve a beneficial public purpose."[90]

And citing to its contemporaneous opinion in *Daniel v. City of Colorado Springs*,[91] the *A.R.L.* Court held that a three-step analysis should be employed to determine whether a public facility is "located in" a "recreation area":

> First, we determine what property is relevant to our analysis by determining the boundaries of the "putative recreation area." We do so by including any contiguous areas of public property that plausibly promote recreation and excluding any pieces of property that clearly do not promote recreation. Second, we determine if the public entity's "primary purpose" in constructing or maintaining the recreation area is recreational. Third, assuming the primary purpose is recreational, we determine whether the public facility at issue was located in the boundaries of this recreation area.[92] (Citations omitted.)

Based on these principles, the Court in *A.R.L.* found that the injury in question occurred on a "facility" because the zip line was a component of the larger playground, that the playground was "public," and that the playground was located in a "recreation area."[93]

In the companion case *Daniel*,[94] the Court was asked to determine whether a parking lot that served a public golf course constituted a "public facility . . . 'located in' a 'recreation area.'" The Court adopted the same legal principles set forth in *A.R.L.* and found that a "parking lot that serves a public golf course is a 'public facility' under the recreation area waiver."[95]

Other facilities that are subject to a waiver of immunity (under certain circumstances) under subsections (1)(e) and (1)(f) (discussed below) are those for public water, gas, sanitation, electrical, power, or swimming. It has been held that a trash dumpster was not a "public sanitation facility."[96] A "swimming facility" has been defined as a "facility that is both suitable for and commonly used for swimming," and it has been held that a water-themed ride at a water park did not constitute a "swimming facility."[97] Multiple cases concern water facilities, specifically whether water meter pits fall within the definition of this term. Most recently, in a case involving a worker who sustained injuries from stepping into an open water meter pit, the Colorado Supreme Court held that these injuries resulted from the operation and maintenance of a public water facility.[98] It is possible that the Court's recent refinement of the term "facility" in *A.R.L.* could impact some or all of these holdings.

"Gas" facility has been construed to refer to natural rather than liquid (gas-station) gas.[99] Further, the Court of Appeals recently held that where the uncontested evidence established that a government building denominated as the Gas Administration Building was used exclusively for administrative purposes, it was not a gas facility.[100]

The term "public sanitation facility" was amended in 2003 to exclude drainage ditches and storm drains, thereby abrogating prior appellate decisions that included drainage ditches and storm drains within the definition of this term.[101]

As discussed above, a dangerous condition encompasses conditions related to negligent maintenance or construction of a public facility, but excludes design-related conditions, as well as conditions related to the negligent operation.[102] The failure to reduce overcrowding or to provide adequate supervisory personnel at a public facility are conditions that relate to the operation of the facility, rather than its construction or maintenance, and therefore these conditions are not actionable under CRS § 24-10-106(1)(e).[103]

A public golf course's failure to install a formal medical assistance system, an automatic lightning system, a foul weather detection system, or an evacuation plan did not create a "dangerous condition" as these acts or omissions were unrelated to construction or maintenance.[104]

As to injuries "caused by the natural condition of any unimproved property," the Colorado Supreme Court held that native trees bordering a campsite in a state park were a natural condition of unimproved property, and thus the state was immune from suit for injuries sustained by a camper when a branch from one of those trees fell on her, even though the state undertook incidental maintenance of those trees.[105] Similarly, the Court of Appeals has held that Creation Rock, a rock formation that abuts one side of the Red Rocks Amphitheater, a public facility, is a "natural condition of . . . unimproved property" for which there has been no waiver of immunity under CRS § 24-10-106(1)(e). Thus, plaintiffs could not recover for injuries sustained when they were struck by rocks that fell from Creation Rock.[106]

CRS § 24-10-106(1)(f): The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by a public entity

Although CRS §§ 24-10-106(1)(e) and (f) apply to many of the same types of public facilities, subsection (1)(e) is limited by the CRS § 24-10-103(1.3) definition of dangerous condition, which excludes conditions related to both the design and operation of the public facility.[107] In contrast, subsection (1)(f) explicitly waives immunity for claims related to the "operation" of a public facility and does not exclude design-related conditions. The Colorado Supreme Court has held that the design limitation contained in the CGIA's definition of "dangerous condition" does not apply to actions under subsection (1)(f) relating to operation and maintenance.[108]

Record-keeping and responding to public inquiries have been held to not constitute "operation" of a water facility, because these activities were ancillary to the purpose of such a facility.[109]

CRS §§ 24-10-106(1)(g) through (i) are not discussed here because they are self-explanatory.

CGIA Notice Requirements

CRS § 24-10-109(1) provides that:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty-two days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

Pursuant to CRS § 24-10-106(2), the notice must contain:

- the name and address of both the claimant and claimant's attorney, if any;
- a concise statement of the factual basis of the claim that includes the date, time, place, and circumstances of the act, omission, or event complained of;
- the name and address of any public employee involved, when known;
- a concise statement of the nature and the extent of the injury; and
- a statement of the amount of monetary damages requested.

CRS § 24-10-106(3)(a) provides that if the claim is against the state or a state employee, the notice must be filed with the attorney general. If the claim is against any other public entity or employee thereof, the notice must be filed with the public entity's governing body or the attorney representing the public entity. The notice is effective upon mailing by registered or certified mail, return receipt requested, or upon personal service.

Under CRS § 24-10-106(3)(b), a notice that is properly filed with a public entity's agent listed in the inventory of local governmental entities pursuant to CRS § 24-32-116 is deemed to satisfy these requirements.

When the claim is for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin of the deceased.[110]

Actions under CRS Art. 24 must be commenced within the relevant time period in CRS Title 13, Arts. 80 and 81 relating to limitation of actions, or be forever barred. But if compliance with CRS § 24-10-106(6) would otherwise result in the barring of an action, the time period is extended by the time period required for compliance with subsection (6).[111]

Actions under CRS Art. 24 cannot be commenced until after the claimant files timely notice under CRS § 24-10-106(1) and receives a notice of claim denial from the public entity, or until after 90 days have passed following the filing of the notice of claim, whichever occurs first.[112]

The CGIA does not define the term "discovery" for purposes of determining date of discovery of the injury, but the Colorado Supreme Court has held that "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."[113] This holding has been followed on numerous occasions since the issuance of that opinion.[114]

Although a minor child's tort claim does not accrue, for statute-of-limitations purposes, until the minor reaches age 18,[115] the CGIA contains no such limitation, and knowledge of the injury and its cause may be imputed to a minor child. For example, in *Hergenreter v. Morgan County School District*,[116] the Colorado Court of Appeals held that a 14-year-old girl who stepped in a hole on the premises of the defendant school district had knowledge of her injury and its wrongful cause, such that her failure to timely file notice under CRS § 24-10-109 barred her tort claim. In contrast with the teenager in *Hergenreter*, infants and toddlers are considered incapable of preparing notice of a claim.[117]

The notice requirement may also be excused, according to the Colorado appellate courts, "under proper circumstances of mental and physical incapacity . . . ."[118] Thus, a plaintiff injured as a result of medical malpractice could not know, or reasonably be expected to know, of her injuries, where "plaintiff suffered a permanent brain injury as a result of the operation and was severely impaired."[119] And CGIA notice was timely when filed within 182 days after plaintiff regained consciousness, because the notice period does "not begin to run until a plaintiff rendered unconscious by the alleged tortious conduct actually discovers or should have discovered his or her injury."[120]

The notice mandated by CRS § 24-10-109 is a jurisdictional prerequisite to maintaining a suit against a public employee alleged to have been acting in the course of employment.[121] To satisfy this jurisdictional prerequisite,

the plaintiff must demonstrate strict compliance with the CRS § 24-10-109(1) 182-day time requirement.[122] Subsection (1) is considered a nonclaim statute, meaning that the issue of compliance with the time limit is not subject to equitable defenses such as waiver, tolling, or estoppel.[123]

In contrast, strict compliance with other provisions of CRS § 24-10-109 is not required. Thus, the adequacy of the notice's contents is subject to a "substantial compliance" standard,[124] which requires a claimant to make a good faith effort to include within the notice, to the extent the claimant is reasonably able to do so, each item of information listed in CRS § 24-10-109(2).[125] Likewise, a "substantial compliance" standard applies to subsection (3), regarding service of the notice, with consideration being given to principles of agency and equity.[126]

Although a claimant must substantially, rather than strictly, comply with the notice requirements in subsections (2) and (3), emails that the claimant sent to various defendants that did not contain the information required under subsection (2) and were not properly served under subsection (3) did not meet this standard.[127] In addition, the Colorado Supreme Court has held that a failure to include a request for money damages in a notice of claim renders that claim insufficient as a matter of law.[128] The Colorado Supreme Court has also held that, although prejudice to the defendant is a relevant consideration in determining whether substantial compliance has occurred,[129] the absence of written notice precludes a finding of substantial compliance, even when the defendant or his insurer were orally apprised of a potential claim and investigated it.[130]

CRS § 24-10-109(6) provides that no lawsuit may be filed until after the government, having received timely notice, has denied the claim or has taken no action for 90 days. Although subsection (6), like subsections (2) and (3), appears to be mandatory, Colorado appellate courts have not required strict compliance with subsection (6), holding that filing a lawsuit before expiration of the 90-day period does not deprive a trial court of jurisdiction.[131]

Because compliance with the statutory requirements described above is jurisdictional, to defeat a CRCP 12(b)(1) motion to dismiss a claimant must allege in the complaint that the claimant has complied with the jurisdictional prerequisite of filing a notice of claim.[132] However, where no motion to dismiss is filed, a plaintiff's failure to plead compliance with the notice-of-claim provision is not a jurisdictional bar, if sufficient evidence of compliance is presented at trial.[133]

Trinity Hearings

As discussed above, under the CGIA, government entities are immune from suit unless the plaintiff's claim satisfies one of the statutorily enumerated exceptions, and proper notice has been provided. Recognizing that these are issues of subject matter jurisdiction, CRS § 24-10-108 provides that "[i]f a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of sovereign immunity and shall decide such issue on motion."

In *Trinity Broadcasting, Inc. v. City of Westminster*,[134] the Colorado Supreme Court clarified that when a government entity defends against a claim on immunity grounds, claiming that the CRS § 24-10-109 notice provided was insufficient, the issue must be determined under CRCP 12(b)(1) (lack of subject matter jurisdiction) rather than CRCP 12(b)(5) (failure to state a claim upon which relief may be granted). In *Trinity*, the Court authorized trial courts to "conduct an evidentiary hearing before deciding the notice issue,"[135] thereby creating the concept of "*Trinity* hearings." Although *Trinity* concerned the issue of notice under CRS § 24-10-109, the principles enunciated in *Trinity* also apply to the immunity-waiver provisions in CRS § 24-10-106.[136] *Trinity* was extended in *Finnie v. Jefferson County School Dist. R-1*,[137] where the Colorado Supreme Court held that, when a government entity raises an immunity defense, "the GIA requires the trial court to definitively resolve all issues of immunity . . . regardless of whether the issues have been classified as jurisdictional."

At a *Trinity* hearing,

> the plaintiff has the burden of proving jurisdiction, *Trinity Broad*., 848 P.2d at 925, and the trial court is authorized to make appropriate factual findings. (Citation omitted.) It "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." (Citations omitted.) Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broad*., 848 P.2d at 925.[138]

Because the only issue at a *Trinity* hearing is whether the government entity has immunity, a personal injury case can be lost at a *Trinity* hearing, but not won. "A *Trinity* hearing is not a substitute for a trial on the merits . . . ."[139] Thus, the elements of negligence (if not already addressed by the trial court under CRS § 24-10-106), causation and damages, must still be proven at trial.

A trial court's ruling on the issue of sovereign immunity, with or without a *Trinity* hearing, is immediately appealable.[140] A trial court finding of willful and wanton conduct by a government employee is also immediately appealable.[141] On appeal of the immunity issue, an appellate court reviews the trial court's resolution of factual disputes for clear error, but reviews issues of law de novo.[142] However, where the jurisdictional facts are undisputed, the entirety of the trial court's jurisdictional determination is one of law, which is reviewed de novo.[143]

Damage Caps

The CGIA caps damages in cases against the government.[144] Before 2013, that cap was $150,000 per injured party in any one incident, with no authorization for an inflation-related adjustment. In 2013 the cap was increased to $350,000 per injured party,[145] and every four years the Colorado Secretary of State can adjust this figure for inflation.[146]

A loss-of-consortium claimant under the CGIA is subject to a separate damages cap from the principal.[147] However, in a wrongful death case brought by multiple heirs, the $350,000 cap applies, because the operative injury is the wrongful death of the decedent, not the losses suffered by the heirs.[148]

Conclusion

The CGIA is a complex, technical statute, with many potential pitfalls for the unwary civil practitioner. In addition to proving the standard elements of liability and damages, an injured claimant must also prove that immunity has been waived and that notice has been timely transmitted to the responsible government entity. Because of these additional litigation obstacles and the statutorily imposed damage caps, CGIA cases are qualitatively different from traditional tort cases, and should be managed with heightened scrutiny.

Notes

1. CRS § 24-10-102.

2. *See Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1387 (Colo. 1997), *accord Medina v. State*, 35 P.3d 443 (Colo. 2001).

3. CRS § 24-10-102.

4. *Daniel v. City of Colo. Springs*, 327 P.3d 891, 895 (Colo. 2014); *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000).

5. CRS § 24-10-106(1).

6. *Patzer v. City of Loveland*, 80 P.3d 908, 910 (Colo.App. 2003); *accord Denver Health and Hosp. Auth. v. City of Arvada*, 2016 COA 12.

7. *Foster v. Bd. of Governors of the Colo. State Univ. System*, 342 P.3d 497, 500 (Colo.App. 2014).

8. *Id.* at 501.

9. *See, e.g., Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1005 (Colo. 2008); *First Nat'l Bank of Durango v. Lyons*, 349 P.3d 1161 (Colo.App. 2015); *Foster*, 342 P.3d at 504-06.

10. *Open Door Ministries v. Lipshuetz*, 373 P.3d 575 (Colo. 2016).

11. *See* CRS § 24-10-118(2)(a).

12. CRS § 24-10-110(1)(b)(I).

13. CRS § 24-10-118(2)(a).

14. CRS § 24-10-103(1.3).

15. CRS § 24-10-103(2).

16. CRS § 24-10-103(2.5).

17. CRS § 24-10-103(3)(a).

18. The CGIA also provides for limited immunity waivers in cases of prescribed fires, pursuant to CRS § 24-10-106.1, and school violence, CRS § 24-10-106.3. In addition, CRS § 24-10-104 provides that a government entity may, by resolution, waive the immunity provided by the CGIA. There are no published Colorado appellate cases addressing these statutory provisions, and they are not discussed in this article.

19. There are no published Colorado cases addressing this provision, and it is not discussed in this article.

20. CRS § 13-21-128 concerns the destruction or unlawful seizure of recordings by a law enforcement officer. There are no published Colorado cases addressing this provision, and it is not discussed in this article.

21. *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571 (Colo. 2014).

22. *Harris v. Reg'l Transp. Dist.*, 15 P.3d 782 (Colo.App. 2000).

23. *Johnson v. Reg'l Transp. Dist.*, 916 P.2d 619 (Colo.App. 1996).

24. *Young v. Jefferson Cty. Sheriff*, 292 P.3d 1189 (Colo.App. 2012).

25. *Robinson v. Ignacio Sch. Dist.*, 328 P.3d 297 (Colo. 2014).

26. *Kahland v. Villareal*, 155 P.3d 491 (Colo.App. 2006).

27. CRS § 24-10-103(2.7).

28. CRS § 42-1-102(58).

29. *Roper v. Carneal,* 2015 COA 13; *Herrera v. City and Cty. of Denver*, 221 P.3d 423 (Colo.App. 2009).

30. *Henderson v. City and Cty. of Denver*, 300 P.3d 977 (Colo.App. 2012).

31. *See Henisse v. First Transit, Inc.*, 247 P.3d 577 (Colo. 2011).

32. *Ceja v. Lemire*, 154 P.3d 1064 (Colo. 2007).

33. CRS § 42-4-108(2).

34. CRS § 42-4-108(2)(c).

35. *Corsentino*, 4 P.3d 1083.

36. CRS § 24-10-103(3)(a).

37. *Harris*, 15 P.3d at 784.

38. *Daley v. Univ. of Colo. Health Sciences Center*, 111 P.3d 554 (Colo.App. 2005).

39. *Craven v. Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218 (10th Cir. 2001).

40. *Sereff v. Waldman*, 30 P.3d 754 (Colo.App. 2000).

41. *Pack v. Arkansas Valley Corr. Facility*, 894 P.2d 34 (Colo.App. 1995).

42. *Flores v. Colo. Dep't of Corr.*, 3 P.3d 464 (Colo.App. 1999).

43. *Plummer v. Little*, 987 P.2d 871 (Colo.App. 1999).

44. *Id.*

45. *Montoya v. Trinidad State Nursing Home*, 109 P.3d 1051 (Colo.App. 2005).

46. *Gabriel ex rel Gabriel v. City and Cty. of Denver*, 824 P.2d 36 (Colo.App. 1991).

47. *State v. Hartsough*, 790 P.2d 836 (Colo. 1990).

48. CRS § 24-10-103(1.3).

49. *Springer v. City and Cty. of Denver,* 13 P.3d 794, 799 (Colo. 2000).

50. *Id.* at 804.

51. *Id.*

52. *Booth v. Univ. of Colo.*, 64 P.3d 926 (Colo.App. 2002).

53. *Walton v. State*, 968 P.2d 636 (Colo. 1998).

54. *Hendricks ex rel Martens v. Weld Cty. Sch. Dist. No. 6*, 895 P.2d 1120 (Colo.App. 1995).

55. *Longbottom v. State Bd. of Cmty. Colls. and Occupational Educ.*, 872 P.2d 1253 (Colo.App. 1993).

56. *Douglas v. City and Cty. of Denver,* 203 P.3d 615 (Colo.App. 2008).

57. *Padilla v. Sch. Dist.*, 25 P.3d 1176 (Colo. 2001).

58. *Smokebrush Found. v. City of Colo. Springs*, 2015 COA 80, *cert. granted* May 31, 2016.

59. *Jenks v. Sullivan*, 826 P.2d 825, 827 (Colo.1992), *overruled in part on other grounds*, *Bertrand v. Bd. of Cty. Comm'rs*, 872 P.2d 223, 227 (Colo. 1994).

60. *Jencks*, 826 P.2d at 830; *Duong v. Arapahoe Cty.*, 837 P.2d 226 (Colo.App. 1992).

61. *Mentzel v. Judicial Dep't of State of Colo.*, 778 P.2d 323 (Colo.App. 1989).

62. *Seder v. City of Fort Collins*, 987 P.2d 904 (Colo.App. 1999).

63. *Bloomer v. Bd. of Cty. Comm'rs*, 799 P.2d 942, 945 (Colo. 1990).

64. *Id.*; *accord Wark v. Bd. of Cty. Comm'rs of Cty. of Dolores*, 47 P.3d 711 (Colo.App. 2002).

65. *City of Aspen v. Meserole*, 803 P.2d 950 (Colo. 1990).

66. *Colucci v. Town of Vail*, 232 P.3d 218 (Colo.App. 2009). CRS § 24-10-103(6) defines the term "sidewalk" as "that portion of a public roadway between the curb lines or the lateral lines of the traveled portion and the adjacent property lines which is constructed, designed, maintained, and intended for the use of pedestrians."

67. *Stanley v. Adams Cty. Sch. Dist. 27J*, 942 P.2d 1322 (Colo.App. 1997).

68. *Jones v. City and Cty. of Denver*, 833 P.2d 870 (Colo.App. 1992).

69. *Swieckowski*, 934 P.2d 1380 .

70. *Id.* at 1386.

71. *Id.* (citing Webster's Third New International Dictionary 611 (1986)).

72. *Swieckowski*, 934 P.2d at 1386–88.

73. *Estate of Grant v. State*, 181 P.3d 1202 (Colo.App. 2008).

74. *McKinley v. City of Glenwood Springs*, 361 P.3d 1080 (Colo.App. 2015).

75. *Dennis v. City and Cty. of Denver*, 2016 COA 140.

76. *Lin v . City of Golden*, 97 P.3d 303 (Colo.App. 2004).

77. *Hallam v. City of Colo. Springs*, 914 P.2d 479 (Colo. 1995).

78. *Medina*, 35 P.3d 443; *Belfiore v. Colo. State Dep't of Highways*, 847 P.2d 244 (Colo.App. 1993); *Schlitters v. State*, 787 P.2d 656 (Colo.App. 1989).

79. *State v. Moldovan*, 842 P.2d 220 (Colo. 1992).

80. *Cordova v. Pueblo West Metro. Dist.*, 986 P.2d 976 (Colo.App. 1998).

81. *DeForrest v. City of Cherry Hills Village*, 990 P.2d 1139, 1143 (Colo.App. 1999), *modified* 72 P.3d 384 (citing *Lyons v. City of Aurora*, 987 P.2d 900, 903 (Colo.App. 1999), citing *Webster's Third New International Dictionary* 477 (1986)).

82. *DeForrest*, 990 P.2d 1139.

83. *Lyons*, 987 P.2d 900.

84. *Martinez v. Weld County Sch. Dist. RE-1*, 60 P.3d 736 (Colo.App. 2002).

85. *See Montes v. Hyland Hills Park and Recreation Dist.*, 849 P.2d 852 (Colo.App. 1992) (although public golf course was a public facility located in a recreation area, golf cart in which plaintiff was injured was not); *Denmark v. State*, 954 P.2d 624 (Colo.App. 1997) (athletic field on a college campus was located in a "recreation area," even though area was not formally designated as such and it also served educational purposes).

86. *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P.3d 1014 (Colo. 2014).

87. *Id.* at 1021 (*citing Webster's Third New International Dictionary* 812 (2002)).

88. *Id.*

89. *Id.*

90. *Id.* at 1023.

91. *Daniel*, 327 P.3d 891.

92. *A.R.L.*, 325 P.3d at 1023.

93. *Id.* at 1023–24.

94. *Daniel*, 327 P.3d 891.

95. *Id.* at 899.

96. *Delk v. City of Grand Junction,* 958 P.2d 532 (Colo.App. 1998).

97. *Curtis v. Hyland Hills Park & Recreation Dist.*, 179 P.3d 81 (Colo.App. 2007).

98. *Montoya v. City of Westminster Dep't of Public Works*, 181 P.3d 1197 (Colo. 2008).

99. *Jilot v. State*, 944 P.2d 566 (Colo.App. 1996).

100. *Smokebrush*, 2015 COA 80.

101. *See* CRS § 24-10-103(5.5); *City of Colo. Springs v. Powell*, 156 P.3d 461 (Colo. 2007).

102. *Padilla*, 25 P.3d at 1181; *Curtis*, 179 P.3d at 84.

103. *Curtis*, 179 P.3d at 84.

104. *Jaffe v. City and Cty. of Denver*, 15 P.3d 806 (Colo.App. 2000).

105. *Burnett v. State Dep't of Natural Res.*, 346 P.3d 1005 (Colo. 2015).

106. *Ackerman v. City and Cty. of Denver*, 373 P.3d 665 (Colo.App. 2015).

107. *See Curtis*, 179 P.3d at 84.

108. *Powell*, 48 P.3d 561.

109. *Richland Dev. Co., L.L.C. v. E. Cherry Creek Valley Water & Sanitation Dist.*, 934 P.2d 841 (Colo.App. 1996).

110. CRS § 24-10-106(4).

111. CRS § 24-10-106(5).

112. CRS § 24-10-106(6).

113. *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 923 (Colo. 1993).

114. *See*, *e.g.*, *Gallagher v. Bd. of Trs. of Univ. of N. Colo.*, 54 P.3d 386, 388 (Colo. 2002); *Bryant v. City of Lafayette*, 946 P.2d 499, 500 (Colo.App. 1997); *Grossman v. City & Cty. of Denver*, 878 P.2d 125, 126 (Colo.App. 1994).

115. *See* CRS §§ 13-81-101 and -103.

116. *Hergenreter v. Morgan Cty. Sch. Dist. R-3*, 888 P.2d 346, 347 (Colo.App. 1994).

117. *See Rojhani v. Arenson*, 929 P.2d 23, 26 (Colo.App. 1996); *Cintron v. City of Colo. Springs*, 886 P.2d 291 (Colo.App. 1994).

118. *City of Colo. Springs v. Colburn*, 81 P.2d 397, 398 (Colo. 1938).

119. *Visser v. Mahan*, 111 P.3d 575, 579 (Colo.App. 2005).

120. *Bryant*, 946 P.2d at 501.

121. CRS § 24-10-109(6).

122. *East Lakewood Sanitation Dist. v. Dist. Ct. Cty. of Jefferson*, 842 P.2d 233 (Colo. 1992).

123. *Gallagher*, 54 P.3d at 393.

124. *City and Cty. of Denver v. Crandall*, 161 P.3d 627, 632 n.5 (Colo. 2007); *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 298 (Colo.App. 2009).

125. *Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63, 68–69 (Colo. 1990); *Awad v. Breeze*, 129 P.3d 1039, 1042 (Colo.App. 2005).

126. *Finnie v. Jefferson Cty. Sch. Dist. R-1*, 79 P.3d 1253 (Colo. 2003).

127. *Cikraji v. Snowberger*, 2015 COA 66.

128. *Mesa County Valley Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200, 1205 (Colo. 2000).

129. *Woodsmall*, 800 P.2d at 69.

130. *Kristensen v. Jones*, 575 P.2d 854, 856 (1978), *accord Kelsey*, 8 P.3d at 1205.

131. *See Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187, 1192 (Colo. 1996); *Dicke v. Mabin*, 101 P.3d 1126, 1130 (Colo.App. 2004).

132. *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 769 (Colo.App. 2000); *Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo.App. 1985); *Jones v. Ne. Durango Water Dist.*, 622 P.2d 92, 94 (Colo.App. 1980).

133. *Morgan v. Bd. of Water Works of Pueblo*, 837 P.2d 300 (Colo.App. 1992).

134. *Trinity Broad.*, 848 P.2d 916.

135. *Id.* at 924.

136. *Powell*, 48 P.3d at 563.

137. *Finnie*, 79 P.3d at 1258.

138. *Medina*, 35 P.3d 443, 452.

139. *Hamon Contractors, Inc.*, 229 P.3d at 300.

140. CRS § 24-10-108.

141. *Martinez v. Estate of Bleck*, 2016 CO 58.

142. *Loveland v. St. Vrain Valley Sch. Dist. RE-1J*, 2015 COA 138.

143. *Brighton Sch. Dist. 27J*, 325 P.3d 571.

144. CRS § 24-10-114.

145. CRS § 24-10-114(1)(a)(I).

146. CRS § 24-10-114(1)(b).

147. *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489 (Colo.App. 2011).

148. *Steedle v. Sereff*, 167 P.3d 135 (Colo. 2007).