COLORADO COURT OF APPEALS

DATE FILED: October 25, 2018
CASE NUMBER: 2017CA1791

Court of Appeals No. 17CA1791
Garfield County District Court No. 16CV30209
Honorable John F. Neiley, Judge

Jay Barner and Tracy Barner,

Plaintiffs-Appellees and Cross-Appellants,

v.

Town of Silt, Colorado,

Defendant-Appellant and Cross-Appellee.

ORDER AFFIRMED

Division I
Opinion by JUDGE FOX
Taubman and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 25, 2018

Garfield & Hecht PC, David H. McConaughy, Christopher D. Bryan, Haley M. Carmer, Glenwood Springs, Colorado, for Plaintiffs-Appellees and Cross-Appellants

The Law Offices of Steven J. Dawes, LLC, Steven J. Dawes, Denver, Colorado, for Defendant-Appellant and Cross-Appellee

Morgan Rider Riter Tsai, P.C., Sophia H. Tsai, Denver, Colorado, for Amicus Curiae Colorado Municipal League

¶ 1 In this appeal and cross-appeal, we consider whether the Town of Silt waived its immunity under the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2018, where Jay and Tracy Barner's home flooded after the Town's water main burst. We first conclude the district court did not err by not holding a hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). Then, we consider whether the Town waived immunity under section 24-10-106(1)(e) and (1)(f), C.R.S. 2018. We conclude that the Town waived immunity under section 24-10-106(1)(f) — operation and maintenance of a public water facility — and so do not reach the merits of the cross-appeal involving immunity pursuant to section 24-10-106(1)(e) — dangerous condition of a public facility. Therefore, we affirm the district court's order.

I. Background

¶ 2 In the summer of 2016, the Barners returned home from an overnight trip to find the crawlspace of their home completely flooded. They also discovered muddy water throughout the master bedroom, bathroom, and closet. The source of the water was a fist-sized hole in the Town's water main and a break in the sewer

service line; water from those lines flooded the Barners' water service lines and their home. Once the leak was discovered and the water was shut off, water stopped entering the Barners' home.

¶ 3 The Barners' home sustained significant damage. After the Town refused to assist the Barners in repairing their home, the Barners sued. The Town moved for dismissal under C.R.C.P. 12(b)(1), asserting immunity under the CGIA. The district court reviewed the motion to dismiss and, without a hearing, concluded that the Town waived its immunity under section 24-10-106(1)(f) because it operates and maintains a public water facility. The court also concluded that the Town did not waive immunity under section 24-10-106(1)(e) for a dangerous condition of a public facility because a "dangerous condition" is limited to personal injuries, not property damage.

¶ 4 The Town appeals the portion of the order concluding it waived immunity under section 24-10-106(1)(f), and in the alternative, requests that we remand for the court to hold a *Trinity* hearing. The Barners cross-appeal the portion of the order finding the Town immune under section 24-10-106(1)(e).

II. Applicable Law and Standard of Review

¶ 5 The CGIA provides that a public entity is "immune from liability in all claims for injury which lie in tort or could lie in tort." § 24-10-106(1). But it also provides that the public entity's immunity is sometimes waived. *Id.* As relevant here, immunity is waived for "[a] dangerous condition of any . . . public facility . . . maintained by a public entity, or public water . . . facility," § 24-10-106(1)(e), and "[t]he operation and maintenance of any public water facility." § 24-10-106(1)(f).

¶ 6 We strictly construe the CGIA's grants of immunity and broadly construe the waiver provisions in favor of the injured party. *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000); *see Young v. Jefferson Cty. Sherriff*, 2012 COA 185, ¶ 8.

¶ 7 Whether the CGIA bars a claim is a question of subject matter jurisdiction that is properly addressed by a motion to dismiss under C.R.C.P. 12(b)(1). *Fogg v. Macaluso*, 892 P.2d 271, 277 (Colo. 1995). A plaintiff bears the burden to establish that a court has subject matter jurisdiction to hear the case. *Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 85 (Colo. 2003). The court affords the plaintiff the reasonable inferences from the evidence that support a

waiver. *Lopez v. City of Grand Junction*, 2018 COA 97, ¶ 24. If the motion to dismiss attacks the facts underlying the complaint's jurisdictional allegations, the district court may receive evidence and hold a hearing to resolve the dispute. *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001); *see, e.g.*, *Trinity*, 848 P.2d at 924 (hearing required because there was a factual dispute as to whether plaintiff gave timely notice under the CGIA). But, if the relevant jurisdictional facts are not disputed, whether immunity has been waived is a question of law that may be resolved without a hearing. *Padilla*, 25 P.3d at 1180.

¶ 8 We will uphold a trial court's findings of jurisdictional facts unless they were clearly erroneous. *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997). But, if the facts were undisputed, as they were in this case, we review the application of the law de novo. *See Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

III. *Trinity* Hearing

¶ 9 The district court elected not to hold a *Trinity* hearing in resolving this jurisdictional dispute, but it issued a detailed order on the Town's motion to dismiss. Because the pleadings, affidavits,

and exhibits showed that the material facts relating to jurisdiction were undisputed, the district court correctly concluded that a *Trinity* hearing was not necessary. In its motion to dismiss, the Town made a conditional request for a hearing, essentially leaving it to the court's determination. *See Zedner v. United States*, 547 U.S. 489, 504 (2006) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .") (citation omitted); *see also Lyons Sav. & Loan Ass'n v. Dire's Lock & Key Co.*, 885 P.2d 345, 348 (Colo. App. 1994) ("The doctrine of judicial estoppel has been applied in Colorado to preclude a party, as a matter of law, from adopting a legal position which conflicts with an earlier position taken in the same or related litigation.").

¶ 10 The record reveals the following undisputed facts:

- The Barners resided in the Town.
- The Town's answer admitted that it owned, operated, and maintained the Town's public water and sewer systems.

- At least 35,000 gallons of water entered the Barners' home, causing more than $38,000 worth of damage and rendering the house temporarily uninhabitable.
- The water that flooded the Barners' home originated from the water main leak.
- The water main was likely installed in the 1980s.
- The Town repaired a leak in 2011 in the vicinity of the 2016 leak.
- The Town was aware that corrosive soil was present in the area and that it likely created the hole that caused the leaks.
- The water main has plastic sheeting (Polywrap) wrapped around the ductile iron, which served to retard corrosion.
- Town employees responded to reports of the 2016 leak and performed repairs to patch the water main and stop the leaking.

¶ 11 As discussed below, the above facts show that the Town clearly "operate[d] and maintain[ed]" the public water facility, and the Barners' injuries allegedly resulted from this operation and maintenance.

IV. Maintenance

¶ 12 Under section 24-10-106(1)(f), immunity is waived where injury results from a public entity's "operation and maintenance" of a "public water facility." Here, no one disputes that the Town is a public entity or that the water main and sewer lines are public water facilities. Indeed, the Town asserts that it operates a public water facility. Although the issue of negligence remains to be decided, the Town does not deny that the damage to the Barners' home was caused by water originating from the Town's water main. The operative questions, therefore, are whether the Town maintains a public water facility and whether the Barners' injury resulted from this maintenance. We conclude the Town maintains the water facility and that the injury resulted from such maintenance.

¶ 13 "Maintenance" is defined as "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." § 24-10-103(2.5), C.R.S. 2018. The broad definition of "operation" encompasses the concept of maintenance. *Lopez*, ¶ 22; *see* § 24-10-103(3)(a) (defining "operation" as "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 water . . . facility"). "Maintenance" is "ongoing repair and upkeep of the facility as it is put to the original, additional, or different uses than originally constructed" and includes keeping the facility in a state of repair, efficiency, or validity. *Smokebrush Found. v. City of Colorado Springs*, 2018 CO 10, ¶ 28 (quoting *Padilla*, 25 P.3d at 1182 & n.4). But the duty to maintain "does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility." § 24-10-103(2.5).

¶ 14 "Resulting from" is broadly construed and requires only "minimal causal connection" between the injury and the conduct. *Lopez*, ¶ 20 (quoting *Tidwell*, 83 P.3d at 86). The question at the immunity stage does not go so far as "to determine whether the injuries were 'caused by' the specified conduct." *Id.* (citing *Tidwell*, 83 P.3d at 86).

¶ 15 The Town has consistently admitted that it operates the public water facility. *See id.* at ¶ 22 ("This broad definition of 'operation' includes the concept of maintenance."). The Town cannot operate the public water system without maintaining it. The record shows

that the Town remedied the 2011 and 2016 leaks by returning the water main to its previous condition — without holes. Thus, the Town maintains the water system by keeping the lines in the same state as they were originally. *See* § 24-10-103(2.5).

¶ 16 Further, both parties' affidavits claimed that the hole in the water main was likely caused by corrosive soil, that the Town was aware of the corrosive soil problem, and the 2011 leak likely had the same cause. Thus, one could reasonably infer that the Barners' injury resulted from some act, or more likely omission, of the Town in responding to the corrosive soil problem. *See Lopez*, ¶ 24. But, this does not impose a "duty to upgrade, modernize, modify, or improve the design or construction of a facility." § 24-10-103(2.5).

¶ 17 Construing the immunity waiver broadly and in favor of the Barners, some act or omission by the Town — like not remedying the corrosive soil issue of which it was aware — resulted in the injury. *See Young*, ¶ 8. Contrary to the Town's arguments and those in the amicus brief, this conclusion does not make the Town strictly liable. *See Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146, 148 (Colo. App. 1986) ("The doctrine of strict liability in tort is not the equivalent of absolute liability . . . ."). Instead, it merely allows the

Barners' suit against the Town to proceed. The Barners must still prove all the elements of their negligence claim. Questions like whether the Supervisor Control and Data Acquisition (SCADA) system that monitors water levels was sufficient and whether the Town followed normal procedures for monitoring its water mains do not pertain to the broadly construed immunity waiver. But, these issues may be relevant to the elements of a negligence claim. *See Montoya v. City of Westminster Dep't of Pub. Works*, 181 P.3d 1197, 1199 (Colo. App. 2008) ("Because our determination is limited to jurisdictional issues, we do not address the city's contentions regarding negligence or causation. Those matters are properly resolved by the trier of fact.") (allowing a worker's suit against the city for injuries sustained from falling into an open water meter pit to proceed under section 24-10-106(1)(f) waiver); *see also State v. Moldovan*, 842 P.2d 220, 225 (Colo. 1992) ("We add, however, that the effect of a waiver of governmental immunity is merely to allow the liability of the public entity to 'be determined in the same manner as if the public entity were a private person.'") (citation omitted).

V. Dangerous Condition

¶ 18 Because we affirm on the maintenance issue and the Barners' suit may proceed on those grounds, we need not reach the dangerous condition issue raised in their cross-appeal. *See Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 2018 COA 65, ¶ 38 ("An issue is moot when the relief sought, *if granted*, would have no practical effect on an existing controversy.").

VI. Conclusion

¶ 19 We affirm the district court's order allowing the Barners' suit to proceed.

JUDGE TAUBMAN and JUDGE TERRY concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 27, 2018

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