

COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: January 30, 2023 10:20 AM FILING ID: 879FA92A2C8F2 CASE NUMBER: 2022SC293
Certiorari to the Colorado Court of Appeals Case No. 2020CA2088 Hon. Fox, Dailey, and Schutz Pitkin County District Court Case No. 2020CV30055 Hon. Denise Lynch	▲ COURT USE ONLY ▲
Petitioner: CITY OF ASPEN , a municipal corporation, v. Respondent: BURLINGAME RANCH II CONDOMINIUM OWNERS ASSOCIATION, INC. , a nonprofit corporation.	
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<p style="text-align: center;">BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER CITY OF ASPEN</p>	

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☒ It contains 1,849 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Rachel Bender

Rachel Bender, #46228

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
IDENTITY OF CML AND ITS INTEREST IN THE CASE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES

<i>A.C. Excavating v. Yacht Club II Homeowners Ass’n</i> , 114 P.3d 862 (Colo. 2005) ..	5
<i>Berg v. State Bd. of Agric.</i> , 919 P.2d 254 (Colo. 1996).....	4
<i>BRW, Inc. v. Dufficy & Sons, Inc.</i> , 99 P.3d 66 (Colo. 2004)	5
<i>Cosmopolitan Homes v. Weller</i> , 663 P.2d 1041 (Colo. 1983).....	5
<i>In re Estate of Gattis</i> , 318 P.3d 549 (Colo. App. 2013)	6
<i>Robinson v. Colo. State Lottery Div.</i> , 179 P.3d 998 (Colo. 2008).....	4
<i>State v. Hartsough</i> , 790 P.2d 836 (Colo. 1990).....	4
<i>Town of Alma v. AZCO Constr., Inc.</i> , 10 P.3d 1256 (Colo. 2000)	5

STATUTES

C.R.S. § 24-10-102	6, 7
C.R.S. § 24-10-106(1).....	4
C.R.S. §§ 24-10-101 to -120	2

OTHER AUTHORITIES

<i>2023 State of Our Cities & Towns Report</i> , COLORADO MUNICIPAL LEAGUE, https://tinyurl.com/SOOCAT2023	3
<i>All Hands on Deck</i> , Feature in <i>2023 State of Our Cities & Towns Report</i> , COLORADO MUNICIPAL LEAGUE, https://tinyurl.com/SOOCAT2023-Loveland	8

Dara MacDonald, <i>Building Municipal Workforce Housing</i> , COLORADO MUNICIPALITIES, April 2022, at 42, <i>available at</i> https://tinyurl.com/CMApril2022	8
<i>Expanding Housing Affordability Ordinance and Affordable Housing Fee</i> , https://tinyurl.com/DenverCPDFees	7
Jason Rogers & Caitlin Quander, <i>Getting Down to Work</i> , COLORADO MUNICIPALITIES, April 2022, at 31, <i>available at</i> https://tinyurl.com/CMApril2022	8
Meghan MacKillop & Robert Sheesley, <i>Targeted Solutions</i> , COLORADO MUNICIPALITIES, January 2023, <i>available at</i> https://tinyurl.com/CMJan2023	3
Meghan Overton, <i>Fort Collins Vision: Stable & Healthy Housing for All</i> , COLORADO MUNICIPALITIES, April 2022, at 28, <i>available at</i> https://tinyurl.com/CMApril2022	8
Press Release, Colorado Municipal League, Colorado Municipal League Releases Fall Municipal Election Results (Nov. 9, 2022), <i>available at</i> https://tinyurl.com/PR2022Election	7

The Colorado Municipal League (“CML”) respectfully submits the following *amicus curiae* brief in support of Petitioner City of Aspen (“Aspen”).

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML’s members include all 105 home rule municipalities, 166 of the 168 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000. Since its inception, CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide.

CML’s members are leading participants in efforts to solve the affordable housing crisis in Colorado, both through direct and indirect actions. This case examines the applicability of a judicially created contract law remedy concept known as the Economic Loss Rule (“ELR”) to statutory governmental immunity provisions in the context of a residential housing construction defect claim. Whether the ELR applies in this context may determine whether a municipality’s efforts to provide affordable for-sale housing are entitled to immunity under the

Colorado Governmental Immunity Act (“CGIA”), codified at C.R.S. §§ 24-10-101 to -120.

This Court’s opinion will affect CML’s membership and their efforts to provide affordable housing because any diminution of the CGIA’s protections will increase the risks to municipal funds and reduce opportunities for municipalities to participate in affordable housing solutions.

SUMMARY OF THE ARGUMENT

The immunity protections of the CGIA are essential to the provision of municipal services, including participation in the development of affordable housing in Colorado. Municipalities are entitled to immunity in the absence of a specific waiver of immunity, none of which are at issue in this case. Residential construction defect claims, long held to be tort claims not subject to the ELR, should be treated no differently simply because a public entity and the CGIA are involved. A division of the Colorado Court of Appeals upended this understanding when it, for the first time, held that the ELR could remove residential construction defect claims from the realm of tort and outside of the CGIA’s protections. The Court of Appeal’s holding erroneously diminished the CGIA protections afforded to municipalities and, if upheld, could have a significant chilling effect on the provision of municipal services related to the development of affordable housing.

ARGUMENT

Affordable housing is a critical issue in Colorado that municipalities are actively addressing. CML's 2023 State of Our Cities & Towns Report, based on survey data from municipalities around the state, shows affordable housing as one of the top three challenges faced by municipalities. The issue has shown up in the survey as a top challenge since 2014. *2023 State of Our Cities & Towns Report*, COLORADO MUNICIPAL LEAGUE, <https://tinyurl.com/SOOCAT2023> (last visited Jan. 20, 2023).

Municipalities across Colorado have invested heavily in supporting affordable housing in their communities in many forms. Some communities support development indirectly, by providing land or financing through general revenue or new taxes or regulatory fees. Others, like Aspen, are directly involved in making affordable housing available as project owners. *See* Meghan MacKillop & Robert Sheesley, *Targeted Solutions*, COLORADO MUNICIPALITIES, January 2023, at 15-16, *available at* <https://tinyurl.com/CMJan2023>. More and more, municipalities are actively participating in affordable housing development to speed up projects, remove financing barriers, and ensure positive outcomes.

Among the tools available to public entities, the CGIA's protections against tort liability enable municipalities to take an active role in affordable housing

development. The CGIA provides public entities and their officials and employees with immunity “from liability in all claims for injury which 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 the claimant.” C.R.S. § 24-10-106(1) (emphasis added); *see also Berg v. State Bd. of Agric.*, 919 P.2d 254, 258 (Colo. 1996) (“the form of the complaint is not determinative of the claim’s basis in tort or contract”). In this case, the Court must address whether the ELR applies to residential construction defect claims against a public entity and, in turn, could remove such claims from the CGIA’s provision of immunity for claims that “could lie in tort.”

A court’s primary task in construing statutes such as the CGIA “is to determine and give effect to the intent of the legislature,” which requires giving effect to the words used in a statute and the ordinary meaning of those words. *State v. Hartsough*, 790 P.2d 836, 838 (Colo. 1990). Therefore, only if a claim does not and cannot lie in tort does it escape the confines of the CGIA without a specific waiver of immunity. Even “where there is . . . overlap, claims that could arise in both tort and contract are barred by the CGIA.” *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1004 (Colo. 2008).

This Court has held that “[w]here there exists a duty of care independent of any contractual obligations, the economic loss rule has no application and does not

bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus falls outside the scope of the economic loss rule." *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 866 (Colo. 2005) (citing *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000)). In the residential construction context, Colorado has a "recognized independent duty of care requiring builders to construct homes without negligence." *Id.* (citing *Cosmopolitan Homes v. Weller*, 663 P.2d 1041, 1043 (Colo. 1983)). While municipalities cannot avoid purely contractual liability that might arise as a participant in affordable housing development, tort claims of residential construction defects like those asserted in this case remain subject to the CGIA's limitations of liability.

The Court of Appeals erroneously extended the ELR beyond its intended purpose and improperly eroded the CGIA's protections. The Court of Appeals should have ended its analysis when confronted with residential construction defect claims, regardless of the manner of pleading. *Compare id.* (finding the "economic loss rule has no application to negligent residential construction claims"), with *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004) (holding the ELR applies between *commercial* parties). Instead, the Court of Appeals went beyond the CGIA's provisions by suggesting that the ELR could pull

back tort claims against a public entity when the rule would never have applied against a private builder. *See In re Estate of Gattis*, 318 P.3d 549, 553 (Colo. App. 2013) (noting that “the supreme court has declined to extend [the economic loss rule] to negligence claims for latent defects in residential construction”). The Court of Appeals’ holding is inconsistent with Colorado precedent regarding both the ELR and the nature of a residential construction defects claim, as discussed herein and detailed by Aspen in its brief.

Municipalities have been able to take on affordable housing work because they have had the liability protections of the CGIA. Considering the ELR when a municipality seeks to assert the CGIA in a residential construction defect case subverts the CGIA’s purposes in addition to ignoring the statute’s express language. The CGIA “recognizes that the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions.” C.R.S. § 24-10-102. Furthermore, “taxpayers would ultimately bear the fiscal burdens of unlimited liability and . . . limitations on the liability of public entities . . . are necessary in order to protect the taxpayers against excessive fiscal burdens.” *Id.*

The delivery of affordable housing and the protection of taxpayers from the excessive fiscal burdens of unlimited liability fall squarely within the CGIA's intended purpose. *See id.* In this case, the Respondents sought recovery solely from public funds and, after declining to seek recovery from other sources, asserted that the ELR should have some special application in the context of the CGIA.

Taxpayers are authorizing new taxes and municipalities are approving new regulatory fees for the stated purpose of providing affordable or attainable housing—not to pay for litigation or damages awards. *See, e.g.,* Press Release, Colorado Municipal League, Colorado Municipal League Releases Fall Municipal Election Results (Nov. 9, 2022), *available at* <https://tinyurl.com/PR2022Election> (showing 2022 ballot measures passing in Aspen, Carbondale, Durango, Salida, and Steamboat Springs, providing additional funding for affordable or attainable housing); *Expanding Housing Affordability Ordinance and Affordable Housing Fee*, <https://tinyurl.com/DenverCPDFees> (last visited Jan. 26, 2023) (discussing Denver's linkage fee as a funding source for a dedicated affordable housing fund). Public funds should not be made subject to claims of this nature, particularly when other means of recovery are available.

Endorsing the Court of Appeals' view of the ELR under the CGIA would greatly disrupt and deter the current high level of municipal involvement to solve

the affordable housing crisis.¹ Municipalities and other public entities may be hesitant to use all tools available to promote housing. If liability risks and overhead increase, municipalities will have fewer funds to buy land for housing development, to construct projects, to build infrastructure, to offset fees, and to provide grants or loans to housing developers. One line item of overhead that might be particularly susceptible to increase is the cost of insurance. If a municipality's insurance policy contains an exclusion for breach of contract claims while providing coverage for tort claims, affirming the Court of Appeal's construction means that many residential construction defect claims could be deemed breach of contract claims, and damages awards may not be covered

¹ Municipal efforts to provide and support the development of housing are abundant. *See, e.g.,* Meghan Overton, *Fort Collins Vision: Stable & Healthy Housing for All*, COLORADO MUNICIPALITIES, April 2022, at 28, *available at* <https://tinyurl.com/CMApril2022> (discussing Fort Collins' Housing Strategic Plan and support of affordable housing production); Jason Rogers & Caitlin Quander, *Getting Down to Work*, COLORADO MUNICIPALITIES, April 2022, at 31, *available at* <https://tinyurl.com/CMApril2022> (describing Commerce City's partnership to develop a mixed-use community with affordable housing); Dara MacDonald, *Building Municipal Workforce Housing*, COLORADO MUNICIPALITIES, April 2022, at 42, *available at* <https://tinyurl.com/CMApril2022> (examining Crested Butte's development of affordable workforce housing); *All Hands on Deck*, Feature in *2023 State of Our Cities & Towns Report*, COLORADO MUNICIPAL LEAGUE, <https://tinyurl.com/SOOCAT2023-Loveland> (last visited Jan. 18, 2023) (discussing partnership with builder to construct affordable homes for sale and involvement in supporting development of housing for the unhomed).

through insurance. Under those circumstances, the impact to public funds could be drastic.

To ensure that municipalities can provide essential services like the delivery of housing, the CGIA's protections must be preserved when a government operates to provide housing. Accordingly, this Court should reject the Court of Appeals' unprecedented consideration of the ELR in the context of the CGIA's application to claims arising out of residential construction.

CONCLUSION

For the reasons set forth herein, CML urges this Court to hold that the ELR is not a proper consideration in determining whether a residential construction defect claim "could lie in tort" under the CGIA.

Dated this 30th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2023, I filed the foregoing **BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER CITY OF ASPEN** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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