SUPREME COURT, STATE OF COLORADO

Case No. 91 SC 663

BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

CITY OF LAFAYETTE, ROBERT BURGER, ALEX ARINIELLO, LARRY GUPTON, TIM LARSEN, SHARON STETSON, PHYLLIS THIEME, and DON YOSHIHARA,

Petitioners,

v.

JEFFREY B. BARRACK, FRANK BRITTIN CLAYTON III, JANET BEARDSLEY, KARL KURTZ, and JANIS YABES,

Respondents.

Appeal from District Court of Boulder County
Opinion by: The Honorable Morris W. Sandstead
Court of Appeals, Case No. 90-CA-0406
Opinion by: Judge Rothenberg
Judges Reed and Van Cise concurring

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Dated: June 1, 1992

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I. STATEMENT OF THE ISSUE

Whether the Court of Appeals erred in reversing the District Court's decision that the Respondents may not seek tort damages against the City because the Respondents failed to comply with the notice provisions of the Colorado Governmental Immunity Act, which requires the Respondents to notify the City within 180 days after the date of the discovery of any tort claim against the City.

II. STATEMENT OF THE CASE

The League hereby adopts and fully incorporates by reference the statement of the case presented in the opening brief submitted by Petitioners, the City of Lafayette, et al.

III. STATEMENT OF FACTS

The League hereby adopts and fully incorporates by reference the statement of facts presented in the opening brief submitted by Petitioners, the City of Lafayette, et al.

IV. SUMMARY OF ARGUMENT

The conclusion that Respondents discovered injury sufficient to trigger running of the 180 day period in the Notice of Claim statute on the day that Respondents received notice of termination of their water service is consistent with the language of the

statute and with the legislative purpose of the statute, as articulated in decisions of this Court and the legislative history of the statute. Thus, the decision of the trial court was correct; the decision of the Court of Appeals was in error and should be reversed.

V. ARGUMENT

In 1971 the Colorado General Assembly enacted the Governmental Immunity Act following this Court's elimination of the judicial doctrine of governmental or sovereign immunity in Proffitt v. State, 482 P.2d 965 (Colo. 1971); Flournoy v. School District No. 1, 482 P.2d 966 (Colo. 1971) and Evans v. Board of County Commissioners 482 P.2d 968 (Colo. 1971). In Evans this Court said:

> If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part it has the authority to do so (citations omitted). If the legislative arm of our government does not completely restore these immunities, than undoubtedly it will wish to place limitations upon the actions that may be brought against the state and its subdivisions. This, too, it has full authority to accomplish (citation omitted). Evans, 482 2d at 972.

The Legislature reinstated governmental immunity except as to claims arising from specified limited circumstances. See Section 24-10-106, C.R.S. Monetary limits were placed on recoveries, see Section 24-10-114, C.R.S. and the Act's "notice of claim" provision, Section 24-10-109(1), C.R.S., was adopted. Prior to its amendment in 1986, Section 24-10-109(1), C.R.S. provided in pertinent part:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within 180 days after the date of the discovery of the injury.

In Fritz v. Regents of the University of Colorado, 586 P.2d 23 (Colo. 1978) this Court, in a case dealing specifically with the notice of claim statute, said that "the right to maintain an action against a governmental . . . entity is derived from statutes, and reasonable conditions, such as [the] notice requirement, imposed as a condition precedent to the right to maintain the action are mandatory." Id. at 26.

The notice of claim statute has been held to rationally further several legitimate governmental interests.

> Those interests include fostering prompt investigation while the evidence is still fresh; repair of any dangerous conditions; quick and amicable settlement of meritorious claims; and preparation of fiscal planning to meet any possible liability. In addition, in light of the numbers of public entities, the notice requirement of section 24-10-109 is a certain means by which the state or its subdivisions may be alerted to potential liability arising from a governmental activity. Id. at 25.

In 1983 this Court rendered its decision in State v. Young 665 P.2d 108 (Colo. 1983) holding that "discovery of the injury," as used in Section 24-10-109(1), C.R.S., actually meant that a potential claimant should have a "reasonable opportunity to discover the basic and material facts underlying a claim." Id. at 111.

In Young the plaintiff was issued a speeding ticket on I-25 between Castle Rock and Colorado Springs, and instructed to appear in Douglas County Court. The ticket was then erroneously filed with the El Paso County Court. Young called the Douglas County Court the day before she was scheduled to appear and was told that no charges were pending against her, so she did not appear. El Paso County issued a bench warrant for her arrest. Young know nothing of this until she was arrested in Boulder County after being stopped for a license tag violation. This Court decided that Young did not "discover" her injury until seventeen days later when she received documentation that fully explained the mix-up.

In 1986, the General Assembly enacted HB 1196, 1986 Colo. Sess. Law, Ch. 166 (attached as Appendix A), which amended the notice of claim statute to its current form. The pertinent portions of Section 24-10-109(1), C.R.S. now read as follows (the 1986 amendment language is underlined):

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within 180 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.

The General Assembly also amended the definition of "injury," in the Act at Section 24-10-103(2), as follows (deletions made by the 1986 Act are shown struck through; new language is underlined):

> (2) "Injury" means death, injury to a person, damage to or loss of property, or whatsoever kind, which ~~would be actionable in tort~~ 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.

It is abundantly clear that the Legislature's purpose in adding the above language was to reverse the effect of this Court's decision in Young. The purpose of the amendatory language was to make it clear that, in the case of the Young facts, for example, the claimant discovered her injury on the day she was arrested, not seventeen days later when she figured out exactly why the situation occurred.

In a Colorado Lawyer article which appeared shortly after the conclusion of the 1986 Legislative Session, Rep. Chuck Berry, the principal sponsor of HB 1196, cited this Court's decision in Young and stated that the 1986 amendments were intended to address:

> court decisions which have eroded the effectiveness of the Act's 180 day notice requirement . . . the bill addresses Young by providing the 180 day notice period begins to run after the date of discovery of the injury, regardless of whether the claimant knew all of the elements of a claim or the cause of action for the injury.

Berry and Tanoue, Amendments to the Colorado Governmental Immunity Act, 15 The Colorado Lawyer, 1193, 1195 (July 1986).

Representative Berry addressed the amendment to the notice of claim statute when he presented his legislation on the floor of the Colorado House of Representatives:

> what we are actually looking at here is reversing, frankly, a court case where they said we really don't care when the injury is discovered or anything like that

> . . . we want to leave the words "discovery" in the statute, but make it clear that knowing the elements of the claim is simply not something that the court's going to look at.

Hearings on HB 1196 before the Colorado House of Representatives Fifty-fifth General Assembly, Second Regular Session, February 26, 1986 (Appendix B, page 1). Later, in summarizing the bill for the members of the House, Rep. Berry said:

> . . . the Legislature when it passed the Governmental Immunity Act in 1971 - 1972, said that you have to give notice to [a] governmental entity . . . of what the injury was, and if you didn't do that, you couldn't bring the action. The public policy behind that was to give government some degree of certainty about what they were being sued for. This is particularly important, far more important, in today's world where most of our governmental entities are self-insured. The taxpayer deserves to know if there is a claim pending against a local government and not have that be something that comes up six years later to the surprise of everybody. <u>All we are trying to do in the bill is tighten up the notice requirements . . . so that it means what the Legislature back in '71-72 thought it meant, and frankly we are trying to repeal some court decisions which have eroded the meaning of that notice requirement</u>. (emphasis added) Id. at page 12.

Finally, comments by Senator Jim Lee, the principal Senate sponsor of the 1986 Legislation, while not mentioning the <u>Young</u> decision directly, nonetheless make it clear that the intention of the General Assembly was to eliminate the "basis of the claim" approach suggested in <u>Young</u>. In his opening comments presenting the bill to Senate Business Affairs and Labor Committee, Senator Lee stated that a claimant has "180 days from the point of his discovery of the injury -- not all the elements of the injury, <u>just that he has been injured</u> -- to file the notice." (emphasis added)

Hearings on HB 1196 before the Senate Business Affairs and Labor Committee, Fifty-fifth General Assembly, Second Regular Session, May 17, 1986. (Appendix C, page 1).

Given the purposes of the notice of claim statute delineated by this Court in Fritz and the intent of the General Assembly in amending and clarifying the Notice of Claim statute in 1986, the League respectfully urges this Court to reverse the decision of the Court of Appeals and hold that Respondents discovered their injury, for purposes of the Notice of Claim statute, when they received written notice on December 16, 1986 that their water service would be terminated. At that time Respondents may not have known all of the elements of their claims, or of a cause of action for such injuries, but they surely recognized that an injury to their interests had occurred. Potential claims against the City had arisen and this was a circumstance where notice to the City was appropriate and consistent with the purposes for which the Notice of Claim statute was enacted.

It is worth emphasizing at this point that the notice of claim statute was not designed to provide notice to public entities of all the possible legal bases for claims an individual may have or the elements of those claims. Municipalities do not necessarily need to know promptly whether a particular claim will be based on theories of negligence, outrageous conduct, inverse condemnation, or antitrust. To achieve the purposes of the notice requirement, municipalities do need to know promptly who was injured, when, where and how the injury allegedly occurred and the potential claim

against public funds. See generally: 56 Am. Jur. 2d, Municipal Corporations, Section 686; 63 C.J.S., Municipal Corporations, Section 922.

Similarly, claimants do not need to know prior to filing a notice of claim all of their possible legal basis for a claim or each of the facts underlying the claim, since filing the notice has no adverse impact on the claimant. Filing the notice does not require that any suit be filed -- it only preserves the right to sue in the future.

The record in this case contains numerous indications that Respondents "discovered" injury to their interest when they were told by the City that their water service would be terminated.

For example, in their original complaint, Respondents alleged an immediate and substantial adverse impact on their property values. Respondents specifically alleged, concerning the City's announced intention to terminate water service, that:

> The threat of such action has reduced the market value of [Respondents'] property and renders such property virtually unmarketable at any fair price.

(Record, Vol. I, Page 4)

It is important to recognize that Respondents alleged injury from the threat of water service termination. It is entirely reasonable to conclude, as did the trial court, that Respondents discovered significant injury, that is, "damage to or loss of

property . . . which . . . could lie in tort" 24-10-103(2), C.R.S. on December 16, 1986, the date when they received written notice that water service to their property would terminate. Despite Respondents' claim that the City's announced intention to terminate water service had rendered their property "virtually unmarketable," Respondents did not file a Notice of Claim pursuant to 24-10-109(1), C.R.S. until December 30, 1987, over one year later. When Respondents sought to amend their complaint to add tort claims in January of 1989, they sought recovery of damages for, inter alia, diminution of their property values. (See Record, Vol. I, Pages 164-168) Presumably, these tort damages were, in large part, attributable to that diminution in value which Respondents have alleged occurred when the City announced plans to terminate water service.

It seems quite improbable that Respondents could have received written notice that their property would lose its water service yet not "discover" any injury to their property values (injury for which they would ultimately seek recovery in tort) until over six months later (that is, until June 27, 1987, the date 180 days prior to when Respondents finally filed their Notice of Claim). A far more plausible conclusion is that Respondents recognized, or "discovered," the alleged diminution in property values and other injuries on the date when the City provided written notice that water service to their properties would be terminated.

The League urges this Court to reject as particularly unlikely the Court of Appeals assumption that:

> . . . it was not until December 1987, when [Respondents] entered into the stipulation with the City, that [Respondents] actually became aware of the potential for tort injuries and damages.

Appendix D, Page 7-8

Respondents essentially invite this Court to return to the old "basis of the claim" rule announced in Young and displaced by the General Assembly in its 1986 amendments to the Governmental Immunity Act. The League urges this Court to decline Respondents' invitation. The trial court was correct in this case. The decision of the trial court comported with the language and intent of the statute; the decision of the Court of Appeals did not.

The Notice of Claim statute reflects a well reasoned legislative policy to establish a condition precedent to private parties' pursuit of tort claims against the public funds. It is axiomatic, being well established in statute and decisions of this Court that, in the construction of statutes it is presumed that the "public interest is favored over any private interest." See Section 2-4-201(1)(e), C.R.S., Allen v. Charnes, 674 P.2d 378, 381 (Colo. 1984).

The League suggests that the Court of Appeals decision in Morrison v. Aurora, 745 P.2d 1042 (Colo. App. 1987) provides useful guidance for resolution of the case at bar.

As in the present case, a major issue in Morrison was when Plaintiffs discovered their injury, thus triggering the running of the 180 day period for filing a notice of claim pursuant to Section 24-10-109(1), C.R.S.

In Morrison, the City of Aurora placed floodway restrictions on property that resulted in a diminution of its market value. The Plaintiff property owners filed their Notice of Claim some 8 1/2 months after learning of these restrictions. The City urged that the running of the 180 day period was triggered when the property owners learned of the floodway restrictions on their property. The Plaintiffs, on the other hand, argued that they did not discover their injury until they actually sold their property at a reduced price (this sale had occurred within the 180 days prior to filing of notice).

The Court of Appeals held in favor of the City and reversed the District Court's finding that "no cause of action sufficient to trigger the notice requirement arose until such time as duty, breach of duty, and ultimately, damages came together, and that occurred at the time of closing" on the contract to sell the property. The Court held that the Notice of Claim statute does not allow an aggrieved party to wait until "all the elements of the claim mature" before filing its notice. Id. at 1046. The Court of Appeals found that:

> . . . the Plaintiffs were aware of the claimed injury to the property and the potential damages . . . when the notice of floodway restrictions precipitated the renegotiation of their selling price for the property. Therefore, we conclude that the trial court erred as a matter of law by ruling the notice requirement was not triggered until the damage element of the claim was mature. Id.

Here the City provided written notice to the property owners of imminent termination of their water service. The property owners subsequently alleged that this threat reduced the market value of their property and "rendered such properties virtually unmarketable at any fair price." (Record, Vol. 1, Page 4) In Morrison the property owners discovered their injury when they learned of the floodway restrictions on their property; it would be entirely reasonable to conclude, as did the trial court, that Respondents discovered their injury when they received written notice that water service to their property would be terminated. Respondents allegations in their initial complaint and in support of several tort claims in their proposed amended complaint (Record, Vol. I, Pages 4 and 164-176, respectively) are consistent with Respondents' discovery of injuries coincident with the time that they received their written notice of water service termination from the City. Respondents' claims may not have matured as of that date, they may not have known "all of the elements of a claim or of a cause of action for such injury" 24-10-109(1), C.R.S., and they may have elected to initially pursue injunctive relief, contract claims, and other relief, but they were certainly sufficiently aware of injury on that date to trigger the 180 day period in the Notice of Claim statute.

In Mountain Gravel and Construction Company v. City of Cortez, 721 P.2d 698 (Colo. App. 1986), the Gravel Company's building permit was revoked in March 1983 and the Company challenged the revocation pursuant to C.R.C.P. 106(a)(4); the District Court

affirmed the revocation in September 1983. Five months later, in February 1984, the Company sought recovery in tort. The trial court granted summary judgement in favor of the city based in part upon the Gravel Company's failure to timely file a Notice of Claim pursuant to 24-10-109(1), C.R.S.

The Gravel Company appealed and the Court of Appeals affirmed the decision of the trial court. The Court of Appeals rejected the Company's argument that the 180 day period did not begin to run until after the trial court ruled on the legality of the building permit revocation; instead the Court of Appeals found that the Company discovered its injury when it learned of the revocation.

In the present case Respondents discovered their injury when they received notice of the water service termination. That is the date upon which the 180 day notice period should commence, not some future date when it became apparent to Respondents that their non-tort remedies would not adequately address their injuries. As this Court said in Fritz, supra, part of the purpose of the Notice of Claim is to prompt government fiscal planning to meet "possible liability" and assure that local governments "may be alerted to potential liability arising from a governmental activity." Fritz, supra, 586 P.2d at 25. The City was entitled to know that, in addition to Respondents' contract claims and claims for injunctive relief, there was potential exposure for the City in tort when it announced its intention to terminate Respondents' water service.

VII. CONCLUSION

Prior decisions of this Court articulating the purposes of the Notice of Claim statute and the legislative history of that statute clearly indicate that Respondents should be held to have discovered their injury for purposes of the Notice of Claim statute on the date that they received notice that water service to their property would be terminated. This discovery triggered Respondents' obligation to file a notice of claim with the City within 180 days thereafter, if Respondents wanted to preserve their opportunity to pursue tort claims against the public's funds. Respondents did not timely file this notice. Thus, the decision of the trial court was correct and the decision of the Court of Appeals permitting Respondents to now pursue their tort claims was in error and ought to be reversed.

Respectfully submitted this 1st day of June, 1992.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, first class postage prepaid, this 1st day of June, 1992 to:

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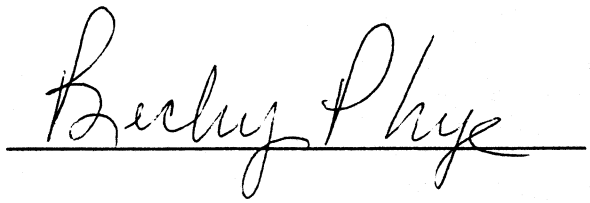

SUPREME COURT, STATE OF COLORADO

Case No. 91 SC 663

APPENDICES TO BRIEF OF THE COLORADO MUNICIPAL LEAGUE

CITY OF LAFAYETTE, ROBERT BURGER, ALEX ARINIELLO, LARRY GUPTON, TIM LARSEN, SHARON STETSON, PHYLLIS THIEME, and DON YOSHIHARA,

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Dated: June 1, 1992

APPENDIX "A"

42-5-103, 42-5-105, 42-6-137, 42-7-422, 42-7-510, and 42-8-105. This paragraph (e) shall not be construed to affect any levy of costs pursuant to paragraph (c) of this subsection (1).

Section 2. **Effective date - applicability.** This act shall take effect July 1, 1986, and apply to offenses committed on or after said date.

Section 3. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 8, 1986

CHAPTER 166

GOVERNMENT — STATE

GOVERNMENTAL IMMUNITY

HOUSE BILL NO. 1196. BY REPRESENTATIVES Berry, Paulson, Singer, Fish, Allison, M.C. Bird, Grant, Hamlin, Mutzebaugh, Schauer, D. Williams, Wright, Bath, M.L. Bird, Bledsoe, Bond, Bowen, Bryan, Campbell, Gillis, Grampsas, P. Hernandez, T. Hernandez, Hume, Markert, Minahan, Moore, Philips, Romero, Swenson, Taylor-Little, and K. Williams; also SENATORS Lee, Allard, Beatty, Bishop, Brandon, Fenlon, McCormick, R. Powers, Rizzuto, Strickland, Traylor, and Wattenberg.

AN ACT

CONCERNING THE LIABILITY OF PUBLIC ENTITIES, OFFICIALS, AND EMPLOYEES PURSUANT TO THE "COLORADO GOVERNMENTAL IMMUNITY ACT".

Be it enacted by the General Assembly of the State of Colorado:

Section 1. 24-10-102, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-10-102. Declaration of policy. It is recognized by the general assembly that the doctrine of sovereign immunity, whereunder the state and its political subdivisions are often immune from suit for injury suffered by private persons, is, in some instances, an inequitable doctrine. The general assembly also recognizes that the supreme court has abrogated the doctrine of sovereign immunity effective July 1, 1972, and that thereafter the doctrine shall be recognized only to such extent as may be provided by statute. THE GENERAL ASSEMBLY ALSO 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. THE GENERAL ASSEMBLY FURTHER RECOGNIZES THAT THE TAXPAYERS WOULD ULTIMATELY BEAR THE FISCAL BURDENS OF UNLIMITED LIABILITY, AND THAT LIMITATIONS ON THE LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES ARE NECESSARY IN ORDER TO PROTECT THE TAXPAYERS AGAINST EXCESSIVE FISCAL BURDENS. IT IS ALSO RECOGNIZED THAT PUBLIC EMPLOYEES, WHETHER ELECTED OR APPOINTED, SHOULD BE PROVIDED WITH PROTECTION FROM UNLIMITED LIABILITY SO THAT SUCH PUBLIC EMPLOYEES ARE NOT DISCOURAGED FROM PROVIDING THE SERVICES OR FUNCTIONS

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

~~the traveled portion and shoulders or curbs~~ 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 the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any ~~paved~~ highway which is a part of the federal secondary highway system, or of any ~~paved~~ 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. AS USED IN THIS SECTION, THE PHRASE "PHYSICALLY INTERFERES WITH THE MOVEMENT OF TRAFFIC" SHALL NOT INCLUDE TRAFFIC SIGNS, SIGNALS, OR MARKINGS, OR THE LACK THEREOF, BUT SHALL INCLUDE THE FAILURE TO REPAIR A STOP SIGN OR A YIELD SIGN WHICH REASSIGNED THE RIGHT-OF-WAY OR THE FAILURE TO REPAIR A TRAFFIC CONTROL SIGNAL ON WHICH CONFLICTING DIRECTIONS ARE DISPLAYED, IF SUCH FAILURE CONSTITUTED A DANGEROUS CONDITION AS DEFINED IN SECTION 24-10-103 (1);

(e) A dangerous condition of any ~~public facility; except roads and highways located in parks or recreation areas; public parking facilities; and public transportation facilities maintained by such public entity.~~ 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. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting ~~the defense of~~ sovereign immunity ~~to~~ FOR an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity. ~~or a dangerous condition existing therein.~~

(2) Nothing in this section OR IN SECTION 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

Section 6. Article 10 of title 24, Colorado Revised Statutes, 1982 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

24-10-106.5. Duty of care. (1) In order to encourage the provision of services to protect the public health and safety, and to allow public entities to allocate their limited fiscal resources, a public entity or public employee shall not be deemed to have assumed a duty of care where none otherwise existed by the performance of a service or an act of assistance for the benefit of any person. The adoption of a policy or a regulation to protect any person's health or safety shall not give rise to a duty of care on the part of a public entity or public employee where none otherwise existed. In addition, the enforcement of or failure to enforce any such policy or regulation or the mere fact that an inspection was conducted in the course of enforcing such policy or regulation shall not give rise to a duty of care where none otherwise existed; however, in a situation in which sovereign immunity has been waived in accordance with the provisions of this article, nothing shall be deemed to foreclose the assumption of a duty of care by a public entity or public employee when the public entity or public employee requires any person to perform any act as the result of such an inspection or as the result of the application of such policy or regulation. Nothing in this section shall be construed to relieve a public entity of a duty of care expressly imposed under other statutory provision.

(2) Nothing in this article shall be deemed to create any duty of care.

Section 7. 24-10-107, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-10-107. Determination of liability. EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, where sovereign immunity is ~~abrogated as a defense~~ NOT A BAR under section 24-10-106, liability of the public entity shall be determined in the same manner as if the public entity were a private person.

Section 8. 24-10-108, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-10-108. Sovereign immunity a bar. Except as provided in sections 24-10-104 to 24-10-106, sovereign immunity shall be ~~available to~~ A BAR TO ANY ACTION AGAINST a public entity ~~as a defense to an action~~ for injury WHICH LIES 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. IF A PUBLIC ENTITY RAISES THE ISSUE OF SOVEREIGN IMMUNITY PRIOR TO OR IMMEDIATELY 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.

Section 9. 24-10-109 (1), (2) (b), (3), and (5), Colorado Revised Statutes, 1982 Repl. Vol., are amended, and the said 24-10-109 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

24-10-109. Notice required - contents - to whom given - limitations. (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty 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. ~~Substantial~~ Compliance with the ~~notice~~ provisions of this section shall be a ~~condition precedent~~ JURISDICTIONAL PREREQUISITE to any action brought under the provisions of this article, and failure of ~~substantial~~ compliance shall ~~be a complete defense to~~ FOREVER BAR any such action.

REQUIRED BY THE CITIZENS OR FROM EXERCISING THE POWERS AUTHORIZED OR REQUIRED BY LAW. It is further recognized that the state, its political subdivisions, and the public employees of such public entities, by virtue of the services and functions provided, the powers exercised, and the consequences of unlimited liability to the governmental process, should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided by this article. The general assembly also recognizes the desirability of including within one article all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions ~~other than contract~~ 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 A CLAIMANT and that the distinction for liability purposes between governmental and proprietary functions should be abolished.

Section 2. 24-10-103 (1), (2), and (4), Colorado Revised Statutes, 1982 Repl. Vol., are amended to read:

24-10-103. Definitions. (1) "Dangerous condition" means ~~the~~ A physical condition of ~~any public building, public hospital, jail, public highway, road, or street, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming~~ A facility ~~where the physical condition of such facilities~~ or the use thereof WHICH constitutes ~~a~~ 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 in constructing or maintaining such facility. For the purposes of this subsection (1), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of ~~due~~ 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 ~~set forth in this subsection (1)~~ is inadequate. ~~in relation to its present use.~~ THE MERE EXISTENCE OF WIND, WATER, SNOW, ICE, OR TEMPERATURE SHALL NOT, BY ITSELF, CONSTITUTE A DANGEROUS CONDITION. NOTHING IN THIS SUBSECTION (1) SHALL PRECLUDE A PARTICULAR DANGEROUS ACCUMULATION OF WATER, SNOW, OR ICE FROM BEING FOUND TO CONSTITUTE A DANGEROUS CONDITION WHEN A PUBLIC ENTITY FAILS TO USE EXISTING MEANS AVAILABLE TO IT FOR THE REMOVAL OF SUCH ACCUMULATION AND WHEN THE PUBLIC ENTITY HAD NOTICE OF SUCH ACCUMULATION AND REASONABLE TIME TO ACT.

(2) "Injury" means death, injury to a person, damage to or loss of property, of whatsoever kind, which, ~~would be actionable in tort~~ 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.

(4) "Public employee" means an officer, employee, ~~or~~ servant, OR AUTHORIZED VOLUNTEER of the public entity, whether or not compensated, elected, or appointed, but does not include an independent contractor

or any person who is sentenced ~~pursuant to section 12-4-1202 (4), C.R.S. 1973,~~ to participate in any type of useful public service. FOR THE PURPOSES OF THIS SUBSECTION (4), "AUTHORIZED VOLUNTEER" MEANS A PERSON WHO PERFORMS AN ACT FOR THE BENEFIT OF A PUBLIC ENTITY AT THE REQUEST OF AND SUBJECT TO THE CONTROL OF SUCH PUBLIC ENTITY.

Section 3. 24-10-104, Colorado Revised Statutes, 1982 Repl. Vol., is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

24-10-104. Waiver of sovereign immunity. Notwithstanding any provision of law to the contrary, the governing body of a public entity, by resolution, may waive the immunity granted in section 24-10-106 for the types of injuries described in the resolution. Any such waiver may be withdrawn by the governing body, by resolution. A resolution adopted pursuant to this section shall apply only to injuries occurring subsequent to the adoption of such resolution.

Section 4. 24-10-105, Colorado Revised Statutes, 1982 Repl. Vol., as amended, is amended to read:

24-10-105. Prior waiver of immunity - effect. It is the intent of this article to cover all actions 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. No public entity shall be liable for such actions except as provided in this article, and no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton, except as provided in this article. Nothing in this section shall be construed to allow any action which lies 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 to be brought against a public employee except in compliance with the requirements of this article.

Section 5. The introductory portion to 24-10-106 (1) and 24-10-106 (1) (b), (1) (d), (1) (e), (1) (f), and (2), Colorado Revised Statutes, 1982 Repl. Vol., are amended, and the said 24-10-106 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

24-10-106. Immunity and partial waiver. (1) A public entity shall be immune from liability in all claims for injury which ~~are actionable~~ 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 except as provided otherwise in this section. Sovereign immunity ~~whether previously available as a defense or not, shall not be asserted~~ IS WAIVED by a public entity ~~as a defense~~ in an action ~~for damages~~ for injuries resulting from:

(b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., ~~1973,~~ or jail by such public entity; ~~or a dangerous condition existing therein;~~

(d) A dangerous condition OF A PUBLIC HIGHWAY, ROAD, OR STREET which PHYSICALLY interferes with the movement of traffic ~~on~~

(2) (b) A concise statement of the FACTUAL basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;

(3) If the claim is against the state or an employee thereof, the notice shall be ~~presented to~~ FILED WITH the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be ~~presented to~~ FILED WITH the governing body of the public entity or the attorney representing the public entity. SUCH NOTICE SHALL BE EFFECTIVE UPON MAILING BY REGISTERED MAIL OR UPON PERSONAL SERVICE.

(5) Any action brought pursuant to this article shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., ~~1973,~~ relating to limitation of actions, or it shall be forever barred; EXCEPT THAT, IF COMPLIANCE WITH THE PROVISIONS OF SUBSECTION (6) OF THIS SECTION WOULD OTHERWISE RESULT IN THE BARRING OF AN ACTION, SUCH TIME PERIOD SHALL BE EXTENDED BY THE TIME PERIOD REQUIRED FOR COMPLIANCE WITH THE PROVISIONS OF SUBSECTION (6) OF THIS SECTION.

(6) No action brought pursuant to this article shall be commenced until after the claimant who has filed timely notice pursuant to subsection (1) of this section has received notice from the public entity that the public entity has denied the claim, or until after ninety days has passed following the filing of the notice of claim required by this section, whichever occurs first.

Section 10. 24-10-110 (1) (b), the introductory portion to 24-10-110 (1.5), and 24-10-110 (1.5) (a) and (5), Colorado Revised Statutes, 1982 Repl. Vol., as amended, are amended, and the said 24-10-110 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

24-10-110. Defense of public employees - payment of judgments or settlements against public employees. (1) (b) (I) The payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton or ~~in the case of public entities other than the state of Colorado,~~ where ~~the defense of~~ sovereign immunity ~~is available to~~ BARS THE ACTION AGAINST the public entity, and provided that the employee does not compromise or settle the claim without the consent of the public entity.

(II) A public entity ~~other than the state of Colorado~~ shall be liable for the payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton, even though ~~the defense of~~ sovereign immunity ~~is available~~ WOULD OTHERWISE BAR THE ACTION, when the public employee is operating an emergency vehicle within the provisions of section 42-4-106 (2) and (3), C.R.S., ~~1973,~~ if the employee does not compromise or settle the claim without the consent of the public entity.

(1.5) Where a claim against a public employee arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, the public entity shall be liable for the reasonable costs of the defense AND REASONABLE ATTORNEY FEES of its public employee unless:

(a) It is determined ~~at trial~~ BY A COURT that the injuries did not arise out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment or that the act or omission of such employee was willful and wanton. If it is so determined, THE PUBLIC ENTITY MAY REQUEST AND the court shall order such employee to reimburse the public entity for reasonable costs AND REASONABLE ATTORNEY FEES incurred ~~by such public entity~~ in the defense of such employee; or

(5) In any action against a public employee in which ~~it is alleged~~ EXEMPLARY DAMAGES ARE SOUGHT BASED ON ALLEGATIONS that an act or omission of a public employee was willful and wanton, if the plaintiff ~~fails to prove~~ DOES NOT SUBSTANTIALLY PREVAIL ON HIS CLAIM that such act or omission was willful and wanton, ~~and the court determines that the allegation of willful and wanton conduct was frivolous,~~ the court ~~may~~ SHALL award attorney fees against the plaintiff and in favor of the public employee UNLESS THE COURT DETERMINES IT IS UNJUST.

(6) The provisions of subsection (5) of this section are in addition to and not in lieu of the provisions of article 17 of title 13, C.R.S.

Section 11. The introductory portion to 24-10-114 (1) and 24-10-114 (4), Colorado Revised Statutes, 1982 Repl. Vol., are amended to read:

24-10-114. Limitations on judgments. (1) The maximum amount that may be recovered under this article IN ANY SINGLE OCCURRENCE, WHETHER FROM ONE OR MORE PUBLIC ENTITIES AND PUBLIC EMPLOYEES, shall be:

(4) A public entity shall not be liable EITHER DIRECTLY OR BY INDEMNIFICATION for punitive or exemplary damages ~~under this article~~ OR FOR DAMAGES FOR OUTRAGEOUS CONDUCT, EXCEPT AS OTHERWISE DETERMINED BY A PUBLIC ENTITY PURSUANT TO SECTION 24-10-118 (5).

Section 12. 24-10-114 (2), Colorado Revised Statutes, 1982 Repl. Vol., is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

24-10-114. Limitations on judgments. (2) The governing body of a public entity, by resolution, may increase any maximum amount set out in subsection (1) of this section that may be recovered from the public entity for the type of injury described in the resolution. The amount of the recovery that may be had shall not exceed the amount set out in such resolution for the type of injury described therein. Any such increase may be reduced, increased, or repealed by the governing body, by resolution. A resolution adopted pursuant to this subsection (2) shall apply only to injuries occurring subsequent to the adoption of such resolution.

Section 13. 24-10-115 (3), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-10-115. Authority for public entities other than the state to obtain insurance. (3) A public entity, other than the state, may establish and maintain an insurance reserve fund for self-insurance purposes and may include in the annual tax levy of the public entity such amounts as are determined by its governing body to be necessary for the uses and purposes of the insurance reserve fund, subject to the limitations imposed by section 29-1-301, C.R.S., ~~1973. In the event that a public entity has no annual tax levy, it~~ OR SUCH PUBLIC ENTITY may appropriate from any unexpended balance in the general fund such amounts as the governing body shall deem necessary for the purposes and uses of the insurance reserve fund, OR BOTH. The fund established pursuant to this subsection (3) shall be kept separate and apart from all other funds and shall be used only for the payment of administrative and legal expenses necessary for the operation of the fund and for the payment of claims against the public entity which have been settled or compromised or judgments rendered against the public entity for injury under the provisions of this article ~~or~~ AND FOR ATTORNEY FEES AND FOR THE COSTS OF DEFENSE OF CLAIMS AND to secure and pay for premiums on insurance as provided in this article. School districts may include an annual tax levy for liability and property damage self-insurance purposes not to exceed one and one-half mills, whether under this subsection (3) or under section 29-13-101 (3), C.R.S., ~~1973,~~ or under both said subsections. In no case shall the revenue raised by any school district exceed an amount adequate for such reserve fund, which shall be determined in a manner similar to, and the payment of the costs thereof shall be in the same manner as, that provided in section 24-10-115.5; except that the commissioner of insurance shall review the school district's determination of the amount to be raised by said tax levy, which review shall be made no later than October 20 of each year. In such review, the commissioner shall determine the need for continuation of the mill levy for the insurance reserve fund. Subsequent to determination that the amount in the reserve fund is adequate, money for the payment of any liability and property insurance premiums and for payments into the reserve fund to cover the cost of operations and expected losses out of the insurance reserve fund shall be budgeted from the school district's general fund. The commissioner of insurance may determine that the insurance reserve levy should be reapplied because the insurance reserve fund has experienced extraordinary claims.

Section 14. 24-10-115.5 (1), Colorado Revised Statutes, 1982 Repl. Vol., is amended, and the said 24-10-115.5 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

24-10-115.5. Authority for public entities to pool insurance coverage. (1) Public entities may cooperate with one another to form a self-insurance pool to provide all or part of the insurance coverage authorized by this article or by section 29-5-111, C.R.S., ~~1973,~~ for the cooperating public entities. Any such self-insurance pool may provide such coverage by the methods authorized in sections 24-10-115 (2) and 24-10-116 (2), BY ANY DIFFERENT METHODS IF APPROVED BY THE COMMISSIONER OF INSURANCE, OR BY ANY COMBINATION THEREOF. Any such insurance pool shall be formed pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. ~~1973.~~

(7) Any public entity pool formed under this article and under article 13 of title 29, C.R.S., and the members thereof, may combine and commingle all funds appropriated by the members and received by the pool for liability or property insurance or self-insurance or for other purposes of the pool.

Section 15. The introductory portion to 24-10-118 (1) and 24-10-118 (1) (a), (2), and (3), Colorado Revised Statutes, 1982 Repl. Vol., as amended, are amended, and the said 24-10-118 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

24-10-118. Actions against public employees - requirements and limitations. (1) Any action against a public employee, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies 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, and which arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, unless the act or omission causing such injury was willful and wanton, shall be subject to the following requirements and limitations, regardless of whether or not such action against a public employee is one for which the public entity might be liable for costs of defense, ATTORNEY FEES, or payment of judgment or settlement under section 24-10-110:

(a) ~~Filing of the notice required by~~ COMPLIANCE WITH THE PROVISIONS OF section 24-10-109, ~~with the public entity,~~ in the ~~form~~ FORMS and within the ~~time~~ TIMES provided by section 24-10-109, shall be a ~~condition precedent~~ JURISDICTIONAL PREREQUISITE to any such action against a public employee, and failure of ~~substantial~~ compliance shall ~~be a complete defense to~~ FOREVER BAR any such action against a public employee. Any such action against a public employee shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., ~~1973,~~ relating to limitation of actions, or it shall be forever barred.

(2) A public employee shall be immune from liability in ~~all claims~~ ANY CLAIM for injury, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which ~~are actionable~~ LIES 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, and which ~~arise~~ ARISES out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that no such immunity may be asserted ~~as a defense~~ in an action ~~for damages~~ for injuries resulting from the circumstances specified in section 24-10-106 (1).

(3) Nothing in this section shall be construed to allow any action which lies in tort or could lie in tort REGARDLESS OF WHETHER THAT MAY BE THE TYPE OF ACTION OR THE FORM OR RELIEF CHOSEN BY

A CLAIMANT to be brought against a public employee except in compliance with the requirements of this article.

(4) The immunities provided for in this article shall be in addition to any common law immunity applicable to a public employee.

(5) Notwithstanding any provision of this article to the contrary, a public entity may, if it determines by resolution adopted at an open public meeting by the governing body of the public entity that it is in the public interest to do so, defend a public employee against a claim for punitive damages or pay or settle any punitive damage claim against a public employee.

Section 16. Article 10 of title 24, Colorado Revised Statutes, 1984 Repl. Vol., as amended, is amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

24-10-119. Applicability of article to claims under federal law. The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies 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.

24-10-120. Severability. If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

Section 17. **Repeal.** 24-10-110 (3) (a) and (3) (c), Colorado Revised Statutes, 1984 Repl. Vol., are repealed.

Section 18. **Effective date - applicability.** This act shall take effect July 1, 1986, and shall apply to injuries occurring on or after said date; except that sections 14, 18, and 19 shall take effect upon passage.

Section 19. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 29, 1986

CHAPTER 167

GOVERNMENT — STATE

PUBLIC WORKS FISCAL RESPONSIBILITY ACCOUNTING ACT OF 1981

HOUSE BILL NO. 1045. BY REPRESENTATIVES Pankey, Schauer, Armstrong, Bath, Berry, M.L. Bird, Bond, Carpenter, Fish, Grampsas, T. Hernandez, Mielke, and Owens;
also SENATOR Hefley.

AN ACT

CONCERNING CONTINUATION OF THE "PUBLIC WORKS FISCAL RESPONSIBILITY ACCOUNTING ACT OF 1981".

Be it enacted by the General Assembly of the State of Colorado:

Section 1. **Repeal.** 24-16-108, Colorado Revised Statutes, 1982 Repl. Vol., is repealed.

Section 2. **Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: February 27, 1986

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

APPENDIX B

Hearings on HB 1196 before the Colorado House of Representatives Fifty-fifth General Assembly, Second Regular Session, February 26, 1986

HOUSE FLOOR DEBATES 2/26/86

Clerk:

House Bill 1196 by Rep. Berry and Senator Leech concerning liability of public entities, officials, and employees pursuant to the Colorado Governmental Immunity Act.

Rep. Berry:

Thank you Mr. Chairman and members. This is the bill that Rep. Paulson referenced earlier that concerns liability of public entities and seeks to address that in a comprehensive manner. I would move the adoption of House Bill 1196 on second reading, and if you'll bear with me before we get into the substance of this bill, I would first like to move the State Affairs Committee amendment and an amendment that I had prepared to address in technicalities in the State Affairs Committee amendment. Mr. Chairman, I believe that what we should do first is address this amendment, and it seeks to change several oversights, frankly, in the State Affairs Committee amendment. I don't know how many of you actually open up the little house journals, but if you look at your green sheet on page 2, between lines 9 and 11, this first part of the amendment seeks to speak to that. When we talk about discovery of injury, we're talking about the notice that a claimant has to file with a governmental entity before they're authorized to bring the action. The current language is that the claim notice must be filed 180 days after the discovery of the injury or the action is barred. The original bill as drafted struck the words "discovery of the injury"; the State Affairs Committee, in fact, intended to put that language back in; in other words, to leave the existing statute that would state 180 days from discovery of the injury. Somehow that was overlooked when the amendment itself was prepared. What we're actually looking at here is reversing, frankly, a court case where they said we don't really care when the injury is discovered or anything like that, but the claimant must know all of the elements of the civil action he is going to bring, and once the claimant knows that, then he has 180 days to bring the action. It was a recommendation of the governor's task force on tort reform and liability insurance that that be clarified and that in fact not be the standard, but we do want to leave the words "discovery" in the statute and that's primarily involved in medical malpractice cases where, at Health Sciences Center or Denver General Hospital or something like this, someone has an injury because of malpractice but they're not aware of it. So, we want to leave the words "discovery" in the statute, but make it clear that knowing the elements of the claim is simply not something that the court's going to look at. The second part of the amendment on your green sheet is lines 20 and 21, which addresses the issue of someone alleging willful and wanton conduct, not being able to prevail on that claim, and having an attorneys' fees award entered against

them. Again, and I think Rep. Skaggs, who offered that amendment will agree with this, what we're seeking to do here is simply to clarify what the intent of State Affairs was. The language "is alleged" is in current law and we need to, in fact, do some affirmative action to strike that out, so that's what this amendment does and the Committee amendment did not. The language basically clarifies that we're limiting this to a situation where exemplary damages are sought based on an allegation that the public employee was willful and wanton. Based on that, I would ask that the committee approve the Berry amendment to the State Affairs Committee amendment.

Rep. Kopel:

Just to clarify, page 2, lines 10 and 11, in the green sheet will no longer be there with the amendment that you've made.

Rep. Berry:

Correct. They would be replaced by lines 4 through 8 of the . . .

Chairman:

Hearing no further discussion on the Berry amendment to the Committee amendment, all in favor say aye. Ayes have it; the Berry amendment to the Committee amendment has been adopted. I believe we have an additional amendment to the Committee amendment. Rep. Skaggs?

Rep. Skaggs:

Thank you, Mr. Chairman. I would move the Skaggs amendment to the Committee amendment; ask that it be put on the screen and not read at length; or perhaps it would be better for it to be read, Mr. Chairman.

Chairman:

The clerk will please read the Skaggs amendment.

Clerk:

Amend Committee amendment as printed in House Journal February 11, page 243, line 53, after the period add the following: "Nothing in this subsection shall preclude the failure of a public entity to use existing means available to it for the removal of a particular dangerous accumulation of water, snow, or ice, about which accumulation the public entity had notice and reasonable time to act from being found to constitute a dangerous condition."

Rep. Skaggs:

Thank you, Mr. Chairman. This was an issue that came up in State Affairs and we were unable at that time to come up with acceptably narrow language. This is really just to make it clear that if a public entity knows about an accumulation; has the means to do something about it; has the time to do something about it; and still fails to do something about it, even though it's the result of weather, that still could constitute a dangerous condition.

Rep. Berry:

I would have no objection to this amendment. What we're saying in the bill--and you can find this in the Committee amendment, page 1, line 7 and 8--is the mere existence of a weather condition, such as wind, water, snow, ice, or temperature, does not in and of itself create a dangerous condition. So, when somebody runs off a road up towards the Eisenhower Tunnel because of their own negligent driving, they can't sue the State of Colorado to recover. What Rep. Skaggs is trying to do is say that if the governmental entity has snow plows, the existing means available, and has notice that there is a dangerous accumulation of snow or ice or whatever, within a reasonable time, then they have to use the equipment they have. I don't have any objection to that, but I want to make it very clear for the record that we're not saying that any particularly small towns--let's say the town of Oak Creek in Routt County--has no duty to go out and buy snow plow equipment. Maybe they simply want snow, ice, and those kinds of things to melt by natural processes. There is nothing in this bill or in this amendment that is going to compel them to remove the snow, but on the other hand, if the City of Colorado Springs has bought snow plow equipment, then they have to use that in a reasonable way to remove snow and ice.

Chairman:

Any further discussion of the Skaggs amendment to the Committee amendment? Seeing none, all in favor, say aye. All opposed, no. Division of the chair is in doubt; I ask for division. All people in the House who are not allowed to vote, please be seated. Those in favor of the Skaggs amendment, please rise. More than 33 having arisen, the Skaggs amendment to the Committee amendment is passed. We're back to the Committee amendment, then. Rep. Berry?

Rep. Berry:

Mr. Chairman and members, the Committee amendment addressed several issues. One we've just explained stating that you can't sue a governmental entity merely based on the existing of a weather condition. The second part of the Committee amendment begins on line 9, page 1, and goes through line 17, and

basically this was an amendment offered by the Health Sciences Center to say that the doctors who are employed by the Health Sciences Center or the students who are full-time medical students at the Health Sciences Center who then, either through an internship or some other program, work in a private hospital such as Rose Medical Center, that they are still deemed to be public employees, and that when they're sued for malpractice or whatever, as long as they have that relationship with the Health Sciences Center, they are going to be deemed to be a public employee and they're going to have the protections of the Governmental Immunity Act. Health Sciences offered this in Committee and the Committee felt that it was appropriate.

Rep. Kopel:

Well, first, Mr. Chairman, I'd like to ask the sponsor of the Bill to tell me who a genetic counselor is, which is listed under health care practitioner. Line 12 and 13 of the green sheet.

Rep. Berry:

I have no idea.

Rep. Kopel:

Neither do it. We're passing things we don't what it contains. I assume these other people are supposedly licensed to practice in the State of Colorado; in fact, I think they all are, but I've never heard of a genetic counselor. I suppose that's somebody who's going to change your genes, but . . .

Rep. Bond:

A genetic counselor is one who counsels families with regard to the possible consequences of particular matings or what have you.

Chairman:

Thank you, Rep. Bond. Rep. Kopel?

Rep. Kopel:

I pass; we ought to have an amendment because I don't think they're recognized anywhere else in our statutes. These other people are all licensed parties, but another question about this whole section struck me as kind of a little weird. I'm in Rose Hospital; I'm a patient; I'm being cared for by an intern who happened to come out of the Health Sciences Center; I guess there's two interns in the room. If I'm gonna be treated, I better be treated by the one who's not from the Health Sciences Center. Am I supposed to ask whether--are you from the Health

Sciences Center? Because that person is going to have immunity, whereas the one who is working for Rose would not. That's not fair for the patient.

Rep. Straley:

This is an interesting exercise in consistency in that physicians are very much opposed to being employees until their own pocketbook gets into play and then they want to be treated as employees. I suggest that maybe this is an invitation to us to create officially one profession that can have its cake and eat it, too.

Rep. Kopel:

I wonder, Mr. Chairman, if we could sever--I think it's lines 9 though 16 and lines 22 to 29 on page 1 and line 1 on page 2--I think those are the sections dealing with this particular issue. Is that correct, Rep. Berry? I'm not sure what line 18 to 21 goes to--is that also part of the same?

Rep. Berry:

No, line 18 through 21 goes to definition of the term "authorized volunteer."

Rep. Kopel:

So if we sever and do lines 9 through 16 and 22 through 29 and line 1 on page 2, we would be dealing with this issue?

Rep. Berry:

Correct. That's the Health Sciences Center amendment.

Rep. Kopel:

I move to sever that and take it as a separate amendment.

Chairman:

All right, let's get that on the screen and we will look at its severability.

Rep. Berry:

I certainly have no objection to the severance. I think the amendment basically speaks for itself. They want to take these people who they deem as employees and full-time students and just say that when they go to nonpublic entities that they're within the scope of this Governmental Immunity Act. I might correct one thing that I think needs to be said right now; it needs to be said in response something Rep. Kopel said. I'm not

carrying this bill because I want government employees who commit torts to be immune, if they aren't now immune. I'm not trying to expand immunities for governmental employees and say that if they did that in their private capacity, they would be liable, but since they do it in some public capacity, they're immune; and I'll be glad to go into that in more detail when we get to the bill. That's not the purpose of this bill. If someone is an employee of Health Sciences Center and commit malpractice, it's my understanding under the areas set forth in current law, Rep. Kopel, where we say these are areas that public employees can be liable, that they'd still be liable. We're not making someone immune who would now be liable under the existing Governmental Immunity Act. What their Health Sciences Center is trying to say is they want to clarify that they are public employees, and maybe they already are public employees within the definition, because it's fairly broad. It's true that once you're under the Governmental Immunity Act, then you enjoy the limitations we place on there for damage recoveries, and perhaps that is a valid distinction, but we're not making people immune under this amendment or bill who are now liable for something.

Chairman:

The chair rules that this is severable and, I believe, let's make lines 22 through 29 and then the first line of page 2, number 1, I believe. Since that's what the discussion is centering on right now, we'll make lines 9 through 16 number two and then the rest of the amendment number three. So we're going to take all these at number one--9 through 16 and 22 through line 1 on the second page. Rep. Straley?

Rep. Straley:

Going back to what you were just told is the purpose of the Health Center in this matter. I think perhaps the sponsor of this bill has not been adequately informed. Their purpose is much more than they apparently have told him. There is a statute which permits Denver General Hospital specifically to hire physicians and they are employees. There is a statute which specifically permits the Health Sciences Center to hire physicians who have been licensed in other countries, and that is specifically permitted, and they are employees. There is no statute which gives the Health Center an immunity from the Medical Practices Act which says doctors cannot be hired by anyone but doctors, and they don't like to admit that no statutory authority for them to hire physicians exists. They hang their hat on the fact that they are claiming that these physicians at the Health Sciences Center are in a different category because they are employees of the Board of Regents and the Board of Regents has a special constitutional power. I can find nothing in that power about exemptions from the Medical Practices Act. The worry is that if they are contract

employees, they are not entitled to coverage under the doctrine of sovereign immunity. Conventionally, at least, the doctrine of sovereign immunity extends only to employees and agents, and not to independent contractors, and so they want somehow to plant both feet firmly in mid-air and say on the one hand these folks are not employees, they are independent contractors, and then on the other hand to say, well, in terms of liability, we'll call them employees. I suggest that that hospital ought not to be able to stand on both sides of the fence at the same time any more than any citizen should.

Rep. Kopel:

Please mark this is probably the first time and only that I and Rep. Straley will be on the same side with me, but we really don't need this section and I hope we vote against it. Though this is an example, we're not only talking about the people who are licensed here; we're also talking about any person acting at the direction or supervision, which is an enormous number of individuals that we are not even defining here. And again, I have tried to figure out how somebody going to Rose, how the patients are gonna know the difference; I suppose we could require these people to have haloes to distinguish them from the other licensed people there, but I don't know any other way. I urge a new vote on this section.

Chairman:

Any further discussion? Hearing none, the question before us is number one of the Committee amendment. All those in favor, say aye. Those opposed, no. No's have it; number one is struck from the Committee amendment, leaving us with number two. Rep. Birdy--Rep. Berry?

Rep. Berry:

Thank you, Mr. Chairman.

Chairman:

I think that just goes to prove my thought I was having up here after hearing Rep. Bond's explanation of genetic counselors and I'm sure we have none in this state, and I have just made that very clear. Rep. Berry?

Rep. Berry:

Thank you, Mr. Chairman. Lines 18 through 21 on the green sheet are, I think, an important amendment, because we take the term "authorized volunteer," which we're defining as being a public employee, and we're saying what it means; we're defining the term "authorized volunteer." This is an important recommendation of the governor's task force on tort reform and

liability. Because there are so many people who volunteer their services, particularly to local government, but also to state government, and they act for the government; they perform an important function for the public, and they need to be treated the same way, I think, as other governmental employees. The governor's task force found that if in fact we don't provide them some protection, it's going to become increasingly difficult for government, and particularly local government, to acquire the kinds of volunteers that do very important work, whether it be for county health departments, or social services departments, or whatever. I think we're all familiar with the various kinds of things that volunteers do and the contribution they make, and if we don't have them protected and we don't have them doing those volunteer services, there's going to be even more pressure on government itself to hire people and provide those services. Going over to page 2 of the Committee amendment, talking about suspending discovery here, the issue that was addressed--and this will speak to something in the bill-is that when immunity is raised as a defense--and again I have to reiterate--all governmental functions are not immune; there are some that are very open to liability; but when the governmental entity legitimately feels that it has immunity as a defense and it raises that, the issue ought to get decided by the court early on. The court ought not to wait until the case in fact goes to the jury and then, having taken it under advisement after the jury verdict comes back, make a ruling on whether the governmental entity even ought to have been in the case to begin with. This amendment simply seeks to refine that and say that if a governmental entity says we're immune and the motion is before the court, the court suspends all further discovery except discovery which relates specifically to that motion, and the court then rules, and the court can't take this matter under advisement. We heard about in specific cases where this was being delayed and frankly leading to court costs and attorney time that were unnecessary. Some of these other matters merely clarify whether things have to be done by registered mail and those sorts of things. Let me go down to what's marked as section 17, lines 24 through 27 of the amendment, because I think this again speaks to an important issue in the Bill. 24-10-110(3)(a) and (3)(c) should have been repealed during the special session. One of the purposes of this bill is to make some necessary technical changes to that bill we passed when we came back in September for three days to answer the state's liability insurance crisis. These sections from existing law in fact conflict with the provision that we passed, which says when a public employee is sued, the public entity has to go in and either represent that person, that public employee, with a public entity attorney or has to go find a private attorney and the public entity has to pay for that. If it's ultimately found that the public employee committed a willful and wanton act and is subject to punitive damages, then the public entity may go back against the public employee, but sections (3)(a) and (3)(c) in fact leave an out for the

governmental entity to back out of representing that person and I think if you believed in what we did during the special session, you will agree that we ought to repeal these provisions.

Rep. Herzog:

Thank you. Rep. Berry, on that amendment, line 24 striking article 80, just leaving in article 81 on the notice provision--would you explain, since I can't find that without looking it up in the statute--what article 81 does or what 80 did, too, so . . .

Rep. Berry:

Article 80 of title 13 is the series of statutes of limitation. Article 81 is the so-called disability provisions which say that if you are incapacitated for some reason, then the statute of limitations are tolled as to you until you are aware of what it is that the statute seeks to address. In this case, specifically where we're talking about injury, it would leave the injury provision subject to the disabilities provision, which says that if a person is under disability, then the time period is tolled until the disability is taken away and they're aware that this injury has resulted. I think putting 80 in was an oversight in drafting; there's no reason to put the statute of limitations in at this point. If you'll look in the existing Bill over on the next page, on page 10, lines 14 and 15, the part that is not capitalized is existing law and it's very clear that any action brought under the Governmental Immunity Act is subject to statutes of limitation. So with that, unless there is further discussion, I would ask the adoption of the State Affairs Committee amendment, as amended.

Chairman:

That is the question before us. Any furthe discussion? Seeing none, the State Affairs Committee amendment is before us. All in favor, say aye. Those opposed, no. The ayes have it; the State Affairs Committee amendment is adopted to the Bill. Rep. Berry.

Rep. Berry:

At some time I would like to share with the body some of the general reasons we're doing this. I know it's getting very complicated because of all these amendments and technical side issues, but let me speak just briefly about why we're having this Bill. Several reasons--we all came back in September to address a crisis that the state was confronted with because our insurance had been cancelled and we had to act quickly to provide a self-insurance mechanism to pay claims that were made against the State of Colorado. At that special session, we also

began to look at this Governmental Immunity Act and see what changes needed to be made in it with the increasing self-insurance of these kinds of claims. This has compounded since that special session because many of your local governments have either had their insurance cancelled or they've not been able to renew their insurance and, in fact, the taxpayers are the ones who are underfunding, or I should say funding, this whole area of liability, rather than the insurance companies. Because of that dramatic change, the Governmental Immunity or Liability Act needed to be examined comprehensively and a number of changes needed to be made to provide more certainty to governments about what areas they were going to be liable for. We had to make it clear that government is not an endless deep pocket to pay all liability claims that occur. One of the very important parts of the Bill--and I think found on page 8, section 6 of the Bill, under Duty of Care--the governor's task force said that one of the primary causes of cancellation of insurance or nonrenewal of insurance, or premiums that are so high that government simply can't afford it, is the whole area of secondary liability. I think this is one of the primary causes of the so-called insurance crisis. Whether it's governmental entities or private entities, those with so-called deep pockets are being looked to more and more to pay for wrongs done to citizens when the primary person or entity that caused that wrong can't pay for it--doesn't have insurance or is a hit-and-run driver and they're not before the court, or whatever reason. This assumed duty doctrine brings this deep pocket concept out very well. What the courts have said is that if some governmental entity tries to do something that it doesn't have to do, but it's doing that in the interest of its citizenry, then it has to do it perfectly, because if it doesn't, it will be held liable in tort. Let me give you several concrete examples--I don't know why all of these seem to arise in Jefferson County, but that seems to be the case--a child goes to school on his bicycle and rides home and is hit by a driver who is driving negligently, perhaps drunk--we don't know, because I think it was a hit-and-run driver--that driver was not before the court. The child is a very worthy plaintiff. They sue the Jefferson County School District. It wasn't a Jefferson County School District employee who hit the child; the child was clearly away from school when this happened; but Jefferson County School District had implemented a policy that for certain lower grade children, they weren't supposed to ride their bicycles to school; they were supposed to find some other means to get there; and because the school district had let this one child slip through the cracks and had failed to absolutely enforce its policy, the Jefferson County School District was the one who is being sued and has to pay the damages for the child. That, to me, is clear secondary liability.

Another case--the same scenario, out in Jefferson County--this time the City of Arvada got sued--the policy had been set up that school crossing guards would be provided to help the safe movement of students. They provided these crossing guards early in the morning and at the time that the students normally left the school. Apparently, the kindergarten class let out early and on the given day there was not a school crossing guard when the kindergartners left the school. A child, very unfortunate situation, was hit, again by a driver who was not before the court, who was responsible for the child's loss, and they sued the City of Arvada, which provided school crossing guards, because they didn't do it perfectly; they provided them in the morning; they provided them in the afternoon, but they didn't have them there in the early afternoon when the kindergartners left, so the City of Arvada was held to be liable for that loss.

Another case dealt with--for the rural legislators--with Eagle County. This was a rural area near Basalt, I believe; some students had gone to some bonfire or some kind of a homecoming celebration, and they had left there and were walking along a rural road in Eagle County. One of them, in fact, was on the road and, according to testimony from the attorney who handled the case on behalf of Eagle County in the State Affairs Committee--we heard that she was walking down the middle of the road; in fact, dancing down the middle of the road. She was hit by a driver and perhaps that driver was not driving prudently; that driver should have paid for her losses, but for some reason, that driver wasn't before the court, so they were suing Eagle County under the theory that they had not provided an adequate walkway along the side of the road. You build a road, you have assumed the duty to provide adequate walkways along the side of the road, and that came as a complete shock to counties with rural roads, understanding from the court of appeals that they had to put sidewalks in on all those roads. So, what we're seeking to address in this, which I think is probably the most important part of the bill, is to say that when you do something for your citizenry, unless it's--and I think Representative Skaggs has an amendment to clarify this--unless it's required in some way by law, you need not do it perfectly and you won't be held liable if somebody else causes an injury to a very worthy plaintiff.

Just to hit a couple of the other high points--traditionally, we have said in our law that the purchase of insurance waives immunity, so if you are immune as a matter of law, if you have been since 1971, but you buy insurance for that, you've waived the immunity and, therefore, you're liable. The governor's task force in extensive testimony found that that provision in fact made it more difficult for governmental agencies to buy insurance because the way the market is structured--and this applies particularly to local government--if they wanted to get insurance for violations of

the Federal Civil Rights Act, which is governed by federal law, they were forced to buy a more comprehensive general liability policy which in fact waived a lot of the immunities that we gave them under state law. It was the feeling of the task force--and I think it has a great deal of merit--that if we remove that nexus between the purchase of insurance and the waiver of liability, it will encourage the insurance companies to structure policies that are more specific towards the risk that the local governments really want to insure, such as the civil rights liability, and it will enable the insurance market to come to local government with more realistic packages that local government can hopefully then afford to purchase. We do allow any governmental entity, including this body, the general assembly on behalf of the state, to waive liabilities--pardon me--to waive immunities, or to waive the limits that we put in there. We have an existing law--and this bill doesn't address it--$150,000 per individual and an aggregate of $400,000 per occurrence. If this body or a local government wants to raise those limits or wants to make conduct which is now immune open to liability, they can do that by resolution, but what we're saying is that the simple purchase of insurance won't do that.

A third important provision, and this will be the last, deals with the notice requirements, and we addressed those briefly when we talked about discovery of injury, but the legislature when it passed the Governmental Immunity Act in 1971-72, said that you have to give notice to that governmental entity, then within 90 days--we've since changed that to 180 days--of what the injury was, and if you didn't do that, you couldn't bring the action. The public policy behind that was to give government some degree of certainty about what they were being sued for. This is particularly important, far more important, in today's world where most of our governmental entities are self-insured. The taxpayer deserves to know that there is a claim pending against a local government and not have that be something that comes up six years later to the surprise of everybody. All we're trying to do in the bill is tighten the notice requirements; say it's jurisdictional, rather than an affirmative defense--and that may sound like legal jargon to some of you, but that gives certainty and I can provide further explanation if you want it--to tighten this notice requirement up so that it means what the legislature back in '71-72 thought it meant, and frankly we're trying to repeal some court decisions which have eroded the meaning of that notice requirement. With that, I'm going to close; I know Representative Skaggs has some amendments and I think some others might have amendments; we'll address those as they come.

Rep. Skaggs:

Thank you, Mr. Chairman; there is an amendment on the desk. Could we have the Skaggs amendment flashed on the screen, please? Would you like it read at length? I don't believe so, Mr. Chairman, I would move the amendment. This is some

clarifying language that Representative Berry referred to in his remarks which merely make it clear that in that new assumed duty section of the law that we're making it clear that other statutory provisions that expressly impose a duty of care will not be compromised by this new language.

Rep. Berry:

I have no objection to this amendment; I think it makes clear something that we weren't trying to repeal. If you have a statutory duty, it's hard to see how that's assumed, but I think this makes it very clear that you have that duty and you can breach it.

Chairman:

Okay, no further discussion on the first Skaggs amendment. Representative Green?

Rep. Green:

Throughout this dealing in this amendment, we refer to public entity and I'm wondering where the definition of public entity is?

Rep. Berry:

Thank you, Representative Green. It's not in the bill; it's in existing law under the definitional section, and I'd be glad to show it to you, but a public entity basically means the State of Colorado, any county, city, special district, or other political subdivision of the State of Colorado, and that would include things like the Urban Drainage and Flood Control District and various other forms of public entities; but it is defined in existing law.

Rep. Green:

I don't have a problem with it; I was just wondering what it was.

Chairman:

The question before us is the first Skaggs amendment to the bill. All in favor, say aye. Those opposed, no. Ayes have it; the first Skaggs amendment to the bill is adopted. Representative Skaggs?

Rep. Skaggs:

Thank you, Mr. Chairman. There is another technical amendment on the desk which I would move at this time, ask that it not be read at length. What this does is delete a new section that appears on page 19 of the bill as 24-10-119,

statutory construction. The reason for taking this out; it seemed to raise questions particularly as it would be read together with some of the new language in the bill about actions that could lie in tort and the judge that might go off the deep end, would conceivably restrict access to the courts for any conceivable cause of action that might have been framed as a tort action, even though it's really a contract or other cause of action; so this is to avoid any danger of that kind of misinterpretation.

Rep. Berry:

Considering some of the other things we've done in the bill, not only what Rep. Skaggs has referred to, but also the declaration of policy that we've enhanced on page 3, I don't have any objection to striking this language. What we're talking about is the statutory construction, "the provisions of this article shall be strictly construed in favor of the immunity of the public entity or public employee," I think we've said that elsewhere in the bill and if Rep. Skaggs wants to delete that, I have no objection.

Chairman:

The question before us is the second Skaggs amendment to the bill. All in favor, say aye. Those opposed, no. Ayes have it; the second Skaggs amendment is adopted to the bill. Rep. Skaggs?

Rep. Skaggs:

Thank you, Mr. Chairman. I think with the work that was done in state affairs and the changes made here on the floor this morning, this bill is now in really very good shape. I would just like to compliment Rep. Berry who I think has been very open to constructive changes that have been offered on this and has handled what is a very complicated and difficult issue very, very well and I appreciate it.

Rep. Wright:

Thank you, Mr. Chairman. I would just like to add that governmental immunity was one of the big issues on the governor's task force and Rep. Berry has included every one of those recommendations in his bill; I want to thank him for it.

Chairman:

The question before us is the adoption of House Bill 1196. Rep. Straley?

Rep. Straley:

I know we've gone on a long time, Mr. Chairman, but there are a couple of questions I'd like to ask the sponsor which I think are important. If you'd yield to a question, Rep. Berry, I have recently read the decision of the supreme court entered some years ago that said sovereign immunity was unconstitutional, and I have to confess it's pretty vague; it seems to say it's unconstitutional unless you are reasonable about it, and then it's constitutional; not in those words, of course, but I wondered--I'm confident you've looked at the same case a good many times working on this--I wondered what assurance you feel you have that this is constitutional in view of that supreme court case.

Rep. Berry:

Well, several of the important parts of the bill have never been tested and I guess that's what you're referring to. I would--the court that decided the Evans case and the other series of cases that abrogated common law sovereign immunity seem to defer a great deal to the legislative wisdom and I think they obviously would put some constraints on it. What we've done would be perceived as a reasonable way to assure government of what the extent of its liability would be. I think if I had come in here, Rep. Straley, and sought to make immune all governmental functions--governmental employees driving cars, operations of public buildings, operations of public hospitals, and we had said the insurance problem is just too great for government and taxpayers; we have to make all of their conduct immune from tort; that the court probably would have found that overstepped the boundaries and was an unreasonable legislative action on this. But I hope in doing what we have done, the court will feel that this is reasonable and meets the constitutional test. I guess I would close by saying that if the legal community--not just the courts--but if the legal community had felt that that original act was so far out of bounds, I think we would have seen constitutional challenges long ago and I think the fact that the court has really not addressed it is in part because the legal community, particularly the plaintiff's bar, felt that this was reasonable and a balanced approach to a very difficult problem.

Rep. Straley:

I'm not quite as confident as you, although I'm gonna vote for this bill, but I do think that--and let me see if you feel the same way based on your research--it seems to me that this probably does not increase our risk of unconstitutional acts over and above what we already have on the books, but I also feel--I'm not quite as sure that the reasons why the act has not been tested are what you've concluded; I suspect that with all cities carrying liability insurance and, thus, having the liability, that it hasn't been necessary to test the act. Can you comment on that?

Rep. Berry:

If I'm interpreting what you're saying right, I think one of the primary issues is whether the limits that we have imposed in the statute--the $150,000 for an individual, $400,000 aggregate--has not been tested in large part because the purchase of insurance waived those limits in many cases and they simply were not an issue before the court, or in that particular case. What we're gonna have now--not only at the state level, but at local levels--is they're going to be relying on those limits because they're self-insured, and I think that is a significant change and we're more likely to get a test of whether those specific elements are constitutional. We tried--on page 19, lines 17 through 23, where we talked about a severability clause--we tried to make it very clear to any court that might construe this, if any article or application of this--if any section or application of this statute were held to be invalid, the remainder are still valid. I think, while severability is a general concept, we felt it was important to come in here and say that if you find that one part is repugnant to the constitution or for some other reason invalid, don't throw out the whole statute because it's extremely important that we maintain as much of this as possible.

Rep. Herzog:

Thank you, Mr. Chairman. There's another question besides the constitutionality of this and I understand that many of these municipalities up to about 90 of them are self-insuring, but the question for this and all the other tort reform bills coming through is, is this going to bring those insurance companies back in that bailed out in Colorado and, if so, what kind of premiums are we talking about? Is there going to be--obviously there are no guarantees--but it seems to me that the point of all this was to try to get insurance at a reasonable basis once again in Colorado. Do you have any comments on that?

Rep. Berry:

I'm glad you asked me to comment and not answer your question, because I think your question was more rhetorical. I can't speak for the insurance companies. In working on this bill and in working with the members of the task force, we tried to come up with things like repeal of the assumed duty doctrine; like the taking away purchase of insurance automatically waives immunity; like the beefing up of--beefing up is a poor word--like clarifying and strengthening the notice provisions. We tried to do things that the insurance company could favorably react to. I think all of those do it. I can't speak with any certainty, Rep. Herzog, any more than you can, about how the insurance industry will in fact react to it, but I think I can say that we've created some very good arguments in this bill that--whether it's the state or local government risk manager

who is negotiating with an insurance company and the insurance company says this is just too uncertain an area; we can't cover this risk because who knows what the courts are gonna do on the next case. We tried to address those problems in the bill and at least provide an argument for the risk managers to say to those insurance companies we do have a degree of certainty now; we can tell you that we're gonna be liable in these areas and we can tell you with more degree of certainty certainly than we had before that we're not gonna be liable in these other areas. I think once we've done that, we've really done all we can at leaste in the public entity sector to try to make insurance companies open up to the possibility of insuring local governments again, or at least providing reasonable premiums That's all I can offer.

Rep. Herzog:

I'm sure Rep. Berry is aware of this, but Lloyd's of London is the reinsurer for the municipal insurance pool and they are responsible for liability above $150,000, so they can still come in and in effect jerk our chain and say no we don't want this; this is what we want. So I'm hoping that by passing this, we are accomplishing something, but I'm really concerned that we're going through an exercise in futility.

Rep. Fisk (?):

Thank you, Mr. Chairman. I did serve on the task force and one thing we kept hearing from the insurance companies was predictability. I worked with the subcommittee on this particular piece of legislation and we were conscious all the time of trying to see whether this would make it more predictable, realizing all the time that the court still will probably have the final say, but I think that was the effort--to put predictability into the statutes so that the insurance companies would feel more comfortable.

Rep. Berry:

I think we've said all that needs to be said probably. I think the legislature is going to be reluctant to go in and tell insurance companies what to do because--tell them specifically what to do--if we start doing that, we're going to drive the availability of insurance even farther away from public entities and from all entities that need coverage. So, I think all we can do is react to these areas; try to tighten them up; try to create more predictability; and hope that in good faith the insurance industry will respond to that and provide a better market.

Chairman:

Seeing no further discussion, the question before us is the adoption--Rep. Green?

Rep. Green:

Rep. Berry, I have a question real quick for you. On page 18, line 27, following public entity; how would you feel about including at a public hearing or at a public meeting; they make this determination.

Rep. Berry:

I have no objection to that. I think, being a former local government attorney, it's gonna be very difficult for any governmental entity to adopt a resolution at a closed meeting. I know you've talked to some other people and they've told you that generally lawsuits, the discussion of settling lawsuits, is exempt from the open meetings requirement and I would agree with the people who told you that, but what this speaks to is adopting a resolution for the payment of money. I don't think they can adopt a resolution at a closed meeting, but I suppose there's always a possibility that a home rule city could put a provision in an ordinance or in its charter that it would allow them to adopt a resolution in secret and basically keep the public from knowing that that governmental entity was in fact gonna pay a punitive damage award for an employee who had been found to be willful and wanton. So if you want to add the words "at a public meeting," I have no objection.

Rep. Green:

I would feel more comfortable with it because it's not just paying, because it goes on to say "or settle any punitive damage claim."

Chairman:

Did you want to offer this as an amendment, Rep. Green? We have to draft that, I believe then. Could we have a 30-second recess? Committee will come back to order and the first Green amendment will be flashed on the screen, and not read at length unless you'd like it to be.

Rep. Green:

I'd like to have this in here basically because we're starting a new thing by allowing them to pay for punitive damages for their public employee and if they're gonna make these kinds of decision, I want to make sure it's at an open meeting so that the public can come and I don't think it's clear without it in there.

Chairman:

Any further discussion of the Green amendment? Hearing none, that's a question before us. All in favor, say aye. Those opposed, no. Green amendment passes. We're back to the bill. Rep. Berry?

Rep. Berry:

I would again move the adoption of House Bill 1196 as amended on second reading.

Chairman:

Hearing no further discussion, that is the question before the committee of the adoption of House Bill 1196. All in favor, say aye. Those opposed, no. The ayes have it; House Bill 1196 is adopted on second reading. Rep. Straley?

Rep. Straley:

Mr. Chairman, before I make the recess motion, I'd like to remind the members of the rules committee that a meeting of the rules committee was announced earlier this morning immediately upon the noon recess and in the absence of the chairman, I'll just say let's meet here at the microphone; it shouldn't take more than a couple of minutes. Notwithstanding the announcement of the rules committee meeting, we will have one later today, but it may be after lunch. We seem to have a chairman who's been abducted. Mr. Chairman, I move the committee now stand in recess until 2:00 p.m.

Chairman:

Hearing no objection to the motion, the committee is recessed until 2:00 p.m.

/jmc

APPENDIX C

Hearings on HB 1196 before the Senate Business Affairs and Labor Committee Fifty-fifth General Assembly, Second Regular Session, March 17, 1986

SENATE BUSINESS COMMITTEE 3/17/86

Unidentified speaker:

. . . the differences and make whatever amendments you want to make and pass or reject these bills, but we don't want to cover the same ground. We have heard that there is an insurance crisis; we've got that testimony; we don't need to do that again. So, if you will keep your testimony brief and to the point, particularly to the point of the differences or what this bill does differently than one of the senate bills, we would appreciate that. Senator Lee asked that his bill, 1196, be heard first, so Senator Lee, we'll turn it over to you and Rep. Berry. Glad to have you here, Chuck.

Sen. Lee:

Mr. Chairman and members of the committee, this is concerning the Governmental Immunity Act, so it tries to address the insurance issue from the standpoint of local governments. I've passed out a letter on my letterhead that summarizes the points of the bill. Basically, it by and large incorporates the recommendations of the task force as they apply to local jurisdictions. At the bottom front of the sheet, item number one is that it addresses the issue of assumed duty and on the back side of the sheet, the top paragraph in the heavy black print, it tells how it addresses that issue. The second thing that the bill does, number two, is that it addresses unintended waivers and at the bottom of paragraph two in the heavy black print, it tells how, so that by the mere taking out of insurance if a local jurisdiction chooses, opts to take out insurance, that does not waive its immunity in that area. Number three, the bill addresses the issue of clarifying where a public official has immunity for judgmental decisions, then the public entity will have like immunity for judgmental decisions. Number four, just tracking down the sheet, 180-day notice provision says that that will become jurisdictional, and not merely just an affirmative defense, and secondly, it provides for a 90-day cooling off period. That means that once the potential plaintiff has filed his notice that he's been injured, then he cannot file his actual suit until 90 days has passed. That's a cooling off period, the purpose of which is to give that local entity time to evaluate the potential claim and see if settlement can be made and thereby avoid a court case.

Unidentified speaker:

You've got 270 days, then, total?

Sen. Lee:

Yeah, to file the action, but 180 days from the point of his discovery of the injury--not all the elements of the injury, just that he's been injured--to file the notice. And we've

added that 90-day cooling off period. Down toward the bottom of the sheet, the issue of volunteers has been addressed by defining authorized volunteer and treating them by the same definition as public employee, so that a citizen doesn't put himself out on the hook by volunteering to be on a committee, commission, school guard crossing, anything else. It needed to be addressed. Those are the main elements of the bill. We do have a series of amendments, none of which, I don't think, are substantive. I don't believe they are, but we'll discuss the amendments one by one as we get to them. So, if you have any specific questions to the bill, we'll be working from the _____ bill as passed by the House, and myself and Rep. Berry are here to respond to your questions. I know that before I signed onto this bill, even though I have a local government background, I was very hesitant to sign onto the bill until I had had some extensive discussions with the local government people, CML, and Rep. Berry, because initially there were some things in that really concerned me and I had to get a lot of questions asked. I do support the bill to the extent that I wanted to sign on as the senate sponsor after those questions were answered and I was put at ease about several different things. So, it's an attempt to very accurately and fairly address the insurance issue from the standpoint of local entities, and yet not try to go overboard and prejudice legitimate individual citizens and their complaints. I think we've done that. We have some representatives here, Mr. Chairman, who want to speak to the bill, and some of the witnesses, like Susan Griffith, for instance, wants to represent several different parties in her comments.

Chairman:

Okay. Les, can you reach that signup sheet? Wait a minute, Rich can get it, Les. Susan, you want to join us?

Susan Griffith:

I'd like to testify in three different stages today, if I can, in the hopes of speeding up the testimony in support of the bill. The first stage is to express to you the general support of local government interests in the bill and, if I may relate to you the organizations that do support the bill, they are Colorado Counties, Inc., Colorado Association of School Boards, Colorado Association of School Executives, Colorado Association of Chiefs of Police, Colorado Municipal League, Colorado Sheriff's Association, and CAPE (?) all support the bill. The second thing I'd like to do is to express to you, if I may, just some general concerns that the bill addresses for those public entities that are becoming increasingly self-insured, or more accurately stated, uninsured, in Colorado. The effect of becoming self-insured or uninsured in Colorado courts is the liability for judgments and for attorneys' fees and defense costs falls directly upon the taxpayers and we are seeing in

Colorado increasingly local governments and, of course, the State of Colorado, achieving a self-insured or uninsured status. And they're getting there in several ways, and if I can just describe for you the types of problems governments are having in Colorado, very briefly. First of all, we have some governmental entities that will simply not receive any quotes from insurance companies, the State of Colorado and its representatives of the State of Colorado . . . Secondly, we have governmental entities from local governments in Colorado that are receiving quotes from insurance companies that they simply cannot afford. Let me give you an example. And, consequently, are becoming uninsured because they choose not to have that kind of insurance coverage. Let me give you just one or two examples. CIRSA is a self-insurance pool now providing coverage for approximately 69 or 70 municipalities in Colorado. Last year, when it had 38 municipalities that were members, they purchased general liability insurance coverage above $150,000 deductible. $150,000 was paid by CIRSA itself to purchase excess insurance above that general liability insurance for $77,000 up to about $5.3 million in coverage last year. This year, in order to purchase general liability insurance coverage, the pool received one informal quote from one insurance company to the effect that it would provide $1 million worth of coverage for $1 million in premiums. The pool decided that that was not a reasonable investment to make and chose not to include the general liability coverage this year. The effect of that, I would just like to point out, is sometimes not always apparent. One effect, for those of you who have been reading that Stanley Lake will not be able for recreational use this summer because it's owned by the City of Westminster. Wesminster is a member of the pool and because the pool was unable to acquire the excess general liability coverage, Stanley Lake could not be insured for the $1 million that the owners required and, consequently, Stanley Lake won't be available unless other coverage is obtained. I would just say to you that the cost of insurance coverage is requiring some communities to be uninsured for certain types of claims. We're also getting many exclusions from local government policy in the areas of absolute pollution exclusion--these days, you can't get coverage for pollution. Asbestoes exclusion, more recent exclusions are exclusions for sexual abuse, various civil rights act exclusions, and a whole series of additional exclusions. Again, areas where the governmental entity is becoming self-insured or uninsured. And finally, if we can afford coverage, oftentimes it can be afforded only with large deductibles; that is, in CIRSA's case for example, the $150,000 deductible permits some excess coverage. For those deductible amounts, again, the public entity is becoming self-insured. The consequence of all this, again, the potential consequence falls upon the taxpayer. Consequently, we see 1196 as important for taxpayers and government entities for two reasons; one, that it provides some additional predictability and losses for governmental entities and that's very important from our perspective. So that, if you're not insured or if you're self-insured you could estimate

what those expenses, potential liabilities, and expenses will be and will be able to fund for those in advance. The other one is to set responsible limits on liability and we think 1196 does both. 1196 is a modest bill; it is not a radical change in current law, but it does provide some predictability and some certainty where it did not exist before and for those reasons we would urge your support of the bill. I could address specific _____ if you had any questions, but I won't. Let me, if I can, conclude by putting on a slightly different hat and urging that you consider one amendment to the bill. We have provided to the sponsors, both the house and the senate sponsors--this is an amendment that will address one specific problem that developed just within the past few days. And my testimony in this instance is on behalf of CIRSA, the municipal property and liability pool, and also on behalf of CCI, which is working to create a property and liability pool for Colorado counties. Right now, the Colorado counties do not have a pool. They have 62 counties very interested in a pool and they are working very hard to get one started, hopefully by July 1st of this year. We learned last week that the insurance that--an assistant attorney general which advised the insurance commissioner's office had issued an opinion saying that monies received by a public entity self-insurance pool for property purposes and liability purposes cannot be comingled. I could go into an example of this, but the effect of it is that, for example, CIRSA does comingle its loss fund monies under a Lloyd's of London policy and we are informed that it could not retain that Lloyd's of London policy if it could not comingle those funds. In addition, the county pool which is being formed utilizes the same Lloyd's of London policy and again if they cannot comingle the loss fund monies, then it appears that Lloyd's of London would be unwilling to provide that excess coverage and the pool might not get off the ground. We've discussed this amendment with the insurance commissioner's office and he has authorized me to say to you that he has no objections to the amendment. It addresses an issue which he intends to address administratively in some o fhis rules and regulations and, consequently, especially with respect to various requirements on public entity pools. So he is going to address that administratively he has no problems with this amendment. The amendment would permit CIRSA to remain in operation and it would allow the county pool to continue with the proposal that it has before the insurance commissioner's office. And I can go into greater detail on the specifics of it, if you'd like to hear it. If you don't, that's fine, too.

Chairman:

Any questions, committee? Thank you very much, Susan. Is there anyone else who didn't get to sign up on 1196?

Leland Pulliard:

Thank you. My name is Leland Pulliard, here on behalf of the Colorado Trial Lawyers Association. We essentially have two points that we would like to bring to the committee. The first is the bottom of page 4, top of page 5. It's § 24-10-103, the definition of dangerous condition. The pertinent part that we're concerned with is the sentence "A dangerous condition shall not exist because the design of any facility is inadequate." That sentence essentially takes any type of design problem and gives immunity for it. We feel that that is going one step too far in providing immunity where it's probably not necessary. Just as an example, the bridge collapse that occurred over I-25. Had that been state engineers that were involved in that, had it been engineers associated with a public entity, by this, that would not have been considered a dangerous condition and thereby not be included in the definition and essentially immunity would have been provided and nothing could have been done in that regard, no matter how bad the design problem was. The second area is over on page 7 and 8, dealing with immunity and partial waiver. Subparagraph (d), where they talk about a dangerous condition which 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. And it goes on to discuss the highways that would apply to. A literal reading of that would require that it be absolutely out on the paved portion of the roadway. It would not include problems concerning traffic control signals that would be off of the paved portion, or hanging overhead, anything of that nature. We would propose that, at the very least, the bill be amended to add language to make clear that the dangerous condition in that regard includes the failure to provide or properly maintain traffic control signs and signals when the failure constitutes a dangerous condition as defined back in the dangerous condition section. An example might be where traffic control signals had gone out, the public entity had been notified, and a substantial period of time went by and they didn't do anything about it; there's no time limit on that. Regardless of how long the problem existed, they would be immune. There would be literally no recovery or no cause of action back against the governmental entity if an accident should occur because of that and, therefore, we feel that this provision needs to be broadened somewhat rather than so tight and such a literal reading. Those are the two problems that we have.

Sen. Lee:

On his first concern on page 5, line 1 of page 5, I intend to submit a personal amendment on the word "solely" to put the word "solely" back in so that it will read "A dangerous condition cannot exist solely because the design of any facility is inadequate." That would just become one of the factors. And

then on his concerns on page, I believe it was 8 or 9, I think Mr. Dave Brougham will be able to respond to that and if you'd like to call that witness now, you can, but he's going to address that issue.

Chairman:

Do you have any other comments to make? Any questions, committee?

David Brougham:

I'm David Brougham; I'm with the law firm of Hall and Evans. I defend the State of Colorado primarily in lawsuits such as those which would be addressed by this bill. I'm not sure whether the proposed amendment is something we should address? The second one hasn't been offered.

Unidentified speaker:

Why don't you respond for the benefit of the committee, however?

David Brougham:

As a general proposition, we oppose this; we feel it would surely open a number of new areas of liability. The original purpose of this amendment addressed a couple of cases, one of which is one called City and County of Denver v. Stevens, where a stop sign was slightly _____ and the contention was someone went through the stop sign because he couldn't see it. The city ended up with a suit over that, for what we considered to be a rather minor problem which was apparently caused by a private person with that particular stop sign. The primary case that led to this provisional section of the bill involved suit against Eagle County where a pedestrian was walking from a homecoming bonfire out in the country to a house down the road about a half and was struck by a car. One of the witnesses testified the girl was dancing down the middle of the road and there were various eyewitness accounts of what happened. Eagle County got sued for what was clearly a theory to provide a walkway next to a county road out in a rural area and the supreme court for that case created a lawsuit where the effective result was the public entity was required to have a walkway next to a roadway; at least, that's the way we all viewed it and that's the way many of the trial judges are now viewing it. The gist of this particular portion of this particular bill was to apply dangerous conditions only to those dangerous conditions which existed on the paved portion of the roadway and which provided a physical _____ to cars or vehicles going down the road. I have trouble with the proposed amendment because of the language that "dangerous condition" is something which physically interferes with the movement of traffic. Physical interferences, potholes in the roadway, piles

of gravel in the roadway, something which specifically interferes with the movement of traffic. Here's a bill--proposed amendment--in an effort to inject signs into that area. It provides no definitional area; I think it's gonna open up a lot of new areas of liability. We already have a concurrent state statute in Colorado which brings into play this--which makes state law, which is called the Manual on Uniform Traffic Control Devices. That's the law in Colorado; it's already there. That section does not follow what I frequently see _____ mumbled _____ a lawsuit. So if there is a problem with signs, I've only seen this thing for about the last ten minutes. The MUTCD would be the controlling test if the signs need to . . . That's one thing that . . . That is on page 8.

Chairman:

Any questions, committee? Being none, thank you very much. That takes care of the witnesses on this bill. Senator Lee?

Sen. Lee:

Rep. Berry, did you want to add something to the bill?

Rep. Berry:

Senator Lee and committee members, I think it's been fairly well summarized. I have maintained an interest in this area, having been the El Paso County Attorney prior to coming to service in the legislature, and I was particularly concerned during the special session when we addressed the state's problem with having its insurance cancelled; that this same thing was going to happen to units of local government and, in fact, it has; many units of local government have had their insurance cancelled and are now looking to taxpayer dollars to cover losses directly and then some of them, of course, have had the problem in having to pool resources together because as a unit of government, they are simply unable to have adequate reserves to pay large claims. So, I think that this bill--my interest in sponsoring it was to provide more certainty; to make it clear that units of government are not pockets of unlimited liability, particularly in the secondary area, where some of the cases I think you heard about with Sen. Arnold's bill on assumed duty. We addressed that for local government specifically in this measure. It's not that we want to make government immune when one of their employees clearly does something negligent and injures somebody. It's that when somebody else does it, the _____ case, or all the different cases you've heard about, government ought not end up picking up the tab on those simply because of its deep pocket, so I think in this measure we tried to restore a lot of the predictability about what liability is going to befall it, and yet certainly not try to make immune anything they do, because I think the citizens of

the state who are injured through negligent acts or intentional acts of government employees ought to be compensated in a reasonable fashion.

Chairman:

Okay. Questions, committee, comments? The bill is on the table?

Sen. Lee:

Mr. Chairman, I do have several amentments, unless the committee has amendments of their own first.

Sen. Fowler:

I have an amendment that I would like to offer on behalf of the Municipal League and Tammy is here to speak to that, so I will call on her.

Tammy:

Mr. Chairman and members, I'm Tammy Connolli (?) and I represent the Colorado Municipal League. This is an amendment that was requested by the Boulder City Attorney. It looks complicated and basically is a very simple amendment and is not intended to be _____. If you will turn to page 4, line 9 of the bill, you will find the definition of a dangerous condition there. Basically, the existing language of the definition of dangerous condition contains redundant language which specifies where those dangerous conditions are: on public buildings, hospitals, jails, public highways, and so forth. This specification of where those dangerous conditions are is unnecessary, as you can see if you would turn to page 7, line 17 of the bill. That's the page on which 24-10-106, at least a portion of 24-10-106, appears. 24-10-106 is the substantive waiver of immunity for certain kinds of activities of state and local government. 24-10-106 also specifies where those dangerous conditions for which government has no immunity. There is a redundancy between 24-10-103 and 106. This amendment would simply strike from section 103, the definition section, specification of where those dangerous conditions are and would make conforming changes to section 106 to make sure that all of those locations of dangerous conditions appear in 106, rather than 103. Thus, this amendment does strike some redundancy, but is not intended to make any substantive changes. I have an informal engrossment which shows the amendments as they would fit into the existing language of the statute if that would be of help in figuring out . . . With that, Mr. Chairman, I would be glad to try and answer any questions concerning this amendment.

Chairman:

Questions, committee? Thank you, Tammy. Sen. Allard?

Sen. Allard:

I would like to check with Tammy. There's no new added provisions as to what actually exists now, is that right?

Tammy:

That's correct. Everything that was taken out of 103 by this amendment is either already in or would be included into 106, so it's not intended to take away anything and it's not intended to add anything.

Sen. Allard:

Are there some differences? I was looking at some differences here between definitions of dangerous conditions and further back here where we talk about a dangerous condition which physically interferes with various things. You're still keeping that definition there of dangerous conditions.

Tammy:

That's correct.

Sen. Allard:

Is dangerous conditions used any place else in the bill other than there or in state law?

Tammy:

Yes, it's used in various places in section 106, as you will see from the informal engrossment that I did; I highlighted all those sections in which the term dangerous condition is used.

Sen. Allard:

Okay, so we talk about, for example, we talk about on page 8 at the top there we talk about a paved portion if paved or on the portion customarily used for travel by motor vehicles and I don't see that in the definition. So, your amendment will take out what we have here and we actually end up with--we've taken paved out of there.

Tammy:

This amendment is cumulative and would not take away from other amendments that have been or will be offered or are now in the bill. This amendment really doesn't affect those other

changes in the bill or--it's a different issue altogether. It simply removes some redundant language from 103 and puts them in where necessary in 106.

Chairman:

Okay, thank you, Tammy. The bill is on the table, committee. Sen. Fowler?

Sen. Fowler:

I move the adoption of the bill and I move the adoption of that amendment.

Chairman:

Municipal League amendment? Do you want to comment on that, Sen. Lee? Okay; you've heard the motion on the amendment, committee. Is there any objection to that amendment? Hearing none, let's prepare to adopt it. Sen. Lee?

Sen. Lee:

_____ inaudible _____ where we reinsert the word "solely." To make it just one of the factors that could be used to cite that the design is inadequate and then the second one is on page 9, line 13 after the word "care" insert the language "where none otherwise existed." I don't think that substantially changes it. It's a specific wording, clarifying wording that I personally ask to be drafted and I would ask that someone . . .

Chairman:

Does anyone wish to move this amendment?

Unidentified speaker:

Move the adoption.

Chairman:

It's been moved. Any discussion?

Unidentified speaker:

Mr. Chairman, I would ask that the amendment be severed, voted on totally separate from the rest of the amendment.

Chairman:

Okay. Is there objection to the passage of the first part of that amendment?

Unidentified speaker:

I object.

Chairman:

Okay, one objection. The _____ Sen. Allard as a "no" vote. Declared adopted. On the second half of the amendment--is there objection to that? Hearing none, that's declared adopted. Sen. Lee?

Sen. Lee:

The next amendment, Mr. Chairman, is the one proposed by CCI, or suggested by them. It refers to page 17, line 4 and other lines. Do you have that amendment? You do have this amendment? If that could be offered, Mr. Chairman.

Chairman:

Any discussion of that amendment? First of all, does anyone want to move it?

Sen. Lee:

It starts out on page 17, line 4, and the substantive part is on page 17 after line 15, you would add that paragraph that we've got there, subsection 7. This refers to the comingling and makes reference to the insurance pool. Sen. Martinez?

Chairman:

Discussion, committee? Hearing none, is there objection? Hearing none, that's declared adopted. Sen. Lee?

Sen. Lee:

The next one refers to page 5, replacing lines 6 through 10. This is not a substantive change, Mr. Chairman, it was brought to my attention by the drafter as just being a better way to word those lines 6 through 10 on page 5. It says the same thing, we just interchanged a couple of phrases to make it read better grammatically.

Chairman:

Discussion of that amendment. Does anyone wish to move that amendment?

Unidentified speaker:

I'll move it, Mr. Chairman.

Chairman:

Discussion? Any objection? Hearing none, that's declared adopted. Sen. Lee?

Sen. Lee:

I have nothing else to offer the committee, Mr. Chairman.

Chairman:

Other amendments, committee? Hearing none, the bill is on the table. Discussion of the bill? Hearing none, call the roll.

[All ayes]

Chairman:

The bill is declared adopted.

/jmc

COLORADO COURT OF APPEALS
No. 90CA0406

August 15, 1991

Jeffrey B. Barrack, Frank Brittin Clayton III, Janet Beardsley, Karl Kurtz, and Janis Yabes,

Plaintiffs-Appellants,

v.

City of Lafayette, Robert Burger, Alex Ariniello, Larry Gupton, Tim Larsen, Sharon Stetson, Phyllis Thieme, and Don Yoshihara,

Defendants-Appellees.

Appeal from the District Court of Boulder County
Honorable Morris W. Sandstead, Judge
No. 87CV1592-1

Division IV
Opinion by JUDGE ROTHENBERG
Reed and Van Cise*, JJ., concur

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Taussig & Taussig, John G. Taussig, Connie Brenton, Boulder, Colorado for Plaintiffs-Appellants

Frank Brittin Clayton III, Pro se

Hall & Evans, Daniel R. Satriana, Jr., Sean R. Gallagher, Denver, Colorado; Ronald Cohen, Patricia C. Tisdale, Office of the City Attorney, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1988 Repl. Vol. 10B)

Plaintiffs Jeffrey B. Barrack, Frank Brittin Clayton III, Janet Beardsley, Karl Kurtz, and Janis Yabes, appeal the trial court's dismissal of their claims against defendants, City of Lafayette, Robert Burger, Alex Ariniello, Larry Gupton, Tim Larsen, Sharon Stetson, Phyllis Thieme, and Don Yoshihara. We affirm in part, reverse in part and remand with directions.

In the 1920's, the City of Lafayette built a pipeline which carried untreated water from South Boulder Creek to a Lafayette water treatment facility for purification. The pipeline ran through Eldorado Springs. During the 1940's, Lafayette allowed certain Eldorado Springs property owners to tap into the water line for domestic water service. However, since the water was untreated, each property owner had to execute an agreement with the City verifying that the owner knew the water was not filtered or purified. Also, the property owners had to agree to hold the City harmless for claims arising from the water service. Each property owner paid to install the meters and paid service charges for the water.

In 1972, the City of Lafayette told the residents of Eldorado Springs that their water service would be terminated on July 1, 1974. Later, however, the City agreed not to terminate the water service in exchange for certain releases from property owners.

On December 16, 1986, the Lafayette City Council determined that it would be unlawful for the City to continue supplying plaintiffs with untreated water, and the council passed a

resolution authorizing the termination of the water service. On December 18, 1986, the council advised each plaintiff by registered letter that service would terminate July 1, 1987.

In June 1987, plaintiffs appeared before the council, expressed their willingness to work with the city council to find a solution, and urged the council to reconsider. In August 1987, plaintiffs filed this action against the City of Lafayette, its mayor, and the members of the Lafayette City Council seeking an injunction preventing the City from terminating plaintiffs' water service. They requested a declaratory judgment finding that the City is a public utility with a contractual duty to provide water to plaintiffs and also sought damages alleging a breach of the City's duty as a public utility. Additionally, plaintiffs claimed breach of implied contract, denial of due process rights, and estoppel. Plaintiffs did not allege any tort claims.

At the hearing on plaintiffs' motion for preliminary injunction, the trial court found that the City's act of supplying untreated water violated public health regulations. The court therefore found that plaintiffs could not demonstrate a reasonable probability of success on the merits and denied plaintiffs' motion for preliminary injunction.

Plaintiffs then filed a motion for temporary restraining order, claiming that new circumstances entitled them to relief. At a hearing before a different judge, plaintiffs presented proof that the City could have obtained a short term variance from the Colorado Department of Health to allow plaintiffs time to find

alternate water sources. The trial court granted plaintiffs' motion for a temporary restraining order.

Also in December 1987, the parties entered into a partial stipulation extending the temporary restraining order to April 15, 1988, and providing that, after April 15, the City could discontinue all water service to plaintiffs whether or not plaintiffs had an alternate source of water. In the stipulation, plaintiffs reserved their damages claims. On December 30, 1987, plaintiffs gave defendants notice of intent to sue under the Colorado Governmental Immunity Act. On April 15, 1988, the City terminated plaintiffs' water service.

In July 1988, plaintiffs sent defendants a second notice of intent to sue under the Colorado Governmental Immunity Act.

In January 1989, plaintiffs moved to amend their complaint to add tort claims including fraud, negligent misrepresentation, and outrageous conduct. The trial court, however, found that the plaintiffs had discovered their injury on December 18, 1986, when each plaintiff received a registered letter from the City. And, since plaintiffs' notice was sent more than six months later, the court concluded that plaintiffs had failed to comply with the notice requirements of the Colorado Governmental Immunity Act.

Accordingly, the trial court denied the plaintiffs' motion to amend to add tort claims, but did allow plaintiffs to amend their contract claims and to include constitutional claims.

Thereafter, defendants filed a motion to dismiss or, in the alternative, for judgment on the pleadings, contending that since

it was no longer legal for them to supply plaintiffs with untreated water, they were excused from performing under the contract by the doctrine of impossibility of performance. Defendants also requested dismissal of plaintiffs' due process claim.

In opposition to the motion to dismiss, plaintiffs claimed that the City of Lafayette is a public utility with a duty to provide "the kind of water that will comply with the health laws . . . of the State of Colorado." Thus, plaintiffs contended that since the City was required to provide them with treated water, the illegality issue was irrelevant.

In January 1990, the court also ruled that the City of Lafayette was not a public utility as to plaintiffs. Since plaintiffs' remaining claims had hinged upon the assumption that the City was a public utility, the court dismissed the remaining contract and constitutional claims.

I.

Plaintiffs first contend that the trial court erred in dismissing their tort claims for failure to comply with the notice provisions of the Colorado Governmental Immunity Act. We agree.

A.

Section 24-10-109(1), C.R.S. (1988 Repl. Vol. 10A), the Colorado Governmental Immunity Act, provides:

> "Any person claiming to have suffered an injury by a public entity . . . shall file a written notice . . . within one hundred

> eighty 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." (emphasis added)

The Colorado Governmental Immunity Act applies to all actions against public entities or their employees which lie or could lie in tort, regardless of whether that may be the type of action or the form of relief chosen by the claimant. State Personnel Board v. Lloyd, 752 P.2d 559 (Colo. 1988).

Section §24-10-109 does not allow an aggrieved party to wait until all elements of the claim mature before filing an action. The 180-day notice period begins to run when a plaintiff becomes aware of the claimed injuries and potential action for damages. See Morrison v. City of Aurora, 745 P.2d 1042 (Colo. App. 1987). However, a claimant must have a reasonable opportunity to discover the basic, material facts underlying the claim before giving the required statutory notice. See State v. Young, 665 P.2d 108 (Colo. 1983).

Here, the plaintiffs and the City dispute the date when the plaintiffs first "became aware of the claimed injuries and potential action for damages." Morrison v. City of Aurora, supra.

The City urges us to conclude as a matter of law that December 16, 1986, was the date of discovery. On that date, the Lafayette City Council sent plaintiffs registered letters informing them that their water service would be terminated.

Plaintiffs disagree and emphasize that when they filed

their action on August 20, 1987, it was for injunctive relief, breach of contract, and denial of due process only. They did not file any tort claims. Under the Colorado Governmental Immunity Act, notice is not required for contract claims, State Personnel Board v. Lloyd, 752 P.2d 559 (Colo. 1988), or for civil rights violations. Mucci v. Falcon School District, 655 P.2d 422 (Colo. App. 1982).

Further, after filing their lawsuit, the plaintiffs received a court order which temporarily restrained the City from terminating their water service. Then, in December 1987, plaintiffs entered into a stipulation with the City which also prevented interruption of water service until April 15, 1988.

Thus, despite the city council's threats of termination, which began in 1972 and occurred again in December 1986, it is undisputed that the City did not and, because of the court order and stipulation, could not terminate plaintiffs' water service until April 15, 1988.

Under these circumstances, plaintiffs urge us to conclude, as a matter of law, that the city council's mere threats of future action did not trigger the notice requirement of the Act and that it was not until April 15, 1988, that they actually became aware of their injuries and damages. Since notice was sent on December 30, 1987, plaintiffs contend that it was timely.

In Morrison v. City or Aurora, supra, sellers of real property brought a suit against the City of Aurora after the sellers had to reduce the price of their property because of

flood restrictions. A central issue in Morrison was whether the plaintiffs had complied with the notice requirement of the Act. This turned on the issue of when the plaintiffs knew of their claimed injuries and damages.

The plaintiffs learned that Aurora planned to place a drainage channel across the subject property in 1978 and plaintiffs objected. They began negotiations with Aurora which resulted in a contract granting plaintiffs an easement.

In 1982, Aurora conducted an updated study and concluded that a portion of plaintiffs' property was still subject to flood restrictions. Plaintiffs learned of those restrictions in June 1983. However, plaintiff sold the property at a reduced price and therefore incurred their damages in December 1983.

This court held that, for purposes of the Act, the period for giving notice began to run in June 1983 because:

> "plaintiffs were aware of the claimed injury to the property and the potential damages in June when the notice of the floodway restrictions precipitated the renegotiation of their selling price for the property. Therefore, we conclude the trial court erred as a matter of law by ruling the notice requirement was not triggered until the damage element of the claim was mature."

By analogy, here, the plaintiffs were threatened as early as 1972 with termination of their water services and, as in Morrison, plaintiffs negotiated with the City. Here, however, despite threats and legal proceedings, it was not until December, 1987, when they entered into the stipulation with the City, that

plaintiff actually became aware of the potential for tort injuries and damages. And, unlike the situation in Morrison, the actual damages to these plaintiffs did not exist until April 15, 1988, and may never have existed. Thus, under these particular circumstances, it would have been premature for these plaintiffs to have given notice of their tort claims before December 1987. See Morrison v. City of Aurora, supra.

The notice requirement of the Governmental Immunity Act furthers the legitimate state interests of:

> "fostering prompt investigation while the evidence is still fresh; repair of any dangerous condition; quick and amicable settlement of meritorious claims; and preparation of fiscal planning to meet any possible liability." Fritz v. Regents of University of Colorado, 196 Colo. 335, 586 P.2d 23 (1978).

See also State Compensation Insurance Fund v. Colorado Springs, 43 Colo. App. 112, 602 P.2d 881 (1979).

Even though the Act has been amended since Fritz and compliance is now a jurisdictional prerequisite, the basic purpose of the Act remains unchanged. Here, it is undisputed that the City of Lafayette had a full opportunity to investigate promptly the matters in issue, and also engaged in settlement negotiations with plaintiffs. See Fritz v. Regents of University of Colorado, supra. Thus, the conclusion that we reach here is consistent with the purposes of the Act.

In sum, we hold that the trial court erred in granting defendants' motion to dismiss plaintiffs' tort claims pursuant to

the Colorado Governmental Immunity Act.

II.

Plaintiffs next argue that the trial court erred in dismissing their contract claims based on the defense of impossibility of performance. We disagree.

In order to establish the defense of impossibility of performance, it is necessary to demonstrate changed circumstances which have made the "promise vitally different from what reasonably should have been within the contemplation of both parties when they entered into the contract." Littleton v. Employers Fire Insurance Co., 169 Colo. 104, 453 P.2d 810 (1969). If governmental action occurs which makes a contract impossible to perform, the action must have made the performance illegal. Colorado Performance Corp. v. Mariposa Associates, 754 P.2d 401 (Colo. App. 1987).

In their original complaint, plaintiffs alleged that the City of Lafayette provided the original Eldorado Springs property owners with untreated water. After the City provided the original plaintiffs and their predecessors in interest with untreated water for several years, the Colorado Department of Health adopted water regulations requiring that all surface water be treated before delivery to consumers. Therefore, it was no longer legal for the City to deliver untreated water to the plaintiffs, and, under the doctrine of impossibility of performance, the City was discharged from whatever express or implied contractual obligation it may have had to the plaintiffs.

III.

Plaintiffs next argue that the trial court erred in dismissing their due process claims. We disagree.

In order to state a claim for violation of a procedural due process right, a plaintiff must first show a property interest. The concept of a property interest under the due process clause extends beyond actual ownership of real estate, chattels, or money, and includes a person's interest in a "benefit." However, in order to have a property interest in a benefit, one must have more than an abstract need or desire for the benefit; one must have a legitimate claim of entitlement to it. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Here, plaintiffs claim that they have a protected property interest in continued water service. We would agree with plaintiffs if they had contracted for treated water which could be supplied legally. See Denver Welfare Rights Organization v. Public Utilities Commission, 190 Colo. 329, 547 P.2d 239 (1976). However, here, they contracted for untreated water which could no longer be legally supplied. Since plaintiffs are not entitled to continued service of untreated water, the trial court properly dismissed their due process claim.

That portion of the judgment dismissing the contract and constitutional claims is affirmed. That portion of the judgment based upon the denial of plaintiffs' motion to amend their complaint to add tort claims is reversed, and the cause is

remanded with directions to the trial court to grant plaintiffs' motion to amend and for further proceedings on plaintiffs' tort claims.

JUDGE REED and JUDGE VAN CISE concur.