SUPREME COURT, STATE OF COLORADO

Case No. 93SC249

BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

STATE DEPARTMENT OF HIGHWAYS,

Petitioners,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, d/b/a US WEST Communications, Inc.,

Respondents.

Court of Appeals, Case No. 91CA2074
Opinion By: The Honorable Karen S. Metzger; The Honorable Charles Pierce concurring
The Honorable Janice Davidson dissenting

Geoffrey T. Wilson, #11574
General Counsel
Colorado Municipal League
1660 Lincoln, Suite 2100
Denver, Colorado 80264
(303) 831-6411

Dated: April 19, 1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

AUTHORITIES

INTRODUCTION

In a most unfortunate decision, and one that is literally without precedent in Colorado jurisprudence, the Court of Appeals has created an "impled waiver" of governmental immunity. This creation is in direct conflict with the plain language of the Colorado Governmental Immunity Act, Sec. 24-10-101, et seq, C.R.S. (1988 Repl. Vol. 10A) (hereafter "Governmental Immunity Act," or "Act") and the express statements of legislative purpose and intent contained therein. Furthermore, the decision of the Court of Appeals is contrary to prior decisions of this Court and by various divisions of the Court of Appeals. If this decision is permitted to stand, Colorado's carefully constructed system of statutory governmental immunity and limited express waivers will begin to unravel, as one statute after another is presented as the basis for an "implied waiver" of governmental immunity.

Following this Court's abrogation of common law sovereign immunity in Evans v. Board of County Commissioners, 482 P.2d 968 (Colo. 1971), Flournoy v. School District No. 1, 482 P.2d 966 (Colo. 1971), and Proffitt v. State, 482 P.2d 965 (Colo. 1971), the General Assembly reinstated governmental immunity by enacting the Colorado Governmental Immunity Act (See: 1971 Colo. Laws Ch. 323; p. 1204)

Section 24-10-108, C.R.S. (1988 Repl. Vol. 10A), of the Governmental Immunity Act provides that, unless waived by resolution of the governing body or by a specific provision of the Act itself,

> . . . sovereign immunity shall be a bar to any action against a public entity 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. Id.

In Section 24-10-105, C.R.S. (1988 Repl. Vol. 10A) the General Assembly expressed that:

> 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. Id.

Then, in Section 24-10-106(1), C.R.S., (1988 Repl. Vol. 10A) the General Assembly prefaced its listing of the limited circumstances in which governmental immunity is waived, by stating flatly that:

> A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Id.

The General Assembly included in the Act a detailed "Declaration of Policy" (see: Section 24-10-102, C.R.S., (1988 Repl. Vol. 10A)) in which it recognized, *inter alia*, "that the state [and] its political subdivisions . . . should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided in this article." Id.

> 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 which lie in tort or could lie in tort. Id.

The language and legislative purpose of the Governmental Immunity Act are clear. The decision of the Court of Appeals in the case at bar is obviously in direct conflict with the requirements of the Act, and, as will be developed below, completely without support in the applicable decisions of this Court and the Court of Appeals. This decision by a divided Court of Appeals is particularly deserving of review by this Court, and the League respectfully urges this Court to grant the State's petition for certiorari. In support of its position, and consistent with the criteria for certiorari review set forth in Rule 49, C.A.R., the League submits the following argument.

ARGUMENT

I. The Court of Appeals has Decided a Question of Substance in a Manner that is not in Accord with Applicable Decisions of this Court or Decisions in Other Divisions of the Court of Appeals.

Given the clear language and expression of legislative intent in the Governmental Immunity Act, application of the Act to various claims against public entities has involved the following straightforward two-part analysis: Is the claim for injury one that lies in tort or could lie in tort? If so, since the Act bars the action unless immunity is waived pursuant to the Act, has immunity been waived?

The present case involves a claim for injury that lies in tort (negligence). Obviously, no express waiver of immunity in the Act applies here, otherwise the Court of Appeals need not have resorted to creation of an "implied" waiver.

Judge Davidson, dissenting from the Court of Appeals decision and finding the action here barred by the Governmental Immunity Act, wrote ". . . the absence of an explicit waiver of sovereign immunity in Section 24-10-106 (1988 Repl. Vol. 10A) for the negligent activity alleged here is dispositive." 17 Brief Times Reporter at 237. We agree. The absence of an explicit waiver has been dispositive for this Court and the Court of Appeals in every case where the issue has been presented.

The League has been unable to locate any decisions, either of this Court or of the Court of Appeals, that support the "implied waiver" of governmental immunity created by the Court of Appeals in this case. In all cases, this Court and the Court of Appeals, having first determined that the claim lies in tort or could lie in tort, have then examined whether the injury that is the basis for the claim arose from circumstances in which immunity is expressly waived in the Act.

For example, in City and County of Denver v. Desert Truck Sales, 837 P.2d 759 (Colo. 1992), this Court held that a replevin claim against Denver sounded in tort and

> ". . . [a]s such, the claims are barred by the Governmental Immunity Act unless supported by facts demonstrating conduct for which sovereign immunity has been waived. Sections 24-10-106 - 118(2) (1988 Repl.

> Vol. 10A) (additional case citation omitted). The record does not reflect that sovereign immunity has been waived." 837 P.2d at 765.

In Jenks v. Sullivan, 826 P.2d 825 (Colo. 1992) this Court narrowly construed the waiver of governmental immunity (in Section 24-10-106(1)(c) (1988 Repl. Vol. 10A) of the Act) for an action for injuries arising from a "dangerous condition of any public building" to not include activities conducted within public buildings. This Court recognized that, under the Act, "all public entities, officials and employees are immune from tort liability unless, under the circumstances, they fit within the specified exceptions." 826 P.2d at 827. The Court acknowledged the legislative purposes identified in the Act's "Declaration of Policy" (Section 24-10-102, C.R.S. (1988 Repl. Vol. 10A)) in concluding that:

> By limiting the waiver of sovereign immunity to specified circumstances, the Act protects the public entity against the risk that unforseen tort judgements will deplete public funds resulting in the termination or curtailment of important government functions. 826 P.2d at 830.

In Willer v. City of Thornton, 817 P.2d 514 (Colo. 1991) this Court affirmed the trial court's dismissal of Willer's claims against the City for injuries arising from alleged negligent design of a street intersection. This Court noted that Section 24-10-108 (1988 Repl. Vol. 10A) bars actions against public entities that lie in tort or could lie in tort "except as specifically provided in

other provisions of the Act." 817 P.2d at 517, and declined to read into the Act a waiver of governmental immunity where none had been expressly provided.

Prior decisions of Division I and other divisions of the Court of Appeals have applied the two-part analysis utilized by this Court for determining whether tort claims against public entities are barred by the Act. As with the decisions of this Court, many decisions by the Court of Appeals have involved construction of the express waivers of governmental immunity contained in Section 24-10-106 (1988 Repl. Vol. 10A) of the Act. However, until Division I's decision in the present case, no decision in any division of the Court of Appeals has suggested an "implied waiver" of governmental immunity.

For example, in Lehman et al v. City of Louisville, 16 Brief Times Reporter 1805 (Colo. App. 1992), Division I affirmed the dismissal of claims against the City because plaintiffs estoppel claims could lie in tort and, citing the declaration of immunity in Section 24-10-106(1) (1988 Repl. Vol. 10A) of the Act, found that "[t]he exceptions to this immunity, enumerated in the statute, do not apply to the facts here." 16 B.T.R. at 1806.

Division III of the Court of Appeals, in Grimm Construction Company v. Denver Board of Water Commissioners, 835 P.2d 599 (Colo. App. 1992), declared that the Governmental Immunity Act provides public entities with tort immunity "unless the injury is among those for which immunity has been expressly waived." 835 P.2d at 601. The Court found that Grimm's interference with contract

claims lay in tort and affirmed dismissal because plaintiff's injuries did not "fall within any of the categories enumerated in Section 24-10-106(1) for which there is deemed to be a waiver of immunity." Id.

In Jones v. City and County of Denver, 833 P.2d 870 (Colo. App. 1992) Division V affirmed denial of tort claims by individuals who slipped and fell on ice at Stapleton Airport parking facilities because "in [the] absence of clear language in Section 24-6-106(1)(e) waiving immunity for dangerous conditions in public parking facilities, we must construe that section as expressing the General Assembly's intent to retain a public entity's sovereign immunity from liability for such claims." 833 P.2d at 872.

Numerous decisions in various divisions of the Court of Appeals have denied tort claim recovery because the circumstances giving rise to the injury did not fit within the specific waivers of immunity contained in the Act. See, for example, Howard through Young v. Denver, 837 P.2d 255 (Colo. App. 1992), Division I (Governmental Immunity Act's waiver of immunity for operation of jail, including performance of statutory duties incident to such operation, does not encompass pre-trial investigative services that jail keepers may perform); Gabriel v. City and County of Denver, 824 P.2d 36 (Colo. App. 1991), Division III (waiver for injuries arising from operation of "public hospital, correctional facility" or "jail" held not to include foster homes); Duong v. Arapahoe County, 837 P.2d 226 (Colo. App. 1992), Division IV (specific waiver in Act for "dangerous condition" of public building held

limited to building or structural defects; waiver does not include action by those present within the building) and Bain v. Town of Avon, 820 P.2d 1133 (Colo. App. 1991), Division V (waiver in Act for action for injuries resulting from operation of a motor vehicle owned or leased by public entity found not to include backhoe, as backhoe is not a "motor vehicle".).

While not an exhaustive listing of all cases in which this Court and the Court of Appeals have applied the Governmental Immunity Act, these decisions serve to illustrate the dramatic departure by the Court of Appeals in the case at bar from the well established course of jurisprudence in this area. For the first time, the Court of Appeals has not considered the absence of an express waiver of immunity in the Governmental Immunity Act dispositive. For the first time, in the absence of such an express waiver, the Court of Appeals has approved venturing outside of the Governmental Immunity Act to infer from a completely unrelated statute an "implied waiver" of governmental immunity.

II. The Court of Appeals' Reliance on Moldovan v. State is Inappropriate and Highlights Why Certiorari Review is Appropriate Here.

The Court of Appeals' citation of this Court's decision in State v. Moldovan, 842 P.2d 220 (Colo. 1992) is misplaced. The Court of Appeals application of the Moldovan decision to justify its creation of the "implied waiver" heightens the League's concern about what this decision may portend for the General Assembly's carefully conceived, and heretofore well understood, concept of

governmental immunity, subject only to limited, specific statutory waivers.

The Court of Appeals' rationale was essentially that, since this Court in Moldovan allowed negligence recovery based on breach of a statutory duty to maintain roadside fences, negligence recovery in the present case was appropriate for breach of duties imposed pursuant to the Excavation Requirements Statute, Sec. 9-1.5-101 et seq., C.R.S. (1986 Repl. Vol. 3B). The Court of Appeals' reliance on Moldovan fails to take into account the critical fact that in Moldovan there existed a nexus between the statutory duty imposed and an express waiver of immunity in the Governmental Immunity Act. As Judge Davidson points out in her dissent, Moldovan:

> . . . was premised upon the Court's explicit determination that sovereign immunity for the negligent activity involved, i.e. maintaining a dangerous condition of a public highway, is *specifically* waived by 24-10-106(1)(d) of the Governmental Immunity Act. Thus, the holding in Moldovan that there is a private cause of action created under the fence law included the prior determination that the cause of action is not otherwise barred by the Governmental Immunity Act. The cause of action here, on the other hand, is barred by the Act.
>
> Moreover, the analysis in Moldovan makes it clear that the existence of a statutory duty of care imposed on the state, here by the Excavation Requirements Statute, is not determinative of the independent question of whether sovereign immunity bars the lawsuit. 17 B.T.R. at 237.

It is obvious where the majority's erroneous reliance on Moldovan, and its derivative creation of the "impled waiver" of governmental immunity, will lead. Virtually any statute that

arguably imposes a duty on a public entity will be claimed as the basis for another "impled waiver" of governmental immunity. The resulting myriad of implied waivers will make a mockery of the clear language of the Governmental Immunity Act and the expressions of legislative purpose contained therein. It is not difficult to envision the General Assembly, in order to further the purposes expressed in the "Declaration of Policy" in the Governmental Immunity Act (See Section 24-10-102, C.R.S. (1988 Repl. Vol. 10A)), being obliged to amend statute after statute in order to insert language expressly providing that no waiver of governmental immunity is intended.

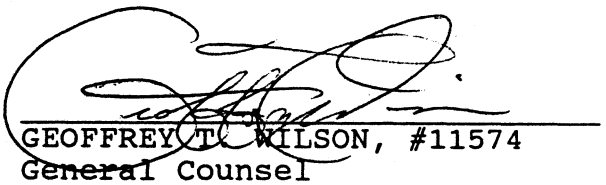
Conclusion

The Court of Appeals decision in the case at bar has created and grafted on to Colorado's structure of statutory governmental immunity with limited express waivers, an "impled waiver," concept. This creation is directly contrary to the express language of the Governmental Immunity Act and the legislative purposes of the Act. There are no decisions of this Court or of the Court of Appeals that support creation of an implied waiver. The Court of Appeals decision is plainly contrary to numerous decisions by this Court and various divisions of the Court of Appeals (including Division I itself) that have been faithful to the language and intent of the General Assembly in enacting the Governmental Immunity Act. If allowed to stand, the Court of Appeals decision would spawn a

myriad of implied waivers of governmental immunity and frustrate the purposes of the Governmental Immunity Act.

WHEREFORE, the League urges this Court to grant the State's petition for certiorari.

Respectfully submitted by



GEOFFREY T. WILSON, #11574
General Counsel
Colorado Municipal League
1660 Lincoln Street, Suite 2100
Denver, Colorado 80264

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Colorado Municipal League as amicus curiae was placed in the U.S. Postal System on the 19th of April, 1993, addressed to the following:

Kathleen Shildmyer
U.S. West
1801 California
Suite 5100
Denver, Colorado 80202

Timothy Flanagan
Kelly Stansfield & O'Donnell
1225 17th Street
Suite 2600
Denver, Colorado 80202