SUPREME COURT, STATE OF COLORADO

Case No. 95SC46

BRIEF OF THE CITY OF AURORA, COLORADO MUNICIPAL LEAGUE AND THE STATE OF COLORADO AS AMICI CURIAE

REGIONAL TRANSPORTATION DISTRICT,

Petitioner,

v.

JOSE LOPEZ,

Respondent.

Appeal from the District Court of the City and County of Denver,
Case No. 93CV3297
The Honorable William G. Meyer

Dated: September 5, 1995

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I. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in construing Section 24-10-109(3), 10A C.R.S. (1988), which specifies that a notice of claim against a public entity is "effective upon mailing by registered mail or upon personal service" to mean that such notice is also effective upon mailing by regular mail.

2. Whether the Court of Appeals erred in concluding that it was "too harsh" to dismiss with prejudice an action filed prematurely in noncompliance with Section 24-10-109(6), 10A C.R.S. (1988 & 1994 Supp.), even though subsection (1) of the same Section specifies that "failure of compliance" with the "provisions of this Section" shall "forever bar" the action.

II. STATEMENT OF THE CASE

The Amici hereby adopt and incorporate by reference the statement of the case contained in RTD's Opening Brief.

III. SUMMARY OF ARGUMENT

The Court of Appeals' decision effectively nullifies the protections accorded to governmental entities by the notice provisions of the CGIA. The decision would leave governmental entities of this state in the untenable position of being unable to accurately assess their possible liability. The General Assembly has declared that the taxpayers of this state should not be placed in such a position and thus the Court of Appeals' decision should be reversed.

This case was properly dismissed by the trial court on RTD's motion for failure of the Plaintiff to establish subject matter jurisdiction under the Colorado Governmental Immunity Act. It is Plaintiff's burden to prove jurisdiction and his failure to submit any affidavits in opposition to RTD's supporting affidavits essentially left the trial court no choice but to dismiss his claims.

The trial court as the fact finder on the issue of notice considered the only competent evidence before it and determined that the case should be dismissed. Such findings of fact are afforded a high degree of deference and cannot be revised on appeal unless clearly erroneous.

The Court of Appeals erred in reversing the trial court on two issues. First, the Court of Appeals ignored the plain language of the notice provisions of the immunity statute and prior decisions of this Court. C.R.S. Section 24-10-109(3) states that notice "shall be effective upon mailing by registered mail." The Court of Appeals, on the other hand, held that notice is also effective on the date sent by regular mail. The undisputed facts are that Plaintiff's notice was sent by regular mail on the 180th day after his injury. The notice was received by RTD's legal department on the 187th day. This Court has previously addressed the 180-day limit and repeatedly held that strict compliance is required.

Second, the Court of Appeals erred when it determined that dismissal with prejudice was "too harsh" a sanction for a violation of the "safe harbor" provision of the notice statute. Once again, the undisputed facts establish that Plaintiff failed

to comply with Section 24-10-109(6) by filing his action prior to his claim being denied or the passage of ninety days after notice. The plain language of the statute states that failure to comply with any of the provisions of this notice statute "shall forever bar" any such action.

The CGIA, as amended in 1986, is a non-claim statute which imposes a jurisdictional bar for noncompliance. The Court of Appeals' finding that this bar is "too harsh" amounts to judicial legislation and should not be permitted to stand.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The Court of Appeals erred in reversing the trial court's decision to grant RTD's Motion to Dismiss. In the case of Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993), this Court definitively established the method of raising governmental immunity issues and the corresponding standard of review, stating:

> Any factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury to determine. Appellate review of such a factual determination is on a clearly erroneous basis. . . . The 'clearly erroneous' standard of appellate review under Fed.R.Civ.P. 12(b)(1) differs greatly from the standard of appellate review used if a Fed.R.Civ.P. 12(b)(6) motion is converted to a summary judgment motion under Fed.R.Civ.P. 56. The test for summary judgment is very stringent and gives every benefit of the inferences to the non-moving party . . . By contrast, under Fed.R.Civ.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction and the standard of appellate review is highly deferential.

Id. at 924-5. (emphasis added).

Subsequent appellate decisions have unanimously adopted this highly deferential, clearly erroneous standard of review. Norsby v. Jensen, 19 Brief Times Reporter 1244 (Colo. App. 1995); Armstead v. Memorial Hospital, 892 P.2d 450 (Colo. App. 1995); Shandy v. Lunceford, 886 P.2d 319 (Colo. App. 1994); Cline v. Rabson, 862 P.2d 1035 (Colo. App. 1993).

In the instant case, the Court of Appeals did not accord the trial court the appropriate level of deference.

B. STRICT COMPLIANCE WITH C.R.S. SECTION 24-10-109(3) IS REQUIRED.

The declaration of purpose in the Colorado Governmental Immunity Act (CGIA) states, in pertinent part, as follows:

> 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 required by the citizens or from exercising the powers authorized or required by law . . .' Section 24-10-102, C.R.S. (1988 Repl. Vol. 10A)

This Court has consistently held that the purposes behind the notice provisions of the CGIA are:

> . . . designed to permit a public entity to conduct a prompt investigation of the claim and thereby remedy a dangerous condition, to make adequate fiscal arrangements to meet any potential liability, and to prepare a defense to the claim. E.g. Uberoi v. University of Colorado, 713 P.2d 894, 899 (Colo. 1986); Fritz v. Regents of University of Colorado, 196 Colo. 335, 338-39, 586 P.2d 23, 25 (1978).

Woodsmall v. Regional Transportation District, 800 P.2d 63, 68 (Colo. 1990); East Lakewood Sanitation District v. District Court, 842 P.2d 233, 236 (Colo. 1992).

In keeping with those stated purposes, governmental entities across the state rely heavily upon the provisions of the CGIA for protection from liability for unreported incidents. If affirmed, the Court of Appeals' decision in this case would eviscerate the carefully drafted provisions of the notice statute and leave governmental entities unable to rely upon those protections.

The notice provisions of the CGIA provide, in pertinent part:

> (1) Any person claiming to have suffered an injury by a public entity . . . 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. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action . . . (3) Such notice shall be effective upon mailing by registered mail or upon personal service. . . . (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.

C.R.S. Section 24-10-109.

In its Trinity decision, this Court stated:

> Unless a plaintiff complies with the statutory requirements, including notice, sovereign immunity bars suit against a public entity for injury which lies or could lie in tort. Id. The terms by which a sovereign . . . consents to be sued must be strictly followed since they 'define [the] court's jurisdiction to entertain the suit.' United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct. 1361, 1368, 108 L.Ed.2d 548 (1990) (citations omitted). The sovereign cannot be forced to trial if a jurisdictional prerequisite has not been met.

Trinity, supra at 924. Further, the Trinity Court noted:

> The Governmental Immunity Act is not a tort accrual statute. It is a non-claim statute, raising a jurisdictional bar if notice is not given within the applicable time period. § 24-10-109(1); Barrack v. City of Lafayette, 847 P.2d 136 (Colo. 1993); cf. § 15-12-803, 6B C.R.S. (1987 & 1992 Supp.)

Id. at 923.

In 1986 the Legislature amended the notice provisions of Section 24-10-109 by removing the term "substantial" from the compliance provision and adding language making compliance a jurisdictional prerequisite. Woodsmall, supra, and C.R.S. Section 24-10-109. Despite this amendment, this Court subsequently held in Woodsmall that substantial compliance with subsection (2) of 24-10-109, the contents section, was sufficient. The Court's paradoxical treatment of this statutory change in Woodsmall has caused some confusion regarding the interpretation and application of the notice sections of the CGIA as reflected by the decisions in Cassidy v. Reider, 851 P.2d 286 (Colo. App. 1993) and East Lakewood Sanitation District, supra.

This Court has, however, consistently refused to extend substantial compliance to any other provision of the notice requirements. Specifically, this Court has held that substantial compliance with the 180-day requirements would not be tolerated and that failure to strictly comply with the 180-day requirement mandates dismissal. East Lakewood Sanitation District, supra.

In the instant case, the Court of Appeals misapplied this Court's previous rulings and has implicitly grafted a "substantial compliance" standard onto both the 180-day notice requirement and the ninety-day "safe harbor" requirement.

The undisputed facts of this case establish that Plaintiff mailed his first notice of claim by regular first class mail on April 12, 1993, exactly 180 days from the date of his injury. The notice was not received by RTD's legal department until April 19, 1993, 187 days after the injury.

Colorado Courts have held that a notice of claim mailed by regular mail which is actually received by the governmental entity within 180 days is effective, e.g., Blue v. Boss, 781 P.2d 128, 130 (Colo. App. 1989). However, the same Courts have repeatedly stated that the purpose of the registered mail requirement is to conclusively establish the effective date of service for the 180-day requirement. Id.; East Lakewood Sanitation District, supra at 235; Woodsmall, supra at 69; Armstead v. Memorial Hospital, 892 P.2d 450, 453 (Colo. App. 1995). The Woodsmall case stated unequivocally that:

> . . . resort to service by regular mail does not carry with it the presumption that service has been effected on the date of mailing.

Id. at 69.

As another division of the Court of Appeals pointed out recently:

> . . . while a plaintiff may file a notice of claim by regular mail, he or she assumes the risk that such notice may not be received at all.

Armstead, supra at 453. In this case, Plaintiff must assume the risk that his notice would not be received within 180 days of his injury. Quite frankly, it would have worked no hardship on Plaintiff, who obviously knew of the notice requirement, to have simply mailed his notice by registered mail, thus establishing

the date of effect. In light of the fact that Plaintiff waited until the last possible day to mail his notice, it was incumbent on him to insure that he complied with the requirements of the Act. He should not now be heard to complain because he chose to risk a finding of noncompliance. Id.

The cases relied upon by the Court of Appeals for its holding that a notice of claim sent by regular mail within the 180-day limit is effective upon mailing do not stand for that proposition and are easily distinguishable from the case at bar. In the Woodsmall and Blue cases, it was undisputed that notice was actually received by the entity within the 180-day limit. In Trinity, the notice was sent by registered mail and the issue was when the plaintiff should have discovered its injury.

In Lafitte v. State Highway Dept., 885 P.2d 338 (Colo. App. 1994), the Court of Appeals prefaced its ruling by stating that it applied only "[u]nder the unique circumstances presented here." Id. at 340. In Lafitte, the plaintiff mailed her notice by certified mail [which is included in the definition of registered mail in the statutes. C.R.S. Section 2-4-401(12)] within the 180-day period, however, she failed to affix sufficient postage and the notice was returned to her. The subsequently mailed notice was not accepted until after the 180-day limit. The Court of Appeals held that the delay caused by lack of additional postage should not result in a dismissal. In the instant case, Plaintiff made no attempt to comply with the statute, and Lafitte's "unique circumstances" would not apply.

Even more important, however, is the problem pointed out by Judge Roy, in his dissent, that the Lafitte case was based on a misreading of Woodsmall and Trinity. The Lafitte court relied on Woodsmall's substantial compliance standard with respect to the 180-day limit. As has been previously pointed out in this brief, this Court has specifically rejected substantial compliance in regard to the 180-day limit. East Lakewood Sanitation District, supra.

This Court has made it abundantly clear:

> . . . that compliance with the requirements of [Section 24-10-109] is a jurisdictional prerequisite to any action brought under the Governmental Immunity Act. . . . when a party fails to strictly comply with the 180-day notice requirement, the party's action must be dismissed.

East Lakewood Sanitation District, supra at 236.

Here the trial court properly weighed the evidence submitted and found that Plaintiff had failed to carry his burden of establishing subject matter jurisdiction. Such determinations are in the province of the trial court and must be upheld unless clearly erroneous.

C. A PREMATURELY FILED CLAIM MUST BE DISMISSED WITH PREJUDICE PURSUANT TO C.R.S. 24-10-109(6).

Finally, the Court of Appeals' holding that "dismissal with prejudice is too harsh a sanction for premature filing of an action against a public entity in violation of Section 24-10-109(6)" is in direct derogation of the statute. Although the Colorado Supreme Court has not directly addressed this issue,

it has twice noted in recent opinions that a claimant may not commence suit until the claim has been denied or ninety days have passed since the filing of the notice. Trinity, supra at F.N. 12; City of Lafayette v. Barrack, 847 P.2d 136, 139 F.N. 7 (Colo. 1993).

The obvious intent of subsection (6) is to allow the governmental entity an opportunity to evaluate the claim and assess possible settlement options without the expense of litigation. If the only sanction for premature filing was dismissal without prejudice, this purpose would be clearly defeated.

The entity would be forced to expend resources to obtain the initial dismissal and yet be again subject to suit after a short delay. In reality, with the backlog of cases in the state's courts, by the time a prematurely filed case could be dismissed, the ninety days would have run and a dismissal without prejudice would be an exercise in futility.

Only if the provisions of subsections 24-10-109(1) and (6) are strictly complied with will the "safe harbor" provision have any practical effect. The majority opinion, as pointed out in the dissent, "amends a statute which does not require construction . . ." by improperly removing the "forever barred" language from the statute.

V. CONCLUSION

For the above stated reasons, the Amici respectfully request that Parts II and III of the decision of the Court of Appeals be reversed.

Dated: September 5, 1995.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I have this 5th day of September, 1995, deposited in the U. S. mail with sufficient postage affixed thereto, a true and correct copy of the foregoing Brief of the City of Aurora and the Colorado Municipal League as Amicus Curiae addressed to:

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