IN THE SUPREME COURT
STATE OF COLORADO

Case No. 95 SC 330

BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY; and SUZY McDANAL, R.A. "CHRIS" CHISTENSEN and JAMES SULLIVAN, Individually and in their capacities as members of the Board of County Commissioners of Douglas County, Colorado; and ED TEPE, Individually and in his capacity as the Director of Planning and Community Development in Douglas County, Colorado,

PETITIONERS/CROSS RESPONDENTS,

v.

JOHN SUNDHEIM AND JOANN SCOGGIN SUNDHEIM,

RESPONDENTS/CROSS PETITIONERS,

and

DOROTHY RUDD and ROBERT RUDD,

RESPONDENTS.

COLORADO COUNTIES, INC. AND COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS/CROSS RESPONDENTS' ANSWER/REPLY BRIEF

Certiorari to the Colorado Court of Appeals issued in Case No. 93 CA 1324 and 93 CA 1891, authored by the Honorable Judge Davidson affirming in part and reversing in part the decision in case no. 91 CV 720, Douglas County District Court.

May 8, 1996

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ATTORNEYS FOR COLORADO COUNTIES, INC. AS AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

COME NOW, Colorado Counties, Inc. ("CCI") and Colorado Municipal League ("CML") as amicus curiae, by and through their undersigned counsel, hereby submit this amicus brief in support of Petitioners/Cross Respondents' Answer/Reply Brief as follows:

ISSUES PRESENTED FOR REVIEW

A. Whether Colorado's Constitution affords remedies similar to 42 U.S.C. § 1983, and if, whether the Sundheims' state constitutional claims should be treated similarly to their § 1983 claims.

B. Whether the Court of Appeals correctly ruled that monetary damages claims under 42 U.S.C. § 1983 may be brought separately regardless of the status of a C.R.C.P. 106(a)(4) action.

STATEMENT OF THE CASE

CCI and CML adopt and incorporate the statement of the case as set forth in petitioners' opening brief.

STATEMENT OF THE FACTS

CCI and CML adopt and incorporate the statement of the facts in petitioners' opening brief.

SUMMARY OF ARGUMENT

The instant case provides the Court with a good opportunity to rule out the potential than an implied damages remedy exists for violations of article II, § 25 and other provisions of the Colorado Constitution's Bill of Rights where no explicit damages remedy is provided. The lack of any intent and the common law background of sovereign immunity is a strong

indication that the drafters of the Bill of Rights never intended that monetary damages be awarded for a violation of these sections. Moreover, the recognition of a damages remedy now that the common law doctrine of sovereign immunity has been abrogated and replaced by a statutory immunity (which may not be applicable to a constitutionally based claim) would destroy the efficient interaction between governmental immunity and liability. Furthermore, the recognition of a damages remedy would be a substantial departure from this Court's acknowledgment that the regulation of governmental liability and immunities fall within the Legislature's bailiwick.

Contrary to the Sundheims' assertions, article II, § 6 of the Colorado Constitution does not provide any authority for the creation of a damages remedy. Furthermore, the mere fact that certain provisions of the Bill of Rights section of the state constitution are self-executing does not mandate the creation of a monetary damages remedy. Instead, both the availability of injunctive and/or declaratory relief for actions that violate the state constitution allow for its execution. Where other sections of the Bill of Rights allow for monetary damages, the self-executing nature of the constitution would allow for a money damages remedy.

Finally, the fact that common law immunities may bar the Sundheims' state due process claims counsel against this Court

creating a damage remedy under the circumstances of this case. Moreover, the lack of any other guidelines concerning constitutional damage claims such as immunities, defenses and restrictions on liability, further point to the conclusion that the legislative process provides a best forum to resolve such issues.

ARGUMENT

I. CREATION OF A DAMAGES REMEDY IS INCONSISTENT WITH THE INTENT AND LEGAL BACKGROUND OF THE COLORADO CONSTITUTION.

As noted by petitioners/cross respondents (hereinafter noted as "the County"), respondent/cross petitioners (hereinafter referred to as "the Sundheims") originally sought damage for alleged violations of the due process and equal protection under the Colorado Constitution. The Sundheims' due process claim is apparently premised upon article II, § 25 of the Colorado Constitution which reads that: "No person shall be deprived of life, liberty or property, without due process of law."

The Sundheims' opening brief, however, only requests that the Court provide them with a damages remedy under a substantive due process theory under article II, § 25. Moreover, amicus for the Sundheims (hereinafter the "ACLU") not only seek to have this Court recognize a damages remedy under article II, § 25 of the Colorado Constitution, but for any violation of article II or the Bill of Rights of the Colorado Constitution. Whether the focus is upon article II, § 25 or the Bill of Rights section of the Colorado

Constitution, this Court should not recognize a damages remedy because it is inconsistent with constitutional intent.

Despite the litany of arguments in cases cited by the Sundheims and the ACLU in support of creating a damages remedy under the Colorado Constitution, their opening briefs improperly gloss over the lack of evidence of the drafters' intent to allow for a damage remedy in creating the Bill of Rights and the Colorado Constitution. It is fundamental that the intent of the constitutional convention and the people who ratified it constitute the primary guideline in construing the state constitution. White v. Anderson, 155 Colo. 291, 394 P.2d 333 (1964); Romer v. Colorado General Assembly, 840 P.2d 1081 (Colo. 1992).

As the Sundheim's and the ACLU ask this Court to create a civil remedy, this Court must also look for a "clear expression" of such an intent. See Board of County Commissioners of La Plata County v. Moreland, 764 P.2d 812, 817 (Colo. 1988). See also Walinski v. Morrison & Morrison, 377 N.E.2d 242 (Ill.App.1 Dist. 1978) (finding intent to create damage remedy under Illinois Constitution based upon drafters' intent).

Moreover, in construing the Constitution, this Court recognized that the Constitution was not the beginning of law for the state but it assumed the existence of a system, well understood which was to remain in force and to be administered under the limits and the restraints imposed by the constitution. State Board

of Equalization v. Bi-Metallic Investment Co., 56 Colo. 512, 514, 138 P. 1010 (1914) aff'd, 239 U.S. 441, 36 S. Ct. 141, 62 L.Ed. 372.

No case law exists concerning the drafters' intent in creating article II, § 25, however, the creation of any implied damages remedy would be contrary to the existence of the sovereign immunity doctrine at the time that the Colorado Constitution was drafted.[1] As this Court noted in Bertrand v. Bd. of County Commissioners of Park County, 872 P.2d 223, 225 (1994), the "doctrine of sovereign immunity became deeply imbedded in the English common law and subsequently, through judicial recognition and reiteration, became a familiar axiom in American jurisprudence." There appears to be little doubt that sovereign immunity was incorporated into the common law at the time the state Constitution was drafted and ratified in 1875 and 1876. In Bertrand, supra, this Court recognized that as early as 1868 the English common law was legislatively ingrafted into the law of this state. See 1868 Rev. Stat. Colo., Ch. 16, Sec. 1. See also Evans v. Bd. of County Commissioners, 174 Colo. 97, 107, 482 P.2d 968, 973 (Colo. 1971) (Kelly, J., dissenting) ("regardless of whether

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[1] Furthermore, the sketchy history of the constitutional convention provides no indication of an intent to create a damage remedy for a violation of the Bill of Rights or article II, § 25. See *generally* Proceedings of the Constitutional Convention for the State of Colorado, (1907).

the court's erred in adopting the doctrine [of immunity] it has been the law of this state since its beginning").

Moreover, as identified in Bertrand, supra, there is persuasive authority for the explicit recognition of sovereign immunity shortly after the ratification of the Colorado Constitution. See County Commissioners v. Bish, 18 Colo. 474, 33 P. 184 (1893); In Re Constitutionality of Substitute for Senate Bill No. 83, 21 Colo. 69, 39 P. 1088 (1895). With some restrictions and limitations, the doctrine of sovereign immunity survived until 1971 when this Court "prospectively abrogated this doctrine." See Bertrand, supra, at 226; Evans, 174 Colo. at 105, 482 P.2d at 972).

Indeed, the doctrine of sovereign immunity prohibited the state from being sued for damages even where the constitution directly provided for monetary damages under article II, § 15. See State v. Colorado Postal Telegraph-Cable Co., 104 Colo. 436, 91 P.2d 481 (1939). In Colorado Postal, a corporation attempted to sue the state under article II, § 15 for damages sustained when the company had to move its telegraph line and poles in an alley that was being excavated. After the trial court rejected the state's defense of sovereign immunity, a jury awarded the company damages. The Supreme Court reversed the damage award on the basis of sovereign immunity even though the state was sued under article II, § 15 which explicitly provides for a damages remedy in the event of a taking for public use. This Court, in pertinent part, resolved

Good case

the apparent conflict between the doctrine of sovereign immunity and the damages provision of article II, § 15 as follows:

> Since counsel for plaintiff in the instant case admit the general rule to be that the state cannot be sued without its consent, and since they ground the exception to that rule which they claim permits the state to be sued solely on § 15, article II of the state constitution as they contend it was construed in Bd. of County Commissioners v. Adler, *supra*, are holding that the section of the constitution relates merely to the matter of liability for an uncompensated taking or injury to property and that the matter of the county's liability is all that was in issue or determined in that case, leaves applicable the admitted general rule that the state, without its consent, cannot be sued.

As the above cases amply demonstrate, both prior to and after the adoption of the Colorado Constitution it was well accepted that the sovereign or government could not be sued under the common law. With that background, the framers of the state Constitution did not intend to abrogate the doctrine of sovereign immunity by enacting the Colorado Constitution's Bill of Rights or article II, § 25. In fact, even an explicit provision for damages in article II, § 15 of the constitution was held insufficient to abrogate the common law sovereign immunity in Colorado Postal, supra. Therefore, in attempting to construe article II, § 25 of the Colorado Constitution, this Court cannot simply disregard and ignore the judicial background and state of the law in defining the intent of the constitutional convention. Bi-Metallic, supra. The Sundheims and the ACLU would have this Court ignore this guiding

principle in constitutional construction and would have this Court ignore the common law backdrop in which the Colorado Constitution was adopted in now requesting that the Court create a damages remedy that could not have even been contemplated at the time the Colorado Constitution was drafted and ratified.

II. THE RECOGNITION OF A DAMAGES REMEDY IS INCONSISTENT WITH THE HISTORY OF THE SOVEREIGN AND GOVERNMENTAL IMMUNITY DOCTRINES IN THIS STATE.

The Sundheims and the ACLU request that this Court now create a whole new class of liability for constitutional deprivations that could very well wreak havoc in the current legislative scheme of immunity. Liability from state Constitutional violations has never been contemplated in connection with the creation and abrogation of sovereign and governmental immunity. It is inequitable to now create a constitutional remedy that was not contemplated by this Court at the time that it abrogated sovereign immunity and was displaced by statutory immunities.

In response to this Court's prospective abrogation of governmental immunity in Evans, the general assembly enacted what is presently the Colorado Governmental Immunity Act. See Bertrand, supra, at 226; Ch. 323, § 1, §§ 130-11-1 to 17 (1971 Colo. Sess. Law 1204, 1204-11). It is significant that in prospectively abrogating sovereign immunity and in legislatively resurrecting governmental immunity, both this Court and the Legislature did not

contemplate and consequently account for liability arising out of violations of the Colorado Constitution. See Evans, supra, (abrogating the sovereign immunity defense in connection with a tort claim); See also Legislative Council Report to the Colorado General Assembly, Governmental Liability in Colorado, research publication no. 134 (1968) at pp. XV - XXII, (referencing "tort liability"). The prospective abrogation of sovereign immunity by this Court in Evans, supra, contemplated that the Legislature would create statutory immunities in a more equitable manner.

By suggesting that a damages remedy for violation of the state Constitution exists, the Sundheims and the ACLU would be able to obtain a damages remedy that may not be restricted or limited by the Colorado Governmental Immunity Act because a statutory limitation on a constitutionally based entitlement would be invalid. See City & County of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 768 (Colo. 1992) (holding that an inverse condemnation claim under article II, § 15 of the Colorado Constitution is not subject to the Colorado Governmental Immunity Act); Srb v. Bd. of County Commissioners of Larimer County, 43 Colo. App. 14, 601 P.2d 1082 (1929); Jorgenson v. City of Aurora, 767 P.2d 756, 758 (Colo. App. 1988). In essence, the Sundheims and the ACLU now seek to create a whole new category of liability that was formerly limited by sovereign immunity but which cannot now be limited by the state's statutory immunity. The recognition of an

implied damages remedy for a violation of the Colorado Constitution creates havoc with the current state of statutory immunities and disregards the history behind the abrogation of sovereign immunity. In this regard, the Sundheims seek to create a constitutional claim where the common law doctrine of sovereign immunity may have applied but cannot now be asserted in light of its abrogation.

III. THIS COURT SHOULD NOT DEPART FROM ITS LONGSTANDING DEFERENCE TO THE LEGISLATURE IN THE CREATION OF ENFORCEMENT MECHANISMS FOR REDRESS OF INJURIES.

In requesting that this Court create a damages remedy for the Sundheims' alleged deprivation of their substantive due process rights under the Colorado Constitution, the Sundheims and the ACLU ignore this Court's historic deference to the Legislature for creating and regulating damage provisions against governmental entities. In fact, the ACLU, without realizing the Legislature's role in adjusting and providing for governmental liability, contends that the Legislature cannot be trusted to create damage remedies. (See Amicus Brief at 1-2).

In Colorado Postal, supra, this Court responded to a plaintiff's argument that it would have to beg the legislature to provide payment for relocation costs for the plaintiffs' telegraph lines in light of the fact that sovereign immunity barred the plaintiffs from seeking a physical taking claim against the state. In pertinent part this Court indicated:

> The ascertainment of the state's constitutional liability and the making of a

> provision to meet it is a proper function of the legislative department of government.

See 91 P.2d at 485. Moreover, Evans, supra, further evidences this Court's deference to the legislature to regulate in this area. As discussed, this Court abrogated the common law doctrine of sovereign immunity in this state in Evans. In abrogating the doctrine, however, this Court held that the doctrine would be struck down approximately 15 months from the decision to allow the legislature to restore these immunities as it deemed fit. Consequently, this Court again deferred to the Legislature to regulate governmental liability. See Quintano v. Industrial Commission, 178 Colo. 131, 495 P.2d 1137 (1982) ("there are certain fields, such as sovereign immunity, in which the courts should leave establishment of substantive law to the legislative branch").

In effectuating the only provision in article II of the Colorado Constitution that specifically provides for damages, the Legislature has enacted specific statutes for eminent domain and inverse condemnation proceedings. See Colo. Rev. Stat. § 38-1-101, et. seq.; Ossman v. Mountain States Telephone & Telegraph Co., 184 Colo. 360, 520 P.2d 738 (1974).

Despite the historical deference to the Legislature as outlined above, both the Sundheims and the ACLU disregard the Legislature's historic role and this Court's deference to that role. See Colorado Postal, supra; Evans, supra. Neither the

Sundheims nor the ACLU provide any suggestion as to why this balance must be disturbed or provide any indication as to why the Legislature cannot adequately provide for constitutional liabilities. In fact, as both the legislative enactment of Colo. Rev. Stat. § 38-1-101, et. seq. and the Governmental Immunity Act indicate, the Legislature is more than capable of regulating governmental liability. If the Sundheims and the ACLU believe that a damages remedy is necessary under the Colorado Constitution, then their remedy is to resort to the Legislature for the creation of such a right by statute or alternatively for approval for a constitutional amendment.

IV. ARTICLE II, SECTION 6 DOES NOT PROVIDE ANY AUTHORITY OR MANDATE TO CREATE A DAMAGES REMEDY.

Both the Sundheims and the ACLU believe that article II, § 6 requires this Court to create a damages remedy. In making this argument, the Sundheims, however, ignore this Court's interpretation of this section in State v. DeFoor, 824 P.2d 783 (Colo. 1992). In DeFoor, injured bus passengers challenged the Colorado Governmental Immunity Act on a number of theories. In pertinent part, the passengers claimed that the damage limitations of the Colorado Governmental Immunity Act denied them an adequate remedy for their injuries under article II, § 6 of the Colorado Constitution. As this Court indicated in DeFoor, article II, § 6 does not create remedies, it only assures that courts will be available to effectuate existing rights as follows:

> This provision protects initial access to the courts. ...The right of access is conditioned upon the existence of legal right under law to seek redress from another. When a right accrues under the law, courts must be available to effectuate that right.
>
> Claimants contend that § 24-10-114(1) violates their right to open courts because it denies them an adequate remedy. **Article II, Section 6, however, does not purport to control the scope or substance of remedies afforded to Colorado litigants.** The open court's guaranty rather assures litigants "that courts of justice shall be open to every person and a speedy remedy afforded for every injury." (emphasis in original, bold added, citations omitted)

824 P.2d at 791.

Consequently, the DeFoor decision eliminates article II, § 6 of the Colorado Constitution as a basis to create a damage remedy where none previously existed. That provision would simply require that courts be available to effectuate a damages remedy assuming that it had been expressly recognized.

V. SELF-EXECUTING PROVISIONS OF THE CONSTITUTION DO NOT PROVIDE THE BASIS FOR CREATING A DAMAGES REMEDY.

Both the Sundheims and the ACLU further believe that this Court's decision of Medina v. People, 387 P.2d 733, 736 (Colo. 1963), which held that the state constitution is self-executing, requires this Court to recognize a damages remedy. The reliance upon Medina, is flawed in two respects: (1) that Medina does not mandate that the Bill of Rights is self-executing; and (2) the

self-executing nature of the constitution does not equate with the creation of a damages remedy.

In Medina, this Court reviewed whether a criminal defendant's rights under article II, § 6 and article II, § 16 of the Colorado Constitution were violated when he did not receive a prompt criminal trial, even though he caused the delay in his trial. Consequently, Medina did not involve a civil claim for monetary damages but only requested that this Court overturn a criminal conviction. The Court recognized that article II, §§ 6 and 16 were self-executing in that they operated to require a criminal defendant to receive a prompt public trial without the need for legislative implementation.

Despite the broad statement in Medina that the Bill of Rights was self-executing, this Court in Kinsey v. Preeson, 746 P.2d 542 (Colo. 1987) found that another section of the Colorado Constitution's Bill of Rights, article II, § 12 was not self-executing, but required legislative action for implementation. In Kinsey, this Court reviewed the constitutionality of a body execution statute contained in Colo. Rev. Stat. § 13-59-103. However in placing that statute in context, this Court found that "the language of [article II], section 12 is not self-executing, but requires a legislative statute for implementation." Consequently, Medina cannot stand for the broad proposition that all rights under article II are self-executing.

Nevertheless, there appears to be little doubt that article II, § 25 of the Colorado Constitution is self-executing. See e.g., Watso v. Colo. Dept. of Social Services, 841 P.2d 299 (Colo. 1992) ("The Fourteenth Amendment to the United States Constitution and article II, § 25 of the Colorado Constitution protect individuals from arbitrary governmental restrictions on property and liberty interests"). State v. DeFoor, supra; People v. Thomas, 867 P.2d 880 (Colo. 1994); People v. Young, 814 P.2d 834 (Colo. 1991).

But contending that article II, § 25 is self-executing does not equate with the need to create a damages remedy. The Sundheims and the ACLU fail to provide any legal authority for the proposition that the self-executing nature of a constitutional provision requires the recognition of a damages remedy. In fact, contrary authority exists. See Bonner v. City of Santa Ana, 33 Cal.Rptr.2d. 233, 239 (Cal.App. 4 Dist. 1994) (self-executing provisions of the California Constitution are self-executing through injunctive relief). For example, statutes or acts that have violated article II, § 25 have been struck down or have been held null and void. People v. Thomas, supra, (restrictions on collateral attacks of criminal convictions); People v. Young, supra, (death penalty statute); Tassian v. People, 731 P.2d 674 (Colo. 1987) (invalidating judge's directive to not accept pro se litigant's personal check for filing fee). To hold that the self-

executing nature of the Colorado Constitution requires a damages remedy simply confuses two distinct concepts. Bonner, supra.

The availability of a damage remedy under the Colorado Constitution is dependent upon constitutional language that explicitly authorizes damages. For example, article II, § 15 has an explicit referenced to monetary damages in mandating that "private property shall not be taken or damaged, for public or private use, without just compensation." Consequently, this section provides explicit authority for the award of damages for a violation of this section. See e.g., Farmers Irrigation Co. v. Game & Fish Commission, 149 Colo. 318, 369 P.2d 557 (1962); State v. The Mill, 809 P.2d 434, 437 (Colo. 1991). Article II, § 15 evidences that where the drafters of the constitution intended to provide for a damages remedy, they explicitly included damages language. In interpretation of the Constitution, this Court must presume that language and structure of article II, § 15 were adopted by choice and that the drafters deliberately chose its language and structure. White, supra. The corollary of this proposition is that where a constitutional provision does not provide for damages, none should be recognized. See e.g., Reale v. Board of Real Estate Appraisers, 880 P.2d 1205, 1208 (Colo. 1994) (where state Constitution explicitly allowed legislature to place further qualifications on certain public officials, court could not imply legislature's ability to place additional qualifications on

county assessor's position since no explicit constitutional reference). In this case, the express creation of a damages remedy under article II, § 15 is inconsistent with both the Sundheims and the ACLU's suggestion that an implicit damages remedy should be read into article II, § 25 because the constitution is self-executing. Reale, supra.

VI. THERE IS NO NEED TO CREATE A DAMAGES REMEDY FOR THE VIOLATION OF SUBSTANTIVE DUE PROCESS IN THIS CASE.

Despite their extensive discussion of the legal basis to create a damages remedy for a violation of the state constitution's substantive due process component, the Sundheims fail to provide this Court with any indication that such a remedy would provide them with damages beyond their substantive due process claim under § 1983. In other words, the Sundheims essentially ask this Court to create a constitutionally based damage claim that may be entirely duplicative of their federal civil rights claim.

Even if the Court were to recognize a damages remedy in this case, such a remedy would provide the Sundheims with little relief. As the ACLU concedes, the individual defendants would be entitled to absolute immunity from the denial of the Sundheims' permit. (See ACLU Amicus Brief at p.3.) Assuming the applicability of judicial immunity, the county defendant would also be subject to immunity under State v. Mason, 724 P.2d 1289 (Colo. 1986) (state parole board and the State of Colorado were also immunized from suit due to quasi-judicial immunity of the individual defendants).

If it's duplicative, what's the big deal?

VII. THE RECOGNITION OF A DAMAGES REMEDY WOULD HAVE NO DEFINED IMMUNITIES OR GUIDELINES.

Any recognition of a constitutionally based damages remedy would occur in a vacuum as this Court has never addressed the existence of such a claim, let alone what immunities or other defenses would be applicable to such a claim. In essence, the Court would be opening up a Pandora's box of unresolved issues, such as the applicability of common law immunities (both qualified and absolute), statutory immunities, the color of state law and municipal liability requirements of federal civil rights litigation and the extent of damages allowable for such claims. The lack of prior judicial precedent concerning these issues strongly counsels against the creation of an entire new class of liability against public entities as these questions have been traditionally resolved by the Legislature. Evans, supra.

CONCLUSION

In light of the foregoing, amicus in support of the County respectfully requests that this Court affirm the dismissal of the Sundheims' state constitutional claims by the trial court as article II, § 25 of the Colorado Constitution does not afford a monetary damages remedy to them.

Dated this 8th day of May, 1996.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of May, 1996, I mailed a true and correct copy of the foregoing COLORADO COUNTIES, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS/CROSS RESPONDENTS' ANSWER/REPLY BRIEF, correctly addressed, postage prepaid, in the U.S. Mail to the following:

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