7/97

SUPREME COURT, STATE OF COLORADO
Case No. 96SC582

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

VERNALEE BROCK and the REGIONAL TRANSPORTATION DISTRICT,

Petitioners,

v.

TRAVIS NYLAND,

Respondent,

Petition from decision of the Colorado Court of Appeals, Division IV issued June 27, 1996.
Opinion of Judge Taubman with Judge Briggs and Judge Davidson concurring.
No. 95 CA 0847

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July 14, 1997

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COMES NOW the Colorado Municipal League as a amicus curiae through its undersigned counsel and submits this amicus brief in support of Petitioners, Vernalee Brock and the Regional Transportation District (hereafter, "RTD").

I. STATEMENT OF FACTS

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of facts in the Petitioners' opening brief.

II. ISSUES PRESENTED

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of issues presented in the Petitioners' opening brief.

III. SUMMARY OF ARGUMENT

Prior decisions of this Court and of the Court of Appeals support the position that notices of claim "shall" be filed in strict compliance with the requirements explicitly provided in the Notice of Claims statute by the General Assembly, that is, that such notices shall be filed with the governing body of a public entity or with its attorney. Section 24-10-109(3), C.R.S. This Court's recent decision in Lopez v. Regional Transportation District, 916

P.2d 1187 (Colo. 1996), does not compel permitting "substantial compliance" with this filing requirement, and various arguments that, in essence, the statute should be changed are more appropriately directed to the General Assembly, than to this Court. This Court should use this case as an opportunity to clarify the scope of its Lopez decision, on which the Court of Appeals erroneously relied in the case at bar. The decision of the Court of Appeals should be reversed.

IV. ARGUMENT

The Court of Appeals erred in holding that "a claimant need only substantially comply with the Section 24-10-109(3), 10A C.R.S. (1996 Supp.), requirement that notice be sent to the public entity's governing body or legal counsel."

The Notice of Claim statute, 24-10-109 C.R.S., has provided for decades that notices of claim "shall be filed with the governing body of the public entity or the attorney representing the public entity". 24-10-109(3), C.R.S. While the notice of claim statute has generated scores of reported appellate decisions over the years, the notable dearth of cases involving the "where to file" requirement in Section 24-10-109(3), C.R.S. indicates that neither litigants nor courts have had any difficulty determining what this statute requires, or complying with it. No doubt there have been occasions where litigants have failed to comply with the plain and unmistakable direction of the General Assembly in Section 24-10-

109(3), C.R.S.; whatever excuses might be offered to explain such lapses, difficulty in locating or understanding the statute could not credibly be suggested.

In this case, Respondent Nyland's attorney failed to file a notice of claim with RTD's legal counsel or governing body, as the statute plainly requires. The Court of Appeals relieved the consequences of this omission by finding that Nyland had "substantially complied" with the statute by sending various letters to RTD's claims department. The Court of Appeals decision was, in essence, that, although the statute says that claimants "shall" file their notices with the public entity's legal counsel or governing body, claimants may nonetheless file with whomever they please, so long as it is later determined that "the purpose of the notice statute is met." (Op. at 5).

The decision of the Court of Appeals was error, and should be reversed. Whatever policy arguments might be advanced in support of the Court of Appeals position, the fact remains that the General Assembly has clearly and unmistakably specified with whom notices of claim shall be filed. Arguments that the law ought to be amended, to provide that notices may be filed "with any person, provided that it can later be shown the purposes for this statute have been met", and so forth, should appropriately be addressed to the General Assembly. Unless and until the General Assembly

decides to change the law, the League respectfully suggests, and urges this Court to hold, that this clear statute should be applied as written.

The decision of this Court that provides the best direction for how to resolve the case at bar is East Lakewood Sanitation District v. District Court, 842 P.2d 233 (Colo. 1992). In East Lakewood this Court was urged to permit "substantial compliance" with a filing deadline requirement in Section 24-10-109(1), C.R.S. of the notice of claim statute, which provides that a potential claimant "shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury" Id. Section 24-10-109(1), C.R.S. goes on to provide that:

> 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. Id.

Invoking a rationale remarkably similar to that utilized by the Court of Appeals in the present case, the trial court in East Lakewood found "substantial compliance" with the 180 day requirement sufficient because literal enforcement would be "hypertechnical" and because the public entity involved "did not show that it was prejudiced by [the] late notice." 842 P.2d at 234

This Court reversed the trial court, explaining that:

> The phrase "shall file a written notice as provided in

> this section within one hundred eighty days after the date of the discovery of the injury" imposes a mandatory requirement that claimants... file a written notice within one hundred eighty days from the date on which they discovered their injuries. The presence of the word "shall" in the clause, which is set off from the remainder of the sentence by a comma, dictates this unambiguous reading.

East Lakewood, supra, 842 P.2d at 236.

The mandatory clause of Section 24-10-109(1) that this Court construed in East Lakewood provides direction to claimants as to "how" and "when" notices of claim shall be filed. Notices "shall" be filed within 180 days after discovery of the injury (and East Lakewood holds that "substantial compliance" with this requirement is insufficient) and notices "shall" be filed "as provided in this section", that is, with the attorney or governing body of the public entity, as provided in subsection 24-10-109(3), C.R.S. Just as claimants in East Lakewood argued to this Court for a "substantial compliance" standard with respect to the 180 day "when" requirement, now claimants argue for "substantial compliance" as to the other part of the clause, the requirement for "how" notices "shall" be filed.

The League sees no basis for distinguishing between the "how" and "when" portions of the mandatory clause in Section 24-10-109(1) with respect to which this Court rejected "substantial compliance" in East Lakewood. The League urges that the same "unambiguous

reading," 842 P.2d at 236, of the clause that caused this Court to require filing within 180 days after discovery of injury, also requires filing of notice with the attorney or governing body of the jurisdiction to which the claim is directed.

The Court of Appeals itself has previously embraced the position that the General Assembly meant what it said when it specified in Section 24-10-109(3), C.R.S. with whom notices of claim "shall" be filed. Aetna Casualty and Surety Company v. Denver School District No.1, 787 P.2d 206 (Colo. App. 1990), involved facts quite similar to those in the present case. In Aetna the notice of claim was filed with the risk manager for the school district. After the notice was filed, an adjuster for the district's liability insurance carrier contacted the plaintiff's claim representative and advised her that the claim was under consideration. Nonetheless, the Court of Appeals affirmed dismissal of Aetna's subrogation claim against the district because:

> the statute clearly mandates that the notice be filed either with the entity's governing body or with its attorney. And, this specific requirement was made a "jurisdictional prerequisite" to suit.

Id., 787 P.2d at 207.

The League respectfully suggests that arguments such as those rejected by this Court in East Lakewood, that requiring filing as provided in Section 24-10-109(3), C.R.S. is "hypertechnical," 842

P.2d at 234, that the public entity can not "show that it was prejudiced" by filing with somebody else, Id., or various policy arguments that some *other* method of filing than that presently required by law may be "consistent with the purposes of the notice statute" are more appropriately directed to the General Assembly than to this Court.

Certainly, the General Assembly made a rational, reasonable choice when it specified with whom notices of claim shall be filed, and provided that compliance with its instruction is a jurisdictional prerequisite to any action.

In Woodsmall v. Regional Transportation District, 800 P.2d 63 (Colo. 1990), this Court succinctly described the purposes of the notice of claim statute:

> The notice requirements of section 24-10-109 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.

Id., 800 P.2d at 68.

Then, in East Lakewood this Court, in refusing to accept "substantial compliance" with the 180 day filing requirement in Section 24-10-109(1), C.R.S. (even as against a claim that less than strict compliance did not prejudice the public entity), explained that:

> the legislative purposes of facilitating both prompt investigations of claims and remedies of dangerous conditions by public entities are served by this reading.

East Lakewood, supra, 842 P.2d at 236.

Requiring that notices of claim "shall" be filed with the governing body or the attorney for the jurisdiction assures that, in the wide variety of jurisdictions across Colorado in which this statute applies, the notice will be provided directly to an official in a position to direct that appropriate responsive actions, consistent with the purposes of the Notice of Claim statute, are taken.

For example, there are presently 269 incorporated municipalities in our state (of which 262 are members of the Colorado Municipal League). Some of these jurisdictions have sophisticated risk management departments, many do not. Some municipalities have large numbers of specialized staff, many do not. Based on 1995 census data, nearly half of Colorado municipalities (133) have a total population of under 1000; 85 municipalities have a population of 500 or less. Particularly in these small jurisdictions, staff perform a wide variety of tasks. The public works supervisor may fix the furnace in town hall, run the sewage lagoon and plow the streets. In addition to running town elections, the town clerk may issue various tax and business licenses, bill citizens for utility services, and keep the town books. These people may or may not know what to do if they receive a letter that satisfies Woodsmall

and serves as a notice of claim. These people may or may not be charged with the investigation of claims and remedying dangerous conditions; that depends on whether they have been assigned this task by the municipal administrator or governing body. And, of course, who is assigned these critical jobs may well be unknown to the general public and will vary from jurisdiction to jurisdiction across Colorado.

On the other hand, it will always be the ultimate responsibility of the governing body to assure that claims are investigated and dangerous conditions remedied. It will always be the ultimate responsibility of the governing body to "make adequate fiscal arrangements to meet any potential liability" Woodsmall, supra, 800 P.2d at 68, and it will always be the ultimate responsibility of the attorney for the jurisdiction to assure that "a defense to the claim" is prepared. Id.

Given the important purposes that notices of claim are intended to serve, it was entirely reasonable for the General Assembly to require a consistent, predictable method of filing such notices. And since these notices serve such an important purpose, and since the filing requirement is so straightforward and simple, it was also reasonable for the General Assembly to make compliance a jurisdictional prerequisite, as an incentive for claimants to make the minimal effort required to properly file.

This is not a situation, such as that discussed by this court in Woodsmall, where there is a danger of meritorious claims being lost because a claimant "makes a good faith effort to satisfy the notice requirement but inadvertently omits a minor detail". Id. Instead, this appeal involves a portion of the notice of claim statute where the meaning of the statute is obvious; failure of compliance would be extremely unlikely unless somebody pursues a claim that "lie[s] in tort or could lie in tort", Section 24-10-105, C.R.S., against a Colorado public entity without having reviewed the Colorado Governmental Immunity Act. The League urges that this is not a situation where justice requires adoption of a "substantial compliance" standard in order to avoid dismissal of actions by diligent claimants.

In deciding the present case, Division IV of the Court of Appeals did not rely on its earlier opinion Aetna, supra, a decision directly on point, and one that rejected "substantial compliance" with the requirement that notices of claim be filed with the governing body or counsel for the jurisdiction. Instead, the Court of Appeals relied upon portions of this Court's recent opinion in Regional Transportation District v. Lopez, 969 P.2d 1187 (Colo. 1996). The holding in Lopez does not compel the conclusion reached by the Court of Appeals. The League respectfully urges this Court to use this appeal as an opportunity to clarify and limit the reach of its Lopez opinion.

Lopez involved the question of whether violation of a prohibition on filing an action within 90 days after the notice of claim is filed, which prohibition is found in subsection 24-10-109(6), C.R.S. of the notice of claim statute, would "forever bar" the claim, pursuant to the "jurisdictional prerequisite" provision in Section 24-10-109(1), C.R.S. (See supra, at 4)

This Court stated that forever barring claims because of premature filing, although supported by the plain language of the statute, would be "an absurd result and one that we should avoid." Lopez, 916 P.2d 1192. After extensive review of the legislative history relating to adoption of Section 24-10-109(6), C.R.S. (and related amendments to Section 24-10-109(5), C.R.S.), this Court concluded that the General Assembly did not intend compliance with the Section 24-10-109(6), C.R.S. bar on premature filing of actions to be a "jurisdictional prerequisite", where failure to comply would forever bar the action. The Court stated that the language in Section 24-10-109(1), C.R.S. making "compliance with the provisions of this section" a jurisdictional prerequisite "must be the result of drafting error" and that "the word 'section' should read 'subsection'." Lopez, supra, 916 P.2d at 1194-95. This portion of the Lopez opinion contains dicta in which the Court observed that compliance with various subsections in Section 24-10-109, C.R.S. which, significantly, were not involved in Lopez appeal, should not

be considered within the Section 24-10-109(1), C.R.S. "jurisdictional prerequisite" mandate. (See Appellees Petition for Certiorari, at 10).

This dicta was seized upon by the Court of Appeals in the present case to avoid its Aetna decision and to justify permitting "substantial compliance" with the Section 24-10-109(3), C.R.S. requirement that notices be filed with the governing body or the jurisdiction's attorney.

The decision of the Court of Appeals should be reversed. First, compliance with that portion of the notice of claim statute concerning with whom notices must be filed was not at issue in Lopez. What was at issue in Lopez was the relationship of Section 24-10-109(1), C.R.S. and Section 24-10-109(6), C.R.S. It would be fair to describe the "drafting error" discovered in Lopez as involving solely an omission on the part of the General Assembly to clearly state that failure of compliance with subsection 24-10-109(6), C.R.S. (concerning the bar on premature filing of actions) would not forever bar the claim.

In presuming the General Assembly's "sin of omission" to be the failure to use the word "subsection" rather than "section" in Section 24-10-109(1), C.R.S., the League respectfully suggests the Court in Lopez went beyond where it needed to go. A judicial

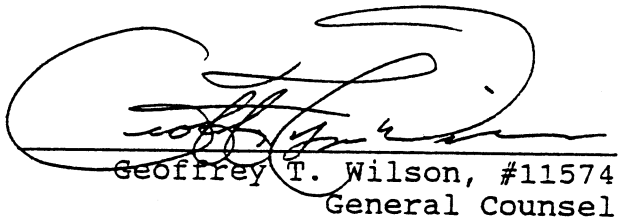
determination that the General Assembly, in using the word "section" in the "jurisdictional prerequisite" provision of Section 24-10-109(1), C.R.S. simply did not intend to include subsection 24-10-109(6), C.R.S., would narrowly support the holding in Lopez. Alternatively, the result in Lopez might as readily be achieved by finding the "drafting error" to be the General Assembly's omission of an exception for subsection 24-10-109(6), C.R.S. in the "jurisdictional prerequisite" language of Section 24-10-109(1), C.R.S., or the omission of a "notwithstanding subsection (1) of this section" qualifier in Section 24-10-109(6), C.R.S. itself. Any of these approaches would enable this Court to avoid what it viewed as an "absurd result" on the Section 24-10-109(6), C.R.S. issue in Lopez, without unnecessarily diminishing the effect of the language actually used by the General Assembly (that is, the word "section") in Section 24-10-109(1), C.R.S..

Nonetheless, if the "drafting error" is said to result in compliance only with the requirements of subsection 24-10-109(1), C.R.S. being a jurisdictional prerequisite, the League again respectfully urges (see discussion, supra., at 4-6) that this Court's East Lakewood decision and the Court of Appeals Aetna decision support a requirement for strict compliance with the Section 24-10-109(1), C.R.S. requirement that notices "shall" be filed "as provided in this section", that is, as plainly required by Section 24-10-109(3), C.R.S.

V. CONCLUSION

WHEREFORE, the League respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted this 14th day of July, 1997.



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing brief was sent by U.S. postal service, postage prepaid, on the 14th day of July, 1997, to the following:

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