

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

OPINION BY THE COURT OF APPEALS
Hawthorne, Marquez, and Graham, JJ.
Case Number: 03-CA-1445

Appeal from the District Court, City and County of Denver
Honorable John N. McMullen, Honorable Robert S. Hyatt
Case No. 96-CV-6912, Ctrm. 2

Petitioner:

DAVID W. STEEDLE, M.D., NEIL WALDMAN, M.D., the
CITY AND COUNTY OF DENVER, and DENVER
GENERAL HOSPITAL, n/k/a DENVER HEALTH
MEDICAL CENTER

v.

Respondent:

BRADLEY SCOTT SEREFF, individually and as Personal
Representative of the Estate of Jennifer Sereff, ELLIOTT
SEREFF and SKYLAR SEREFF, through their Guardian,
Father and Next Best Friend, Bradley Scott Sereff

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Attorneys for the Colorado Intergovernmental Risk Sharing
Agency, Colorado School Districts Self Insurance Pool, and
Colorado Counties Casualty and Property Pool, and the
Colorado Municipal League, *Amici Curiae*.

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Case Number: 05SC811

**BRIEF OF AMICI CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

The Colorado Intergovernmental Risk Sharing Agency (“CIRSA”), the Colorado School Districts Self Insurance Pool (“CSDSIP”), and the Colorado Counties Casualty and Property Pool (“CAPP”) (CIRSA, CSDSIP, and CAPP are collectively referred to as the “Pools”), and the Colorado Municipal League (CML), *amici curiae* (the Pools and CML are collectively referred to as “Amici”), appear by their undersigned attorneys in support of the Petitioner City and County of Denver, et al, and submit this brief in support of the Petition for Certiorari.

INTEREST OF THE *AMICI CURIAE*

The integrity of the Colorado Governmental Immunity Act (“CGIA”) is of vital concern to Colorado’s state and local governments. Though Respondents’ case is against the City and County of Denver, the CGIA protects all Colorado public entities and public employees, including the State, cities, towns, counties, school districts and special districts, as well as their officers, employees, and authorized volunteers. This Court’s decision to review whether the CGIA allows multiple recoveries for a single occurrence of wrongful death will affect the membership of each of the Amici directly and substantially.

The Pools share the same basic structure and function. CIRSA typifies such an organization. It is a public entity insurance pool formed by intergovernmental agreement among its member Colorado cities and towns. It provides property, liability, and workers' compensation coverage to about 235 members—cities, towns, and affiliated public entities seeking an alternative to commercial insurance. The need for such alternatives became particularly apparent during the insurance crisis of 1985-86, when commercial liability insurance for public entities quickly became prohibitively expensive, drastically limited in scope, or entirely unavailable. CIRSA's membership tripled during that period. The crisis required emergency legislative action in 1985 to permit the State of Colorado to self-insure its liability risks after the cancellation of its automobile and general liability insurance coverage.

Member cities and towns govern CIRSA and support it through financial contributions. The contributions pay for covered claims against the members and their officers and employees. The contributions are also used to buy certain excess insurance or reinsurance coverage.

The other Pools represent similar efforts of other local governments in Colorado to self-insure through the use of pooled funds.

CSDSIP was originally formed on June 24, 1981 pursuant to Colorado statutes and by agreement among its members. Presently, 173 public entities are members of CSDSIP. Of these, 140 are school districts, 14 are charter schools, 17 are Boards of Cooperative Educational Services and 2 are instrumentalities. Approximately 79 percent of Colorado's 178 school districts are members. The geographic range of CSDSIP's membership spans the entire state of Colorado and includes both small rural and large metro school districts.

CSDSIP provides its members with insurance coverage in areas including general liability, errors and omissions, automobile liability, and real and personal property. The coverage is provided by member contributions, returns upon investments, and insurance obtained from third-party reinsurers and excess insurers. When a claim succeeds against a member, CSDSIP pays a given "retention" amount (subject to a possible deductible at the member-entity level), while the rest is paid out by a reinsurer. The retention amounts are relatively high; for example, casualty, liability and auto losses have retentions of \$500,000 per occurrence, and property losses have retentions of \$1,000,000 per occurrence.

Two of the principal goals of CSDSIP are to provide its members with stable premiums and reasonably priced insurance. To date, CSDSIP has been able to achieve these goals because of the structure and stability of the CGIA. For some

time, the common understanding has been that all of the damages flowing from a wrongful death constitute a single, unitary claim and that the CGIA places a limitation upon the amount that may be recovered in that single, unitary claim. The CSDSIP and its reinsurers have relied upon that common understanding in setting rates, policy limits, entity-level deductibles and retentions.

CAPP was formed by intergovernmental agreement in July 1986. Presently its membership consists of 51 of the 64 counties in Colorado. All of CAPP's members are governmental entities and fall within the protections of the CGIA. CAPP provides a risk management fund for defined property and casualty coverage and to assist members in controlling costs by providing specialized governmental risk management services and systems. CAPP uses member contributions to defend and indemnify, in accordance with its bylaws, any member against stated liability or loss to the limit of the financial resources of the risk management fund. CAPP covers every kind of claim that may arise from a county's normal activities, including property loss, auto liability and physical damage, general liability, law enforcement professional liability, and public officials' liability. Coverage for wrongful death is certainly a part of that comprehensive liability protection.

The Court of Appeals' decision in this case has the potential to increase individual counties' contributions, depending on the number of wrongful death claims any one member has during the coverage year and the amount of the judgments. The members are assessed a contribution each year based upon a formula, part of which is tied to the \$150,000/600,000 limitations on judgments, as it has been understood for many years. More importantly, perhaps, is that CAPP's actuarial loss projections are also based on the limitations on judgments found in the CGIA. If those limitations are raised, the actuaries will increase loss projections accordingly and there will be a shortfall without a concomitant increase in member contributions. Of course, this potential shortfall could portend financial problems for the Colorado's county governments in the immediate future.

CML is a non-profit, voluntary association of 265 municipalities, founded in 1924. CML's membership comprises 98% of Colorado's total municipal population. CML's membership includes all 91 home rule municipalities, all municipalities with populations over 2000, and the vast majority with populations of less than 2000. Among its members are every city and town for whom CIRSA provides protection, as well as municipalities that protect their taxpayers from liability by other methods. As noted above, Colorado cities and towns are among the public entities that will be directly and substantially affected by the Court of

Appeals' incorrect construction of the CGIA, and whether and how this Court will review it.

Public entities statewide have relied on the accepted meaning of the CGIA's text to provide/obtain liability coverage. Until the court below ruled otherwise, the accepted meaning of C.R.S. § 24-10-114 limited the recovery for a single wrongful death against a governmental entity to \$150,000. As such, the current protections provided to the Pools' members were crafted with this limitation in mind. Each member remains liable for claims not covered by the Pools, and the members are individually or jointly responsible for payment of claims if their contributions (and the excess insurance or reinsurance coverage) are insufficient.

Were the Court of Appeals' ruling in this case allowed to stand, the Pools' members would assume the financial burdens of increased contributions resulting from the Court of Appeals' ruling.

ARGUMENT

Amici believe that Petitioner will effectively demonstrate how the lower court's decision conflicts with the plain meaning of the CGIA's text and the jurisprudence that has interpreted it over the years. Accordingly, Amici will focus on the practical consequences of this case.

I. The Court of Appeals' decision is contrary to the CGIA's stated purpose of protecting taxpayers against excessive fiscal burdens.

Government resources are scarce at all levels. Local government revenues reflect not only a limited tax base, but also limited revenue-raising power. The property taxpayer shoulders most of the tax burden of Colorado's county, school district, and special district governments, as well as some of the municipal tax burden. Tax increases are strictly limited by state law for most public entities.

Furthermore, state and federal laws mandate numerous taxpayer-funded expenditures. Those mandates leave only a portion of the limited revenue available to finance services needed by local citizens: paving streets, filling potholes, providing fire and police protection, educating children, ensuring the availability of water and sewer services, and, of course, funding a working judiciary. The State government's fiscal responsibilities are more varied and more expensive than those of smaller political subdivisions, yet even its larger revenues would be affected if this Court were to allow the decision below to stand.

The Respondents seek a huge and unforeseen expansion of wrongful death liability for governmental entities, not only for their own case, but for an untold number who wait in the wings. The following actual examples of pending or recent cases involving C.R.S. § 24-10-114 illustrate the potential impact of the Court of Appeals' novel construction of the CGIA:

1. A driver was killed as a result of a collision with an emergency vehicle. Although the maximum liability to the public entity would have been \$150,000, since the decedent left three minor children as heirs and a claim is also asserted on behalf of his estate, the arguable recovery under the Court of Appeals' decision is now \$600,000, a quadrupling of potential liability.

2. A pedestrian died as a result of being struck by a motor vehicle at an intersection that was subject to traffic control by a police officer. Again, since the decedent was survived by a wife and two children, a \$150,000 potential liability triples to \$450,000 under the appeals court decision.

3. The driver of a small passenger car died as a result of injuries sustained when a bus rear-ended her car. The claim was settled with the family of the deceased for \$150,000, the full amount the parties understood to be available under the CGIA. Under the current ruling by the Court of Appeals, multiple claims would have had to be considered, one for the spouse and each of the four surviving children.

4. A bus/pedestrian accident resulted in the death of a minor child. Under the law as it has traditionally been understood, the public entity's maximum liability was \$150,000. By contrast, under the current ruling each parent would have a separate claim of \$150,000, resulting in a doubling of the payout.

5. A prisoner committed suicide in a public entity's hold facility. Under the traditional understanding of the CGIA, the maximum liability for the entity would be \$150,000. The Court of Appeals decision could expand that potential liability to \$600,000 because the deceased has six children.

6. A child died in a condominium explosion, amid allegations that the public entity did not have adequate building codes to prevent such incidents. If the Court of Appeals' decision were allowed to stand, the entity's maximum liability for this case could double.

The above examples illustrate how, under the Court of Appeals' unprecedented construction of the CGIA, Colorado's local governments will face substantial increases in liability for wrongful death claims.

Limited resources force governments to make difficult, often painful, choices. In promulgating the CGIA, the Legislature revealed as much when it

wrote into law the policy behind governmental immunity. Immunity, partial and otherwise, “is, in some instances, an inequitable doctrine.” Colo. Rev. Stat. § 24-10-102 (2005). Yet we weigh that inequity against the prospect that greater liability for the government “could disrupt or make prohibitively expensive the provision of such essential public services and functions.” *Id.* Governmental immunity is not a question of fairness to the one, but of financial justice to the millions of Colorado citizens who rely on the government for everything from schools to drinking water.

Amici have relied on the policy behind governmental immunity, as it is codified in C.R.S. § 24-10-102 (2005). *See*, Legislative Council Report to the Colorado General Assembly, Governmental Liability in Colorado, Research Publication No. 134 (Nov. 1968) at 119 n. 8 (remarking that a strict cap on recovery “provides a sound basis for rational fiscal planning and the computation of insurance premiums”). State and local governments have pooled their money to insure the satisfaction of the rights of injured plaintiffs and the continued viability of services for the citizenry. *Cf.*, *State by Colo. State Claims Bd. of Div. of Risk Mgmt v. DeFoor*, 824 P.2d 783, 790 (Colo. 1992) (concluding that “by limiting the liability of a public entity to a fixed amount, the [CGIA] protects the public entity against the risk that unforeseen and unlimited tort judgments will deplete public

coffers and result in the termination or substantial curtailment of important governmental functions”). If the decision in the Court of Appeals is allowed to stand, all manner of government services will come under increased strain. When local governments suddenly face strained budgets because of unpredicted tort liabilities, it is more than mere institutional inconvenience—it is the exact disruption of “essential public services and functions” that the Legislature meant to avoid when it adopted the CGIA. *See*, Colo. Rev. Stat. § 24-10-102 (2005).

CONCLUSION

Amici respectfully request that this Court grant certiorari and, upon review of the merits, find in favor of the Petitioner.

Respectfully submitted this 15th day of December, 2005.

SENTER GOLDFARB & RICE, L.L.C.

By: 

Thomas S. Rice
Elliot J. Scott

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI was deposited in the United States mail, postage prepaid, this 15th day of December, 2005, addressed to each of the following:

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