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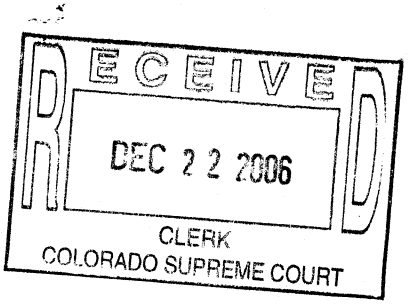
SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, CO 80203 Colorado Court of Appeals, Case No. 04-CA-1989 District Court, City and County of Denver, Colorado Case No. 03-CV-5186	▲ COURT USE ONLY ▲
Petitioner: THE CITY AND COUNTY OF DENVER, COLORADO d/b/a The Denver International Airport, a Colorado Political Subdivision v. **Respondents**: TERRI CRANDALL and JOANN HUBBARD, Individually and on Behalf of All Others Similarly Situated	
Attorneys for *Amicus Curiae*: Rachel L. Allen, # 37819 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Telephone: 303.831.6411 Fax: 303.860.8175 E-mail: rallen@cml.org Bruce J. Barker, Esq., # 13690 Weld County Attorney Weld County Attorney's Office 915 10th Street, P.O. Box 758 Greeley, CO 80632 Telephone: 970.336.7235 Fax: 970.352.0242 Counsel to Colorado Counties, Inc.	Case Number: 06 SC 424 

COMBINED *AMICUS CURIAE* BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC. IN SUPPORT OF PETITIONER THE CITY AND COUNTY OF DENVER

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COMES NOW, the Colorado Municipal League (the "League") and Colorado Counties, Inc. (CCI) through their undersigned attorneys and submits this Brief as amicus curiae in support of the City and County of Denver (the "Denver").

STATEMENT OF FACTS AND OF THE CASE

Amici hereby adopt and incorporate by reference the statement of facts and of the case in the petition of the City and County of Denver.

STATEMENT OF ISSUES ON APPEAL

As announced in its Order of October 6, 2006 granting the Denver's petition for certiorari, the issues before the Court in this appeal are (1) Whether the court of appeals erred in holding that recurring symptoms from alleged environmental exposures were separate and distinct injuries for the purposes of the Colorado Governmental Immunity Act 180-day notice requirement for subject matter jurisdiction, and (2) Whether the court of appeals erred in concluding that Respondents' Notice of Claim was sufficient as to unnamed potential class members under Colorado's Governmental Immunity Act. The League will address the first issue certified for review.

SUMMARY OF ARGUMENT

The Court of Appeals decision embraces a "recurring injury" theory that effectively nullifies the protections accorded to governmental entities by the notice provisions of the Colorado Governmental Immunity Act (CGIA). This decision leaves governmental entities in the precarious position of being unable to accurately assess their possible liability or diminish the possibility of future injuries. 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.

ARGUMENT

The League hereby adopts and incorporates by reference the argument in Denver's Opening Brief and submits the following additional argument.

I. STRICT COMPLIANCE WITH § 24-10-109 IS REQUIRED TO BE CONSISTENT WITH THE INTENT AND PURPOSE OF THE COLORADO GOVERNMENTAL IMMUNITY ACT.

This appeal involves the application of § 24-10-109(1), C.R.S., which is commonly known as the "Notice of Claim statute", a critical aspect of the CGIA. Strict compliance with the "Notice of Claim" provisions of Colorado's Governmental Immunity Act is consistent with the intent of the General Assembly in adopting such provisions. The CGIA Notice of Claim statute provides, in pertinent part:

> 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.

§ 24-10-109(1), C.R.S. (emphasis added).

In this case, injuries occurred when Respondents began working at DIA in 1995. Respondents filed their notice of claim on February 2, 2002. Absent a novel recurring injury theory such as that embraced by the Court of Appeals, Respondents' claim would be barred, which is consistent with the plain language of the statute and the legislative intent.

Prior to 1972, governmental entities enjoyed common law immunity from claims arising from their tortious conduct. *See generally* Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971). In 1972, the doctrine of sovereign immunity was judicially abrogated. In response, the General Assembly enacted the CGIA, §§ 24-10-101 – 120, C.R.S., which establishes sovereign immunity for many governmental activities and waives such immunity for claims arising from specified limited circumstances. § 24-10-106(1)(a), C.R.S.; *see* Bertrand v. Board of County Comm'rs, 872 P.2d 223, 224 (Colo.1994).

It is well established that a court's principal purpose in construing a statute such as the CGIA is to give effect to the intent of the General Assembly. Weld County Court v. Richards, 812 P.2d 650, 652 (1991); Vaughan v. McMinn, 945 P.2d 404, 408 (1997). The overall purposes of the CGIA have been articulated both by the General Assembly and by this Court. In the Legislative Declaration accompanying the Act, the General Assembly declared:

> 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.

§ 24-10-102, C.R.S.

In Lee v. Colorado Department of Health, 718 P.2d 221, 227-28 (Colo.1986) this Court noted that the CGIA reflects the State's interest in creating fiscal certainty, in order to execute its myriad public responsibilities. *Id.* at 227. In State of Colorado v. DeFoor, this Court characterized the legislative intent behind the CGIA:

> The Governmental Immunity Act protects the public entity against the risk that unforeseen and unlimited tort judgments will deplete the public coffers and result in the termination or substantial curtailment of important governmental functions.

State of Colorado, By and Through the Colorado State Claims Board of the Division of Risk Management v. Yvonne E. DeFoor, 824 P.2d 783, 790 (Colo. 1992).

The Notice of Claim statute serves several critical purposes, consistent with the purpose of the CGIA. This Court has consistently held that the purposes behind the notice provisions of the CGIA are not to set a trap for the unwary, but:

(1) to give authorities prompt notice of need to investigate the matter,

(2) to allow for the immediate abatement of dangerous condition,

(3) to foster prompt settlement of meritorious claims,

(4) to make adequate fiscal arrangements to meet any potential liability,

(5) and to prepare a defense to the claim.

See, e.g., Jefferson County Health Services Ass'n, Inc. v. Feeney, 974 P.2d 1001 (Colo. 1998); Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 68 (Colo.1990); Antonopoulos v. Town of Telluride, 187 Colo. 392, 398, 532 P.2d 346, 349 (1975).

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 frustrate the intent of the General Assembly to assure that governmental entities have an opportunity to promptly remedy dangerous situations.

It is worth emphasizing that the Notice of Claim statute is not designed to provide notice to public entities of all possible legal bases for claims an individual may have or the elements of those claims. Governmental entities do not necessarily need to know promptly whether a particular claim will be based on theories of negligence, outrageous conduct, or antitrust. To achieve the purposes of the Notice of Claim statute, governmental entities *do* need to know promptly who was injured, when, where and how the alleged injury occurred and the potential claim against public funds. *See, e.g.*, 45 A.L.R.5th 109, Complaint as satisfying requirement of Notice of Claim upon states, municipalities, and other political subdivisions; 56 Am. Jur. 2d, Municipal Corporations, Etc. § 686.

Filing the notice has no adverse impact on the claimant; claimants are not prejudiced by ignorance of all of the possible legal basis for their claim or each of the facts underlying the claim at the time of filing. Filing the notice does not require that any suit actually be filed; it only preserves the right to sue in the future.

In 1986, the General Assembly enacted HB 1196, 1986 Colo. Sess. Law, Ch. 166, which amended the Notice of Claim statute to its current form. The added language reads that a person must file a notice of claim with the public entity within 180 days of discovering their injury: "regardless of whether the person knew all of the elements of a claim or of a cause of action for such injury." § 24-10-109(1), C.R.S. The General Assembly also enlarged the scope of a defined injury, for which notice is required under the CGIA, at § 24-10-103(2) to include, "injury...that would 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 a claimant."

Representative Berry, the prime sponsor of the 1986 legislation, referred to the Court's decision in State v. Young, 665 P.2d 108 (Colo. 1983), in presenting his legislation on the floor of the Colorado House of Representatives:

> What we are looking at here is reversing, frankly, a court case where they said we really don't care when the injury is discovered or anything like that...we want to leave the words "discovery" in the statute, but make it clear that knowing the elements of the claim is simply not something the court's going to look at.

Hearings on HB 1196 before the Colorado House of Representatives Fifty-fifth General Assembly, Second Regular Session, February 26, 1986. Later, in summarizing the bill for the members of the House, Rep. Berry said:

> ...the Legislature when it passed the Governmental Immunity Act in 1971-1972, said that you have to give notice to [a] governmental entity...of what the injury was, and if you didn't do that, you couldn't bring the action. The public policy behind that was to give government some degree of certainty about what they were bring sued for. This is particularily important, far more important, in today's world where most of our governmental entities are self-insured. The taxpayer deserves to know if there is a claim pending against a local government and not to have that be something that comes up six years later to the surprise of everybody. *All we are trying to do in the bill is tighten up the notice requirements...so that it means what the Legislature back in '71-72 thought it meant, and frankly we are trying to repeal some court decisions which have eroded the meaning of that notice requirement.*

Id. at 12 (emphasis added).

Finally, comments by Senator Jim Lee, the principal Senate sponsor of the 1986 Legislation, make it clear that the intention of the General Assembly was to strictly enforce the requirement for filing a Notice of Claim within 180-days of discovering the injury. In his opening comments presenting the bill to the Senate Business Affairs and Labor Committee, Senator Lee stated that a claimant has "180 days from the point of his discovery of the injury – not all of the elements of the injury, *just that he has been injured* – to file the notice." Hearings on HB 1196 before the Senate Business Affairs and Labor Committee, Fifty-fifth General Assembly, Second Regular Session, May 17, 1986 (emphasis added).

As noted above, the notice of claim statute provides that a claimant "shall" provide notice to the public entity within 180 days of discovering their injury. In East Lakewood Sanitation District, this Court held that the word "shall" in section 24-10-109(1) demonstrates legislative intent that the 180-day time limit to be strictly applied by the courts. East Lakewood Sanitation Dist. v. District Court In and For County of Jefferson, 842 P.2d 233, 236 (Colo. 1992).

In the following year, this Court emphasized a similar view, with respect to the requirement of the CGIA generally:

> 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 (in this case, the state and its political subdivisions) 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 Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916, 924 (1993) (emphasis added).

While this Court has permitted substantial compliance with statutory requirements as to the contents of the notice provided to the public entity, neither the express language of the statute nor the decisions of this Court permit anything other than strict compliance with the 180-day requirement.

See e.g., § 24-10-109(2), C.R.S.; Woodsmall, 800 P.2d at 67-68; East Lakewood, 842 P.2d at 235. In Woodsmall, this Court confronted the issue of whether the 1986 amendments to the Notice of Claim statute mandate strict compliance with the provisions of the Notice of Claim statute. This Court, in permitting some flexibility as to the contents of the notice, described the statute as "requir[ing] a claimant, *within 180 days of the discovery of an injury,* to file written notice with the public entity and to make a good faith effort to include within the notice, to the extent the claimant is reasonably able to do so, each item of information listed in § 24-10-109(2), C.R.S." Woodsmall, 800 P.2d at 66-67 (emphasis added). This Court did not hold that substantial compliance with respect to the 180-day requirement would be tolerated in Woodsmall, and this Court again declined to do so in East Lakewood.

For the foregoing reasons, amici respectfully urge this Court to reverse the decision of the Court of Appeals and find that the Respondents had an obligation to give notice of their injury within 180 days of discovering their injury, which for purposes of the Notice of Claim statute, was when they began working at DIA and were treated for symptoms from alleged environmental conditions in 1995. At that time, potential claims against the City had arisen and this was a circumstance where notice to the

City was appropriate and consistent with the purposes for which the Notice of Claim statute was enacted.

II. THE COURT OF APPEALS ERRED IN EMBRACING A "RECURRING INJURY" THEORY, ENABLING RESPONDENTS TO AVOID DISMISSAL OF THEIR CLAIM.

Because Respondents did not file their CGIA notice until well after 180-days of discovering their injury, their claim should be barred forever. Instead, the Court of Appeals erred in preserving Respondents' claim by applying a novel "recurring injury" theory.

As the 180-day notice period under the statute begins when the claimant "discovers" his or her injury, it is not surprising that this Court and the Court of Appeals have provided considerable guidance concerning when discovery of an injury takes place. The test for discovery of the injury for purposes of the CGIA is "the time when the claimant discovered or should have discovered she was injured." Gallagher v. Board of Trustees for University of Northern Colorado, 54 P.3d 386, 388 (Colo. 2002); Trinity Broad., 848 P.2d at 927. Discovery of the injury in this context only requires that the claimant realize there is *some* injury; the person need not have determined the cause of the injury. The notice period places a burden on the injured person to determine the cause of the injury, to ascertain whether a governmental entity or a public employee is the cause and to notify the

governmental entity within 180 days from the time the injury is discovered. Trinity Broad., 848 P.2d at 923; Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993).

In the instant case, it is an undisputed fact that the Respondents did not file their Notice of Claim within 180-days of first discovering their injury. Instead, the Respondents filed seven years after discovering their injuries. Giving the Respondents every benefit of the doubt and construing the facts in the light most favorable to them, Respondents, by their own admission, discovered their injuries in 1995 and filed their notice of claim in 2002. Because they did not comply with the Notice of Claim statute, their claim should be barred.

Hubbard began working at DIA when it opened in 1995, and her health problems began occurring after she began working at DIA. *See* R. Hearing Transcript at 109, 111-113 & 121; H. Exh. 27, at 47-58 & 88-94. In 1999, Hubbard fainted, was treated by paramedics. Significantly, Hubbard attributed this event to the environmental conditions at DIA. Yet, Hubbard did not file notice of her injury until August 2, 2002. *See* H. Tr., at 113-114 & 123-124.

Crandall began working at DIA when it opened in 1995, and she explains that her medical problems that she attributed to the environmental conditions

at DIA began "pretty much at the beginning of when DIA opened. I had an incident happed in May of 1995." *See* H. Tr., at 135. Crandall filed a disability claim indicating that she first suffered her illness in October 1998, and a workers compensation form indicating her date of injury or disease was November 15, 1999. *See* H. Exh. 15 & H. Exh. 12; H. Tr., at 136-138. Once Respondents did file their Notice of Claim on August 2, 2002, Crandall indicated her date of injury was November 15, 1999. *See* H. Exh. 1.

These facts illustrate that the Respondents actually discovered their injuries long before filing notice of their claim on August 2, 2002. Respondents delay in filing resulted in frustration of the legislative intent reflected in the Notice of Claim statute articulated by this Court in *See e.g.,* Feeney; *See* discussion *supra* page 6. Had respondents filed sooner, Denver would have had an earlier opportunity to investigate and remedy the environmental conditions that Respondents claim are the cause of their injuries. At the very least, the city could have minimized the respondents' exposure to the environmental conditions, thereby mitigating the respondents' injuries. Additionally, Denver might have had the opportunity to prevent injury to other employees.

The League respectfully urges that the best direction for resolution of the case at bar is this Court's decision in Gallagher v. Board of Trustees for University of Northern Colorado, 54 P.3d 386 (Colo. 2002). In Gallagher, the Petitioner experienced numerous episodes of retaliatory conduct because he reported to his supervisors improper financial dealings by his department. This Court rejected the application of a "continuing violation" doctrine to allow claims to be brought under the CGIA. This Court held that "...the judicially-constructed continuing violation doctrine cannot be used to remedy an untimely filing under the CGIA." Gallagher at 393.

Furthermore, this Court in Gallagher overruled the Court of Appeals decision in Patel v. Thomas, 793 P.2d 632 (Colo.App.1990). In Patel, the Court of Appeals applied a continuing violation theory to find a plaintiff's sexual harassment claims not barred for failure to timely file a notice of claim. The Gallagher Court rejected the Patel Court's reasoning that sexual advances create a continuous hostile working environment. Patel at 638; Gallagher at 386.

The Court of Appeals "recurring injury" theory in the case at bar is a semantic variation on the "continuing violation" theory that was denied in Gallagher. 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, at 236. The Court of Appeals reversed the current law by embracing a recurring injury theory enabling Respondents to avoid dismissal of their claim.

This Court has had numerous opportunities to embrace a continuing injury theory and avoid dismissal of the claim, yet this Court has consistently declined to do so. For example, in Lafayette v. Barrack, Plaintiff alleged continuing injury due to termination of their water service, yet this Court upheld dismissal of their claim because they had discovered their injury more than 180 days prior to when they filed their notice. The Court found that the 180-day provision began to run on respondents' tort claims when respondents learned of the city council resolution before 180 days of filing notice. At that point, respondents had all the information necessary to fulfill the notice requirement of the Notice of Claim statute. Consequently because respondents failed to give notice within 180 days of the discovery of their injury, their claims were forever barred. City of Lafayette v. Barrack, 847 P.2d 136, 139 (Colo. 1993).

Again in Kelsey, this Court disallowed an action against a school district for personal injuries sustained in slip and fall on school property to

survive because Kelsey did not comply with the Notice of Claim statute. This Court declined to remand the case, as plaintiff's failure to file timely written notice of claim created jurisdictional bar to the claim, which could not be overcome by equitable defenses such as estoppel. Mesa County Valley School Dist. No. 51 v. Kelsey, 8 P.3d 1200, 1202 (Colo. 2000).

The focus in Gallagher was on when the plaintiff "discovered his injury", thus triggering the 180-day notice period. The Court of Appeals analogy between acts of retaliatory conduct in Gallagher and exposure to environmental conditions in the case at bar is misplaced. Gallagher could easily determine when an act of retaliatory conduct occurred. On the other hand, the Respondents never presented evidence to differentiate when any particular incident occurred, and neither the Trial Court nor the Court of Appeals has attempted to determine when Respondents experienced separate incidents at DIA that constitute separate injuries for purposes of giving notice under the CGIA.

Further, the trial court noted that the Respondents did not present any medical evidence regarding whether environmental conditions at DIA have caused Respondents' injuries. The trial court improperly weighed the evidence submitted and found that Respondents' did suffer injuries from exposure to the environmental conditions at DIA and that Respondents had

recurring symptoms of these conditions. This conclusion cannot be proven absent medical evidence.

The interpretation of the Court of Appeals could have a profound fiscal impact on Colorado governments. Under the Court of Appeals unfortunate decision in the case at bar, should each separate and distinct injury be found to be a separate occurrence, for which up to $150,000 can be recovered. Crandall v. City and County of Denver, 143 P.3d 1105, 1110 (Colo. App. 2006); § 24-10-114(1)(a), C.R.S. The cost to Colorado governments could obviously be enormous.

In the present case, the Respondents discovered their injury when they began to experience symptoms of their alleged exposure to environmental conditions at DIA. The Court of Appeals found the filing of their notice of claim some seven years later sufficient because Respondents had recurring injuries. Amici argue that Denver was entitled to know that there was potential exposure for the City in tort, and the City was entitled to prevent further injury to the Respondents and future employees.

CONCLUSION

Prior decisions of this Court articulating the purpose of the Notice of Claim statute and the legislative history of that statute clearly indicate that

Respondents should be required to file their Notice of Claim with the City within 180 days after discovery of their injuries, in order to preserve their opportunity to pursue tort claims against the city. Respondents did not timely file this notice. The Court of Appeals adopted a "recurring injury" theory, without any statutory or proper judicial support, with the result that Respondents' claim was preserved. This decision of the Court of Appeals was error and should be reversed.

WHEREFORE, for the reasons stated herein and in the Brief of the City and County of Denver, Amici respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted this 22nd day of December 2006.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE CITY AND COUNTY OF DENVER was placed in the U.S. Postal System by first class mail, postage prepared, on the 22 day of December 2006.

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