

<p>COURT OF APPEALS, STATE OF COLORADO Two East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Case No: 2017CA1791</p>
<p>Appeal from the Garfield County District Court, Hon. John F. Neiley, Case no. 16CV30209</p>	
<p>Plaintiffs-Appellees: JAY BARNER and TRACY BARNER,</p> <p>v.</p> <p>Defendant-Appellant: TOWN OF SILT, COLORADO</p>	
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<p style="text-align: center;">BRIEF OF <i>AMICUS CURIAE</i> COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLANT TOWN OF SILT</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,169 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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The Colorado Municipal League (“CML” or the “League”) by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amicus curiae* in support of Defendant-Appellant, Town of Silt.

INTEREST OF AMICUS CURIAE

CML was formed in 1923. The League is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 169 of the 171 statutory municipalities and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. CML’s participation in this case is intended to provide the Court with a statewide municipal perspective because the outcome of this case will likely have an impact on all cities and towns in Colorado.

The outcome of this appeal may significantly broaden statutory waivers of governmental immunity under the Colorado Governmental Immunity Act (CGIA), C.R.S. §§ 24-10-101, *et seq.*, and, thereby, creates a substantial and unmanageable fiscal burden on municipalities. The order of the trial court in this case waives immunity for any failure of a public utility, regardless of the cause of that failure or the public entity’s conduct. This expands governmental tort liability far beyond the plain language of the CGIA and is contrary to the legislative purpose behind the Act.

Such unlimited liability will have far-reaching consequences to municipalities' ability to manage the risks and costs of tort claims. For these reasons, CML urges the Court to reverse the trial court outcome in this case and conclude that no subject matter jurisdiction exists in this case.

ARGUMENT

The trial court's order in this case reasoned that the Town did not adequately maintain its water main because it leaked. In reaching this conclusion, the trial court stated that "'maintenance' means keeping the water main in a suitable state of repair so that it does not fail." Trial Court order, CF, p. 197. Even though the CGIA requires that the public entity's conduct in operating and maintaining the water main must have been the actual cause of the subject loss, the trial court found that simply because it was undisputed that the water main leaked, the Town's maintenance of the water main was inadequate. Without conducting an evidentiary hearing to determine any facts concerning the Town's conduct or the cause of the leak, the trial court found that the waiver provision at C.R.S. 24-10-106(1)(f) applied and waived the Town's immunity. Trial Court order, CF, pp. 187-201.

The trial court's application of C.R.S. 24-10-106(1)(f) to reach the conclusion that there is subject matter jurisdiction is in error because the court's analysis essentially takes a strict liability approach to the CGIA by waiving immunity simply because a public utility has experienced some degree of failure. This position is

contrary to the plain language of the CGIA and its stated legislative intent to allow very limited exceptions from the general application of governmental immunity. *See* C.R.S. § 24-10-102; Ch. 182, § 1, 2003 Colo. Sess. Laws 1342.

A. The Trial Court’s Order Disregards the Plain Language of the CGIA

The primary issue with the trial court’s order is its broad and over-simplified interpretation of “maintenance.” The CGIA defines “maintenance” as:

the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure. “Maintenance” does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.

C.R.S. § 24-10-103(2.5). However, in its order, the trial court interpreted this definition as meaning simply “keeping the water main in a suitable state of repair so that it does not fail.” Trial Court order, CF, p. 197. In applying this reductionist definition, the trial court found simply that “if it leaks, it is not being maintained in the same condition as originally constructed.” *Id.* This analysis improperly disregards the language of the CGIA.

As applicable in the present case, the CGIA requires that an act or omission of the Town in keeping the facility in the same general state of repair or efficiency cause the claimed damages. *See* C.R.S. §§ 24-10-103(2.5) and 106(1)(f). As such, before finding a waiver of immunity, the trial court must find that an act or omission by the Town caused the leak. Evidence in the record shows that the Town had no

advance warning that the leak would occur, and it had no way of knowing that there would be a leak at this location. Affidavit of Rory Hale, CF, p. 39, ¶ 7. As a practical matter, it is impossible to predict when leaks will occur. Affidavit of Jack Castle, CF, p. 154, ¶ 6. The only way to inspect a water main is to expose it, and it is not a standard practice to periodically uncover water main lines to inspect them. Affidavit of Rory Hale, CF, p. 39, ¶ 7. The Town would only become aware of a leak in the water main is when it occurs and the escaping water reaches the surface. *Id.* There was no evidence or finding that the Town acted inappropriately or failed to do regular maintenance in a manner that caused the water main to leak.

By concluding that the Town had waived its immunity simply because the water main leaked, the trial court bypassed the required elements of the operation and maintenance waiver provision. Instead, the trial court relied on principles of strict liability in lieu of applying the statutory language when it found the Town waived immunity in this case. *See Lui v. Barnhardt*, 987 P.2d 942, 944 (Colo. App. 1999) (strict liability is imposed regardless of a defendant's conduct). Waiving immunity under a strict liability type of analysis (*i.e.* waiving immunity without regard to conduct) is inconsistent with the terms of the CGIA. Not only is such analysis inconsistent with the language of the waiver provisions contained in C.R.S. § 24-10-106, the CGIA itself repeatedly provides that no public entity shall be subject to strict liability in any action. *See* C.R.S. §§ 24-10-106(4), 24-10-106.1(4),

and 24-10-106.3(8) (all stating that “no rule of law imposing absolute or strict liability shall be applied in any action filed against” a public entity). To waive immunity under a strict liability analysis is wholly inconsistent with these sections, which bar the imposition of strict liability against public entities.

For these reasons, finding a waiver without any evidence or finding to support that an act or omission by the Town caused the leak is inconsistent with the terms of the CGIA, and this approach to finding that subject matter jurisdiction exists for this claim must be rejected as an error.

B. The Trial Court Erred in Failing to Hold an Evidentiary Hearing on the Facts Necessary to Find That the Town’s “Maintenance” Conduct Caused the Loss

The purpose of the *Trinity* evidentiary hearing is to allow the court to hear evidence relevant to the issue of governmental immunity and make the factual findings necessary to determine whether a public entity has waived its sovereign immunity. *See Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). Municipalities throughout Colorado rely on the evidentiary hearing process that was set out in *Trinity*. That process provides governmental entities with an opportunity to present the evidence that is necessary for a court to make its fact-finding to support a conclusion of law on the question of subject matter jurisdiction.

By its nature, a court's determination of subject matter jurisdiction of whether a public entity's maintenance acts or omissions caused a loss is a fact-driven exercise. Without addressing the day-to-day business of operating a drinking water system, it is impossible to make a finding on what failures in due diligence would allow jurisdiction under the CGIA operation and maintenance waiver contained in C.R.S. § 24-10-106(1)(f). Turning to the facts in this case, the trial court did not consider any of the facts in this regard. This determination requires evidence of civil engineering and utility operation and maintenance standards and practices. Although the Town presented undisputed evidence on these issues (*see generally*, briefing on Town's Motion to Dismiss, CF, pp. 37-58 (motion), pp. 67-134 (response), and pp. 135-158 (reply)), the trial court failed to consider this evidence and failed to make any findings on these factual issues. Trial Court Order, CF, pp. 192-195.

The trial court did not deem an evidentiary hearing necessary in this case (Trial Court Order, CF, pp. 192-195), as its interpretation of "maintenance" did not involve facts regarding the Town's conduct or causation. While the waiver provisions of the CGIA are to be broadly construed, this approach by the trial court goes too far; this rule of construction does not permit the court to disregard the required elements set forth in the plain language of the statutory waiver provisions.

As the trial court did not make any factual findings applicable to a correct application of the CGIA in this case, the court should, to the extent any factual

dispute exists concerning these facts, remand this case for an evidentiary hearing pursuant to *Trinity Broadcasting*. See *Henderson v. City and County of Denver*, 300 P.3d 977, 979 (Colo. App. 2012).

C. The Trial Court’s Analysis Is Contrary to the Purpose and Legislative Intent of the CGIA

1. Purpose of the CGIA

The Court’s role in interpreting the CGIA is

constrained by limiting principles of judicial review to interpret statutory language consistently with the intent of the General Assembly and with the plain meaning of the words chosen by this body when it enacts a statute. [The court] may not substitute [its] view of public policy for that of the General Assembly.

Swieckowski by Swieckowski v. City of Ft. Collins, 934 P.2d 1380, 1387 (Colo. 1997). Thus, while courts broadly construe the CGIA’s waiver provisions, the standard by which courts apply the CGIA is the intent of the legislature. See *State v. Hartsough*, 790 P.2d 836, 838 (Colo. 1990), citation omitted (“our primary task in construing a statute is to determine and give effect to the intent of the legislature”); *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 576 (Colo. 2014), citing *Hartsough* (“Despite the general rule of broad construction, however, our touchstone remains the intent of the legislature.”); *St. Vrain Valley Sch. Dist. RE-IJ v. A.R.L. by and through Loveland*, 325 P.3d 1014, 1018 (Colo. 2014) (the polestar of statutory construction is to give effect to the legislature’s intent.”).

“The CGIA acts as a shield that generally protects public entities ... from tort liability.” *Young, supra*, citing *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001). The primary purpose of the CGIA is to allow claims asserting limited types of torts against governmental entities while preventing the potential liability of those entities from making the cost of providing public services prohibitively expensive. *See* C.R.S. § 24-10-102; Ch. 182, § 1, 2003 Colo. Sess. Laws 1342. In enacting the CGIA, the general assembly expressly recognized:

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.

C.R.S. § 24-10-102; Ch. 182, § 1, 2003 Colo. Sess. Laws 1342. The general assembly went on to recognize:

that 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.

Id.; *see also Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 578 (Colo. 2016).

Accordingly, the legislature enacted the CGIA to delineate the limited circumstances in which a public entity or public employee could be sued for tort. *Open Door Ministries, supra* (public entities and employees should be liable “only to such an extent and subject to such conditions as are provided by this article.”). In short, “sovereign immunity protects public entities against the risk that unforeseen tort

judgments will deplete public funds, resulting in the termination or curtailment of important government functions, by limiting waiver to specific categories of claims.” *See Jilot v. State*, 944 P.2d 566, 569 (Colo. App. 1996).

2. *The Broad Waiver Allowed by Trial Court Defeats the General Assembly’s Intent and Purpose of the CGIA*

As noted above, the trial court’s analysis in this case takes an approach to CGIA waivers that is tantamount to applying strict liability in a negligence case: because there was a water main leak, the Town has *per se* failed to maintain the water main and is strictly liable for damages resulting from a leak. Just as strict liability imposes liability on a defendant without regard to its conduct, *see Lui, supra*, the trial court’s approach in this case waives immunity without any consideration of causation or a defendant’s conduct.

This is in direct contradiction to the legislative intent behind the CGIA, as expressed in the plain language of the statute (as discussed above) as well as the declaration of policy found at C.R.S. § 24-10-102. Since the inception of the CGIA, the general assembly has repeatedly reaffirmed its position that a public entity may not be subject to absolute or strict liability. *See* C.R.S. §§ 24-10-106(4), 24-10-106.1(4), and 24-10-106.3(8) (section 106.1 was enacted in 2012 and section 106.3 was enacted in 2015). In light of this clearly stated bar on strict liability claims, it

was error for the trial court to conclude that the Town waived its immunity under a strict liability type analysis.

Moreover, expanding the scope of the waivers as suggested by the trial court's decision would make risk related to tort liability impossible to manage for governments in Colorado and likely deplete public funds, leading to the curtailment of important government functions. The water main at issue in the present case was ductile iron pipe. Affidavit of Rory Hale, CF, p. 39, ¶ 6. The pipe was installed in the 1980s, making it less than 30 years old. According to a study by the American Water Works Association, the expected service life of ductile iron pipe in Colorado is 60-110 years. *See Buried No Longer: Confronting America's Water Infrastructure Challenge*, p. 8.¹

To avoid waiving its immunity under the trial court's analysis, the Town would have had to absolutely prevent any failure of the water main. In the context of this case, it is notable that the evidence before the trial court was that there was no way for the Town to find a leak in the water main before it occurred. Affidavit of Rory Hale, CF, p. 39 ¶ 7.² Thus, in order to prevent the possibility of any leaks, the

¹ This document can be obtained at <https://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf>

² This is confirmed by CML's members. *See, e.g.*, <https://bouldercolorado.gov/water/water-main-break-information> at the link for "How does the City know that a main break has occurred?"

Town would first have had to anticipate that the water main would leak less than halfway through its expected service life. It then would have to proactively replace those lines to avoid the possibility of a pipe failure before even coming close to the end of the pipe's service life. Alternatively, the Town would have to expose the lines to inspect the lines on a regular schedule and hope that any leaks occur during those inspections. Burying utilities is the most practical, efficient, and safe way to provide water, sewer, and other services to the public. By virtue of placing this infrastructure underground, it necessarily follows that the entity (either public or privately owned) must use other means of determining regular maintenance than cutting into the ground to expose it. In essence, the Town would need to be omniscient in order to meet the strict liability standard that the trial court set out in its order.

Applying the trial court's approach to the public facilities addressed in C.R.S. § 24-10-106(1)(f) (water, gas, sanitation, electrical, power, or swimming facilities), the burden on the public entities would result in the use of most of the entity's capital to prevent unforeseeable and unexpected failures. With regard to water mains, municipalities commonly experience multiple unforeseeable leaks every year. *See, e.g.,* <https://bouldercolorado.gov/water/water-main-break-information> at the link for "How often do water main breaks occur?" (the City of Boulder experiences an average of 70 water main breaks each year). This approach is prohibitively expensive in itself. The alternative, facing nearly unlimited liability if these

precautions are not taken, will have a similar fiscal impact. In either case, adopting the trial court's analysis will undoubtedly lead to disruption in the provision of essential public services and ultimately place an undue fiscal burden on municipalities and taxpayers. This is not to say that municipalities are disinterested in capital operation and maintenance; rather, they endeavor to maintain our municipally-owned utility with stewardship and in consideration of the general practices of maintaining and operating them properly. However, the trial court's strict liability approach would require that governmental capital infrastructure be built perfectly and maintained and operated without any depreciation; this is an impossible standard, regardless if it is a government or private capital asset. These are the precise issues that the general assembly sought to avoid when it enacted the CGIA. Accordingly, the court should decline to expand the immunity waiver at C.R.S. § 24-10-106(1)(f), and it should reverse the trial court on this issue.

The League is likewise concerned that the strict liability approach of the trial court in this case, if left in place, will provide strict liability grounds for subject matter jurisdiction for other CGIA waiver claims. The trial court's order in this case greatly upsets that measured, careful consideration necessary to determine whether jurisdiction exists to hear a CGIA waiver claim. If this approach was applied to other CGIA waivers, the potential municipal governmental liability would be greatly expanded, despite the clear legislative intent to limit governmental liability to

achieve the necessary public policy purpose of balancing remedies for certain governmental torts with the general public's interest in maintaining resources for services and infrastructure.

CONCLUSION

Waiving immunity for the operation and maintenance of a public utility on the sole grounds that the utility failed is inconsistent with the language and purpose of the CGIA, and such analysis undermines the goal of the CGIA to provide a balance between the costs of providing municipal services and allowing certain tort claims to be brought against a public entity. Accordingly, for the reasons set forth here and in the Town of Silt's Opening Brief, CML urges the Court to reject the trial court's analysis of the operation and maintenance waiver provision, find that the Town is immune from the claims asserted, and reverse the trial court's decision. Alternatively, the Court should, at a minimum, remand this case for further proceedings, with direction to the trial court to hold an evidentiary hearing to determine whether the Town's alleged maintenance actions or inactions caused the leak in the water main.

Respectfully submitted this 2nd day of March, 2018.

MORGAN RIDER RITER TSAI, P.C.

s/ Sophia H. Tsai

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 2nd day of March 2018 a true and complete copy of the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLANT TOWN OF SILT** was filed with the Court and served on the parties below via Colorado Courts Electronic Filing:

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