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Appeal from Colorado Court of Appeals
2020CA2088, Judges Fox, Dailey, and Schutz

Pitkin County District Court
2020CV30055, Judge Lynch

Δ Court Use Only Δ

Petitioner: City of Aspen

Respondent: Burlingame Ranch II Condominium Owners Association, Inc.

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Case Number: 2022SC293

AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE'S BRIEF (SUPPORTING RESPONDENT ON APPEAL)

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 28, 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 4,186 words (does not exceed 4,750 words).

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

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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Community Associations Institute's Rocky Mountain Chapter ("CAI") respectfully submits this *amicus curiae* brief in support of Respondent, Burlingame Ranch II Condominium Owners Association, Inc.

I. AMICUS CURIAE IDENTITY AND INTEREST

CAI is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful common interest communities through effective and responsible governance and management. Approximately 2,403,000 Coloradans live in 893,000 homes in more than 9,900 community associations. By 2040, the community association housing model is expected to become the most common form of housing.

CAI's more than 43,000 members include homeowners, board members, property managers, and other professionals who provide services to condominium associations, homeowners associations, and other types of community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States.

II. ARGUMENT SUMMARY

The Court of Appeals erred by applying the Economic Loss Rule ("ELR") in its determination of whether a claim "could lie in tort" under the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-106.

The CGIA was never intended to—and cannot—shield a municipality from its contractual obligations when it acts as a real estate developer. When acting as a real estate developer, the City of Aspen was a market participant, and accepted contractual obligations to the Association and the homebuyers. Colorado's Constitution and the CGIA do not permit a municipality to have immunity from liability for contract-based claims originating from a municipality's acting in a business capacity. A cancellation of the homeowners' warranty rights under the guise of governmental immunity would be an unconstitutional taking.

Because governmental immunity under the CGIA derogates Colorado's common law, it is strictly construed. *Springer v. City and Cnty. of Denver*, 13 P.3d 794, 798 (Colo.,2000). As expressed by the Court in *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008), the determination of whether the CGIA applies is not if the City of Aspen (the "City") committed a tortious act in addition to violating its contractual duties, but rather if the essence of the claim is a breach of a promise or the breach of a tort duty.

Construction defect claims of breach of contract and breach of express and implied warranties arise out of a breach of a promised performance. Therefore, they are fundamentally contract claims and not tort claims.

The determination of whether the City committed tort offenses in addition to the alleged breached of promised performance, and the application of the ELR, are therefore irrelevant to the application of the CGIA. Simply stated, the ELR has no bearing on whether a claim "could lie in tort" under the CGIA.

III. ARGUMENT

A. The CGIA was Never Intended to—and Cannot—Shield a Municipality from its Contractual Obligations when it Acts as a Real Estate Developer.

Acting as a real estate developer to build private homes is not a traditional governmental function. In this case, Aspen developed and sold private homes, entering into contracts with homebuyers. As with any other development, the homebuyers paid for the homes and received warranties and implied warranties in consideration for their purchase. Aspen now argues that it is entitled to escape its warranty obligations as a real estate developer by relying upon the CGIA. If the Burlingame homeowners have their warranty rights taken away from them under the

guise of governmental immunity, they will suffer an unconstitutional taking of these property rights without just compensation.[1]

Since at least 1952, this Court has recognized that the common law doctrine of sovereign immunity was in conflict with the Colorado Constitution:

> The doctrine of sovereign immunity originates through the course of unwritten common law. However, plaintiff's protection and his relief is provided for in the basic written law of our state, namely, section 15, Article II of the Constitution of the State of Colorado, 'Private property shall not be taken or damaged, for public or private use, without just compensation.' It seems needless to say that neither the executive nor the legislative branches of our government has any right whatsoever to deprive anyone of his life, liberty or property without due process or compensation, and surely it cannot be contended that under our system of government it was not intended that the judicial branch of the government stand open as a haven for the protection of any citizens whose rights have been invaded, whether it be by an individual or by either of the other branches of our government. Our courts are to decide the rights of citizens, whether it be between themselves or between them and the government. It is with pride that we say, and it is freely known to every citizen, that our courts respond immediately to rescue a citizen from those holding him under asserted governmental authority and to give him relief as against the sovereign power if the circumstances warrant. This judicial power is conferred by the same constitutional provision and we see no reason to invoke a different doctrine as to remedy for the citizen whose property is wrongfully held by the sovereign or any other source of imposition. The rights of a citizen remain the same whether they collide with an individual or the government, and judicial tribunals were wisely established to correct such matters without the individual being

[1] "Property is defined as being 'the right to posses, use, enjoy, and dispose of a thing.' The thing mentioned does not always have a tangible or physical existence; it may be an easement or anything else that can become the subject of private ownership." *Trippe v. Overacker*, 1 P. 695, 697, 7 Colo. 72, 74 (Colo. 1883); *See also City of Denver v. Bayer*, 2 P. 6, 6, 7 Colo. 113, 114 (Colo. 1883).

> relegated to the position of no other remedy except to appeal to a legislature, maybe to no avail, as all the people, or the citizens, are, in fact, the sovereign under our desirable form of government. When a citizen resorts to our courts having jurisdiction, and has alleged his right to property, he owes deference to no power that would seek to prevent him from having the ear of the court in praying for an enforcement of a right.

Boxberger v. State Highway Dept., 250 P.2d 1007, 1008–09 (Colo. 1952) (*en banc*). Thus, 70 years ago, this Court recognized that sovereign immunity stands in conflict with the Colorado Constitution, at least in cases founded on contract. *Faber v. State*, 353 P.2d 609, 610 (Colo. 1960) (overruled on other grounds) ("[W]here the state enters into contractual relations, the persons dealing with the state are entitled to enforce the contractual rights arising therefrom by resort to judicial proceedings, and the state cannot defeat the action by reliance upon a claim of sovereign immunity from suit."). *Faber* was, in fact, overruled not because it upheld governmental liability in contract cases, but because it did not uphold governmental liability in tort cases as well. *Evans v. Bd. of Cnty. Comm'rs*, 482 P.2d 968, 972 (Colo. 1971). In *Evans*, this Court completely abrogated all common law governmental and sovereign immunity, leaving this issue with the Colorado Legislature. *Id.*

Although the Colorado Legislature responded to *Evans* by enacting the CGIA, the Legislature never intended to enact a statute that would shield any governmental entity from its own contractual obligations. *Robinson*, 179 P.3d at 1003; *Berg v. State Bd. of Agric.*, 919 P.2d 254, 258 (Colo. 1996). In fact, even after the enactment

of the CGIA, Colorado courts have noted the important distinction in cases falling outside of the CGIA where the government is acting in its "proprietary" capacity, as opposed to its "governmental" capacity. When acting in its "proprietary" capacity, "a city is to a great extent subject to the same rules of business dealing which apply to a private party." *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 444 (Colo. App. 1994). If the City of Aspen is permitted to enter into contracts as a real estate developer and later be absolved from its obligations under those contracts, no rational market participant or owner would be incentivized to enter into a future contract with any government entity. "Th[e] capability of a municipality to act in a business capacity necessarily includes the ability to enter into long-term contracts with suppliers, who, if they had to trust the varying moods of city councils for compensation under the contract, might not risk the expenditures necessary to construct and maintain the requisite facilities." *Id.* at 442.

The potential outcome of the City being able to hide behind governmental immunity to escape its contractual obligation could frustrate future municipalities desiring to take similar steps to develop affordable housing. Without contractors and material suppliers willing to contract with an immune municipality, future municipal-sponsored affordable housing projects might never be built.

Additionally, if the City of Aspen is able to dodge its responsibility as a developer, the homeowners who were intended to benefit from the City's affordable

housing initiative will be the ones left suffering expensive construction defect repair bills. What was originally intended to be a project to provide quality, affordable housing will instead cause significant economic harm to the homebuyers who purchased affordable housing from the City.

The Colorado Legislature, in enacting the CGIA, was seemingly aware of the necessary public policy in ensuring that municipalities remain liable when they act in the capacity of one who develops, builds, or maintains real estate. The CGIA lists multiple waivers of government immunity when a municipality develops or maintains real estate, including dangerous conditions of public buildings, public highways, hospitals, jails and other facilities. *See* C.R.S. § 24-10-106(c) through (e). These waivers are to be construed deferentially. *See Walton v. State*, 968 P.2d 636, 642 (Colo. 1998) (en banc). If this Court does not do the right thing here, Colorado would now have a statute that contains an explicit waiver of governmental immunity for dangerous conditions in a public building, but not in a private building built by the public.

The Court of Appeals erred by applying the ELR in its determination of whether a claim "could lie in tort" under the CGIA. The Colorado Constitution, the CGIA and good public policy all are clear that the ELR is irrelevant in a determination of whether a claim "could lie in tort" under the CGIA because the

CGIA cannot—and was never intended to—shield a municipality from its contractual obligations when it acts as a real estate developer.

If the Appellate Court's decision is left standing, condominium associations and their owners would be left with no remedies and no access to the court system to address potentially dangerous construction in their homes. Because governmental immunity under the CGIA derogates Colorado's common law, it is strictly construed. *Springer v. City and Cnty. of Denver*, 13 P.3d 794, 798 (Colo.,2000). As a logical corollary, the CGIA provisions that waive immunity are broadly construed in the interest of compensating victims of governmental negligence. *Id.* Where a governmental entity acts as a market participant and takes on contractual obligations, the public policy of enforcing those contractual obligations is even more apparent.

B. The Source from Which the Allegedly Breached Duty Arises Determines whether the CGIA Applies.

In determining whether the CGIA applies, "a court must examine the source from which the allegedly breached duty arises." *Robinson*, 179 P.3d at 1003, *citing CAMAS Colo., Inc. v. Bd. of Cnty. Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001). though the nature of the relief requested informs the Court's understanding of whether a claim lies in tort for the purposes of applying CGIA, "the nature of the relief requested is not dispositive". *Id.* "[W]e have also made clear that the question

of coverage by the [CGIA] ultimately turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Colo. Dept. of Transp. v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 690 (Colo. 2008).

> While the notion of a "tort" is notoriously difficult to define with any degree of precision, and the expansive statutory phrase "lies in tort or could lie in tort" adds to the difficulty of defining the Act's intended coverage, there can be little doubt that the legislature used this language in reference to the breach of a general duty of care, as distinguished from the breach of a contract or other agreement. And while we have distinguished some statutorily created duties, despite their general and non-contractual nature, on the basis of their broad policy rather than compensatory goals, we have never suggested that coverage of the Act is limited to claims that are capable of being recast as common-law torts by the party bringing the claim.
>
> …
>
> The coverage of the Act, however, is not limited to claims that are presented, or are capable of being presented, directly by the claimant as tort claims. **Rather it more broadly encompasses all claims against a public entity arising from the breach of a general duty of care, as distinguished from contractual relations or a distinctly non-tortious statutorily-imposed duty.**

Id. at 690–91 (emphasis added) (internal citations omitted).

Certain injuries and relief, such as injury to property causing economic losses in construction defect cases, may implicate both tort and contract. However, in such cases, this Court has already determined that this does not end the analysis, but rather makes the analysis "more complicated." *Robinson*, 179 P.3d at 1004.

This Court has held that when "the essence of the claim was the breach of a promise that was detrimentally relied upon," the claim is not a tort claim for the purposes of the CGIA." *Id.*

"The act was not intended to apply to actions grounded in contracts." *Berg v. State Bd. of Agric.*, 919 P.2d 254, 258 (Colo. 1996). Indeed, when a claim is grounded on the breach of a promise rather than a misrepresentation, this Court has held that this is a contractual issue and that the CGIA does not apply. *See id.* at 259; *Robinson*, 179 P.3d at 1004. Even when a contract claim and a tort claim are similar, if the contract claim is "distinct," the CGIA will not apply. *Berg*, 919 P.2d at 259. A contract claim will be considered distinct when the facts that support the contract claims could not support the similar tort claim. *Id.* (disagreeing with contention that "because the same factual basis underlies all of the claims, they are all necessarily based in tort"). If the facts that support a contract claim could not support a tort claim, then the claim would not be one that could lie in tort.

C. The Duty in an Implied Warranty Claim Arises Out of Contract.

This Court has repeatedly held that a claim for breach of implied warranty arises out of a contractual obligation, not a tort obligation. For example, in *Forest City Stapleton Inc. v. Rogers*, this Court stated:

> Because breaches of implied warranties—such as the implied warranty of habitability and the implied warranty of suitability—implicate contract claims, requiring privity of contract in these cases is consistent

> with upholding the distinction between contract claims and tort claims. ("An obligation to act without negligence in the construction of a home is independent of contractual obligations such as an implied warranty of habitability.").

393 P.3d 487, 491 (Colo. 2017) (internal citation omitted); *see also Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042–43 (Colo. 1983).

D. The Facts Necessary to Prove a Breach of Contract or Breach of Implied Warranty in a Construction Defect Case Would Not be Sufficient to Prove a Negligence Claim.

"The [CGIA] was not intended to apply to actions grounded in contracts." *Berg*, 919 P.2d at 258. "In well-settled tort jurisprudence, a claimant alleging negligence of another party must establish the existence of a duty, a breach of that duty, causation, and damages." *Redden v. SCI Colo. Funeral Servs., Inc.*, 38 P.3d 75, 80 (Colo. 2001). Inherent in the elements of duty and causation are a foreseeability analysis. In *Westin Operator, LLC v. Groh*, this court stated:

> A negligence claim requires two distinct and separate foreseeability analyses. First, foreseeability is an integral element of duty. Second, foreseeability is the touchstone of proximate cause. The former is a question of law for the court; the latter is a question of fact for the jury at trial.

347 P.3d 606, 614 n.5 (Colo. 2015) (internal citations omitted).

The facts necessary to prove a breach of contract or breach of implied warranty in a construction defect case would not be sufficient to prove a negligence claim. In *Cosmopolitan Homes, Inc.*, this Court made clear that while there is some

overlap between the proof necessary in contract claims (including the implied warranty of habitability) and negligence claims, that the proof required is distinct:

> Some overlap in elements of proof of such actions may occur, but the scope of duty differs and the basis for liability is distinguishable. The implied warranty of habitability and fitness arises from the contractual relation between the builder and the purchaser. **Proof of a defect due to improper construction, design, or preparation is sufficient to establish liability in the builder-vendor. Negligence, however, requires that a builder or contractor be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property**. Negligence in tort must establish defects in workmanship, supervision, or design as a responsibility of the individual defendant. Proof of defect alone is not enough to establish the claim. Foreseeability limits the scope of the duty, and the passage of time following construction makes causation difficult to prove. Moreover, in the context of the purchase of a used home, the owner must demonstrate that the defect is latent or hidden, and must show that the defect was caused by the builder.

Cosmopolitan Homes, Inc., 663 P.2d at 1045 (emphasis added) (internal citations omitted). More recently, in *Forest City Stapleton Inc.*, this Court reiterated the distinct elements of proof necessary for contract and negligence claims in construction defect cases:

> While a contractual obligation may give rise to a builder's "common law duty to perform the work subject to the contract with reasonable care and skill," this does not "transform the builder's contractual obligation into the measure of its tort liability arising out of its contractual performance." Rather, **contract claims require different proof than tort claims and should be treated separately**. In particular, **a tort claim for negligence is "not limited by privity of contact.**" **Instead, foreseeability determines its scope**.

393 P.3d at 491 (emphasis added) (internal citations omitted).[2]

In construction defect cases, the claims of breach of contract, breach of implied warranties, and breach of express warranties all arise out of a breach of a promise. In particular, a construction defect claim for breach of implied warranty requires the following proof:

> 30:54 Claim—Building Contractor's Breach of Implied Warranty—Elements of Liability
>
> For the plaintiff, (name), to recover from the defendant, (name), on (his) (her) claim of breach of implied warranty, you must find both of the following have been proved by a preponderance of the evidence:
>
> 1. (As a business venture, the) (The) defendant (entered into a contract with the plaintiff to build [insert an appropriate description, e.g., "a house for the plaintiff"]) ([built] [or] [had built] [insert an appropriate description, e.g., "a house"] which [he] [she] [sold to the plaintiff]); and
>
> 2. When the defendant (gave possession of) (sold) the (insert appropriate description, e.g., "house") to the plaintiff, the (insert appropriate description, e.g., "house") did not comply with one or more of the warranties the law implies as part of such a (construction contract) (contract of sale).

Colo. Jury Instr., Civil 30:54.[3] In order to prove a claim for breach of implied warranty, a plaintiff need only prove that (1) defendant built (or entered into a

[2] C.R.S. § 13-20-804 highlights the distinction between contractual and tort claims, the latter of which require additional elements of proof when the negligence claim is based on violation of a building code or industry standard. C.R.S. § 13-20-804(2)(b) clarifies that these additional proof requirements do not apply to contract or warranty claims.

[3] Implied warranties provided by Colorado law are described as follows:

contract to build) the property; and (2) the property did not comply with one of the implied warranties provided. The plaintiff is not required to prove common law duty, breach of duty, causation, or foreseeability.

To be considered a contractual claim under the CGIA, the claim need not be based on an express written contract but may be based on a contract implied in law. *See City of Arvada v. Denver Health & Hosp. Auth.*, 403 P.3d 609, 617 (Colo. 2017). The Association's implied warranty claims are therefore contractual and are not barred by the CGIA.

E. Because The Duty and Proof Required in Contract-Based Construction Defect Claims is Independent of the Duty and Proof Required in A Negligence-Based Construction Defect Claim, The Application of The ELR to a CGIA Analysis Is Nonsensical.

30:55 Definition—Building Contractor's Implied Warranties
A person who enters into a contract to build a building or structure for another or who, as a business venture, builds or has built a structure or building and sells that structure or building to another impliedly warrants, that is, impliedly promises, that:
1. All relevant provisions of the (describe any relevant codes) applicable to the construction of the structure or building have been complied with;
2. All work on the structure or the building has been done in a workmanlike manner; and
3. The building or structure is suitable for the ordinary purposes for which it might reasonably be used.
Colo. Jury Instr., Civil 30:55.

By focusing on the "nature of the injury and the relief sought"[4] rather than the nature of the duty breached, the Appellate Court has asked the District Court to conduct a *Trinity* hearing to determine whether the Association's claims are barred by the ELR, in which case immunity does not apply, but if the claims are permitted under the ELR, then immunity does apply. This misplaced guidance has resulted in the City taking the position that it has an affirmative tort duty, and is therefore entitled to immunity under the CGIA. In an equally odd turn of events, the Association has taken the position that the City owes the Association no tort duty and therefore is not entitled to immunity under the CGIA.

Neither the City nor the Association are correct. Whether or not the City has an affirmative tort duty to the Association is irrelevant to the question of whether the City owes independent contractual duties to the Association. The City's contractual duties are independent of any existent or non-existent tort duties and require different elements of proof.

Governmental entities cannot be immune from their contractual promises, or no person would ever agree to contract with the government. A government entity's mere assertion that its breach of contract also happened to be a result of its negligent

[4] Appellate Court Decision at p. 8, ¶ 18.

conduct would forever immunize governments from fulfilling their bargained-for obligations.

Whether or not the City may committed negligent acts in addition to breaching its contractual obligations is irrelevant to a determination of immunity under the CGIA. Whether or not the ELR applies to negligence claims that might have been but were not brought by the Association is therefore irrelevant to the CGIA analysis. The Appellate Court therefore erred by applying the ELR in its determination of whether the Association claims "could lie in tort" under the CGIA.

IV. CONCLUSION

If the City of Aspen is entitled to governmental immunity when it acts as a private real estate developer, the very citizens who were intended to benefit from the City's affordable housing program will be left without a legal remedy and will potentially be saddled with expensive cost to repair their construction defects. The effect of governmental immunity would be to cancel the express and implied warranties for which the homeowners paid when purchasing their homes from the City. Such a warranty cancellation would amount to an unconstitutional taking without just compensation.

Furthermore, other municipalities which might seek to embark upon affordable housing projects of their own will struggle to find private sector business partners who may be hesitant to contract with an entity that would be absolved from its own contractual liability.

The essence of the Association's claims is a breach of contract, not a breach of a tort duty. The mere fact that the City may have additionally committed negligent acts should not be used by the City to shield itself from liability. The CGIA does not—and cannot—protect a governmental entity from its contractual obligations, regardless of whether the ELR would apply to hypothetical negligence claims that have never been asserted by the Association. The City of Aspen, in acting as a residential real estate developer, must be subject to the same rules as other market participants and cannot be immune because it also is a municipal entity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 30, 2023, I served a copy of the foregoing ***Amicus Curiae* Colorado Trial Lawyers Association's Brief** was submitted to ICCES for service upon the following:

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