DATE FILED: January 11, 2019 1:13 PM
FILING ID: 7F8B021610FE2
CASE NUMBER: 2018CV220

DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100 **Plaintiff: STACY LYNNE** **v.** **Defendants: NOAH BEALS, Senior Planner, City of Fort Collins, in his individual and official capacity, and JEREMY CALL, Senior Associates – Logan Simpson Design, Contractor for the City of Fort Collins, in his individual and official capacity**	COURT USE ONLY
Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com	Case Number: 2018 CV 220 Courtroom: 3C

DEFENDANT BEALS' MOTION TO DISMISS and REQUEST FOR AWARD OF ATTORNEY'S FEES

COMES NOW Defendant Noah Beals, by and through his counsel, Wick & Trautwein, LLC, and pursuant to C.R.C.P. 12(b)(1), respectfully moves the Court to dismiss with prejudice the Plaintiff's Complaint against him. As discussed further below, this Court lacks subject matter jurisdiction over the tort claims alleged against him because they are barred by the immunity provided Mr. Beals as a public employee under the Colorado Governmental Immunity Act ["CGIA"], mandating the dismissal under C.R.C.P. 12(b)(1). Further, Defendant Beals requests the Court award him attorney's fees for defense of this action, as is required upon dismissal by both C.R.S. §24-10-110(5)(a)(c) and C.R.S. §13-17-201. In support hereof, Defendant Beals states as follows:

I. RULE 121 CERTIFICATION

Undersigned counsel for Mr. Beals advised the Plaintiff via email that this motion to dismiss would be filed today, to give her an opportunity to voluntarily dismiss her Complaint and avoid the mandatory award of attorney's fees required upon this Court's dismissal for lack of subject matter jurisdiction under the CGIA. Plaintiff has not responded to indicate she will voluntarily dismiss this action against Mr. Beals, nor does it appear from the online court record that a voluntary dismissal has been filed. Accordingly, Mr. Beals files this motion to have the Court dismiss this action as a matter of law, and to enter an award of attorney's fees in his favor and against the Plaintiff.

II. INTRODUCTION

Plaintiff brings this defamation action for libel and slander[1] against Noah Beals, a public employee of the City of Fort Collins ["the City"], and Jeremy Call, an employee of Logan Simpson Design, one of the City's independent contractors. The Complaint consists of twenty-seven pages of verbose and rambling narrative statements, including lengthy discussions about Plaintiff's status as an investigative reporter, long listings of purported legal definitions, references to another lawsuit she recently brought against the City under the Colorado Open Records Act ["CORA"] in Larimer County District Court Case No. 2018 CV 172[2], incorporation

[1] It should be noted that the introductory paragraph of the Complaint indicates it is an action for libel and slander, and the Plaintiff refers only to alleged defamation throughout the body of the Complaint. However, in the very last sentence on page 26, she refers to intentional infliction of emotional distress and outrageous conduct, which would be considered separate torts. To the extent that the Plaintiff is making such claims, she has clearly failed to properly plead them under the rules noted herein, and the Court should treat this action as one only for defamation given the rest of the Complaint.

[2] This suit was decided against the Plaintiff and in favor of the City, with an order entered by Judge Susan Blanco on October 11, 2018, in which she found the City properly withheld documents on the grounds of attorney-client privilege.

of emails with the City Attorney, discussions with other representatives of the City, and numerous other digressions. Simply put, the Complaint is anything but the "short and plain statement of the claim" required by C.R.C.P. 8. It also violates the fundamental pleading requirements of C.R.C.P. 10(b), which provides as follows:

> **(b) Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by its paragraph number in all succeeding documents. Each claim founded upon a separate transaction or occurrence, and each defense other than denials, shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

Plaintiff's failure to follow these basic rules of pleading make it impossible for Mr. Beals to reasonably prepare an Answer in response to the extensive narrative allegations of the Complaint as it now stands, and does itself constitute grounds for dismissal under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted.[3]

However, notwithstanding that basis for dismissal under C.R.C.P. 12(b)(5), the Court can sift through the twenty-seven pages of verbose and rambling narrative statements to conclude that the Plaintiff's tort claims against Defendant Beals, a public employee of the City, are barred by the immunity provisions of the CGIA. It must therefore dismiss these claims for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

[3] The Complaint is also subject to dismissal under C.R.C.P. 12(b)(5) because, notwithstanding the twenty-seven pages of rambling and verbose narrative, Plaintiff has failed allege by clear and convincing evidence all of the required elements for defamation in this context, where the purported defamatory statements allegedly made by Mr. Beals related to matters of public concern. *See, Lawson v. Stow*, 2014 COA 26, ¶ 15, 327 P.3d 340, 345-46 (Colo. App. 2014). Indeed, Defendant Beals disputes that the two statements actually identified by the Plaintiff in the Complaint as attributable to him would even be considered defamation in the first instance, as that term has been defined under Colorado law. Until the Court resolves issues of its subject matter jurisdiction to hear the tort claims against Mr. Beals, such a motion would be premature. Defendant Beals thus reserves the right to raise these issues in a further C.R.C.P. 12(b) motion if the case is not dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

III. ARGUMENT

A. The CGIA and the governing standard for review.

According to the CGIA, "a public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . .," except as otherwise provided in the CGIA. C.R.S. § 24-10-106(1). This immunity also extends to an employee of a public entity. *See* C.R.S. § 24-10-118. In that regard, section 24-10-118(2)(a) states in pertinent part as follows:

> (2)(a) A public employee shall be immune from liability in any claim for injury … which lies 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 and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that no such immunity may be asserted in an action for injuries resulting from the circumstances specified in section 24-10-106(1).

Further, Section 24-10-118(2.5) goes on to state that, when "a public employee raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery; except that any discovery necessary to decide the issue of sovereign immunity shall be allowed to proceed, and the court *shall decide such issue on motion."* [Emphasis added].

In deciding these sovereign immunity issues on motion, it is important to note the Court is not to determine such issues according to the summary judgment standards of C.R.C.P. 56. *Jarvis By & Through Jarvis v. Deyoe*, 892 P.2d 398, 401–02 (Colo. App. 1994); *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993). Nor is to give the plaintiff the benefit of all reasonable doubts, as it would in reviewing a Complaint for failure to state a claim under Rule 12(b)(5). *Id.*, at 925. Rather, under Rule 12(b)(1), the Court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

Further, the burden of proving subject matter jurisdiction is on the party bringing the action against the public entity or employee. *Delk v. City of Grand Junction*, 958 P.2d 532, 533 (Colo. App. 1998).

B. Plaintiff's claims of defamation are barred by the CGIA, such that this Court lacks subject matter jurisdiction.

Applying the above principles to the case at hand, the Court must determine, as a matter of law, that all of the tort claims asserted by Plaintiff in her Complaint against Mr. Beals are barred by the sovereign immunity afforded him under C.R.S. 24-10-118(2)(a) above. Plaintiff has clearly alleged that Mr. Beals is a public employee (which he does not dispute), and she alleges claims for defamation that are undisputedly considered torts under common law. *See, Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994).[4]

Plaintiff has not asserted that her action and any of her claims against Mr. Beals falls within any of the six exceptions to immunity set forth in C.R.S. § 24–10–106(1). Indeed, the Court could legally conclude, based upon a fair reading of the problematic Complaint and the provisions of C.R.S. § 24–10–106(1), that her tort claims do not fall within any of the six specific circumstances for which immunity is waived.

The Court can likewise conclude as a matter of law that the Complaint fails to allege a specific factual basis for a finding of willful and wanton conduct, as required under C.R.S. § 24-

[4] To the extent the Plaintiff's Complaint could be construed to assert claims of intentional infliction of emotional distress and outrageous conduct based upon its very last sentence, though not properly plead as noted above, it should be undisputed those claims are also tort claims and would be abrogated by the immunity afforded Mr. Beals under the CGIA.

10-110(5)(a) for the immunity of a public employee to be waived. A complaint cannot merely assert that a public employee's acts or omissions were willful and wanton.[5] *L.J. v. Carricato*, 413 P.3d 1280, 1288 (Colo. App. 2018). At a minimum, the complaint must allege "specific facts to support a reasonable inference that the employee was consciously aware that his or her acts or omissions created *danger or risk to the safety of others*, and that he or she acted, or failed to act, without regard to the *danger or risk*." *Id.* (emphasis added); *see, also, Martinez v. Estate of Bleck*, 379 P.3d 315, 322-23 (Colo. 2016) (declining to choose one definition of "willful and wanton" conduct, but indicating they all share a common feature - a conscious disregard of danger to others). The Plaintiff's Complaint altogether fails to plead that here.

The Court must therefore dismiss Plaintiff's action against Mr. Beals pursuant to C.R.C.P. 12(b), because it is barred by the CGIA and this Court lacks subject matter jurisdiction over the matter. Further, the Court is *required* to enter an award of the defendant's attorney's fees upon dismissal on this basis, pursuant to both C.R.S. § 24-10-110(5)(a)(c) and C.R.S. §13-17-201.

IV. CONCLUSION

Notwithstanding Plaintiff's failure to follow the pleading requirements of C.R.C.P. 8 and 10, which justifies dismissal in its own right for failure to state a claim upon which relief can be granted, the Court can determine as a matter of law that dismissal is required under C.R.C.P. 12(b)(1) that it lacks subject matter jurisdiction to hear Plaintiff's tort claims against Defendant Beals.

[5] It should be noted that page 5 of Plaintiff's Complaint refers to "willful and wanton conduct" in the context of attempting to discuss some of the legal definitions of the term, but nowhere in the body of the twenty-seven page Complaint does she even actually allege that Noah Beals acted willfully and wantonly, let alone allege a sufficient factual basis for a finding that he acted with conscious disregard for her safety or the safety of others.

WHEREFORE, Defendant Beals respectfully requests the Court to dismiss with prejudice all of Plaintiff's tort claims against him and award him his reasonable attorney's fees for defense of this action. Defendant Beals can submit an affidavit of attorney's fees incurred in defense of this action within 15 days of any order granting the dismissal with prejudice and awarding his fees.

Respectfully submitted this 11th day of January, 2019.

WICK & TRAUTWEIN, LLC

By: *s/Kimberly B. Schutt*
Kimberly B. Schutt, #25947
Attorneys for Defendant Beals

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT BEALS' MOTION TO DISMISS AND REQUEST FOR ATTORNEY'S FEES** was filed via the Colorado Courts E-Filing System and served this 11th day of January, 2019, on the following:

Stacy Lynne
305 W. Magnolia Street #282
Fort Collins, CO 80521

A courtesy copy was also emailed to Ms. Lynne at *stacy_lynne@comcast.net*

Theresa Corrada
BENEZRA & CULVER, P.C.
633 17th Street, Suite 1450
Denver, CO 80202

s/ Jody L. Minch

[This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by defense counsel is on file at the offices of Wick & Trautwein, LLC]