

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO Larimer County Justice Center 201 LaPorte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 970-494-3500	
Plaintiff: STACY LYNNE, v. Defendants: NOAH BEALS and JEREMY CALL.	▲ COURT USE ONLY ▲ Case Number: 2018 CV 220 Courtroom: 3C
ORDER GRANTING DEFENDANT NOAH BEALS' MOTION TO DISMISS AND REQUEST FOR ATTORNEY'S FEES	

THIS MATTER is before the court on Defendant Noah Beal's Motion to Dismiss for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). The Court has reviewed the motion, response and reply. After careful consideration, the Court finds and orders as follows:

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, Stacy Lynne, is an investigative journalist who resides in Fort Collins, Colorado. Defendant, Noah Beals, is an employee of the City of Fort Collins. Plaintiff alleges that she attended public meetings on February 1, 2018 and February 7, 2018, during which potential sign code updates for downtown Fort Collins were discussed. After the meetings, Plaintiff went to various businesses in the downtown area and informed them of the information

provided at the meetings by the two named defendants in this case. Plaintiff also told business owners that “votes” had been taken at the meeting. On February 15, 2018, at a Downtown Business Association meeting, Plaintiff alleges that Defendant Noah Beals told those in attendance that no “votes” were taken at the sign code update meetings. Plaintiff asserts that Mr. Beals statement that no “votes” were taken at the meetings was defamatory.

Plaintiff filed her Complaint on December 4, 2018, asserting a claim for defamation against Defendant Beals.¹ Defendant filed a motion to dismiss for lack of subject matter jurisdiction and a request for attorney’s fees on January 11, 2019. Defendant argues that Plaintiff’s claims are barred by Colorado Governmental Immunity Act (“CGIA”) and should be dismissed under C.R.C.P. Rule 12(b)(1) for lack of subject matter jurisdiction. Defendant further suggests that Plaintiff’s Complaint should be dismissed under C.R.C.P. Rule 12(b)(5) as Plaintiff’s Complaint fails to allege the required elements for defamation against Defendant Beals.² Plaintiff objected to Defendant’s motion on January 25, 2019. On February 1, 2019, Defendant filed a reply.

LEGAL STANDARD

Under the CGIA, a public employee is “immune from liability in any claim for injury...which lies in tort...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.” C.R.S. § 24-10-118(2)(a) (emphasis added). When a governmental entity or employee raises the defense of immunity under the

¹ Plaintiff’s Complaint also purports to reference claims for intentional infliction of emotional distress and outrageous conduct, though Plaintiff has not alleged the elements of each of those causes of action. Both of these claims would be considered tort claims subject to the qualified immunity afforded to Defendant under the CGIA.

² The Court does not address Defendant’s argument that Plaintiff’s claims should be dismissed under C.R.C.P. Rule 12(b)(5) insofar as that issue is not presently before the Court.

CGIA, the district court must make factual findings to ensure that the court has jurisdiction to hear the case. *City and County of Denver v. Dennis*, 418 P.3d 489, 494 (Colo. 2018). When a plaintiff sues a governmental entity or employee and that entity or employee moves to dismiss for lack of jurisdiction, the plaintiff has the burden of proving jurisdiction. *Id.* Plaintiff is afforded the reasonable inferences from her undisputed evidence. *Id.*

In any action where allegations are made that the public employees' acts or omissions were willful and wanton, the specific factual basis of such allegations shall be stated in the complaint. *Gray v. University of Colorado Hosp. Authority*, 284 P.3d 191, 198 (Colo. App. 2012). Conclusory allegations are insufficient. *Id.* C.R.S. § 24-10-110(5) provides, in relevant part:

(a) In any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint.

(b) Failure to plead the factual basis of an allegation that an act or omission of a public employee was willful and wanton shall result in dismissal of the claim for failure to state a claim upon which relief can be granted.

Under the CGIA, waivers of immunity for acts or omissions that are “willful and wanton” only apply to public employees, not to public entities. *Gray* at 196. The phrase “willful and wanton” is not defined in the CGIA. However, a number of courts to address the issue have applied the definition set forth in Colorado's exemplary damages statute, C.R.S. § 13-21-102. The statute defines willful and wanton conduct as “conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.” *Id.*; see *Moody v. Ungerer*, 885 P.2d 200, 205 (Colo. 1994); see also *Navratil v. Parker*, 726 F.Supp. 800, 805 (D. Colo. 1989) (applying Colorado law, district court held that defendant would only be liable for willful and wanton conduct if he acted with the intent to injure, or in conscious disregard of the

probability that his acts would result in injury to the plaintiff). At a minimum, the complaint must allege “specific facts to support a reasonable inference that the employee was acting with a conscious disregard of the probability that the employee’s acts would result in injury to the plaintiff.

DISCUSSION

1. Request for Evidentiary Hearing

When alleged jurisdictional facts are in dispute, the trial court should hold an evidentiary hearing; when there is no evidentiary dispute, the trial court may rule without a hearing. *Tidwell ex rel. Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003); *Lyons v. City of Aurora*, 987 P.2d 900, 902 (Colo. App. 1999) (may hold hearing on fact if existence of subject matter jurisdiction may turn on that fact).

Plaintiff requests an evidentiary hearing before a ruling on Defendant’s motion to dismiss. Based on the evidence before the Court, the Court finds that there is no factual dispute, only a dispute as to whether Plaintiff sufficiently pled facts to establish subject matter jurisdiction. Therefore, the Court declines to hold an evidentiary hearing.

2. Subject Matter Jurisdiction

Governmental immunity can be waived as set forth in C.R.S. § 24-10-106(1) or by the plaintiff sufficiently alleging the government employee’s acts were willful and wanton. In this case, none of the waiver provisions in C.R.S. § 24-10-106(1) are applicable, and neither party argues otherwise. Therefore, this Court does not have subject matter jurisdiction under the CGIA unless Defendant Beals’ actions were willful and wanton and Plaintiff has adequately alleged in the Complaint the factual basis to support a claim that the speaker’s words were spoken with a conscious disregard of the probability that the words would result in injury to

Plaintiff. C.R.S. § 24-10-118(2)(a). The burden is on Plaintiff to prove jurisdiction. *See Dennis* at 494.

In reviewing Plaintiff's Complaint, the Court has carefully scoured the pleading to determine if Plaintiff has met the pleading requirements set forth in the caselaw and as required under C.R.S. § 24-10-110(5). Plaintiff alleges the following on page 20 of her Complaint:

Noah Beals knew when he told a large group of business owners that no votes were taken at the February 1, 2018 public meeting on the downtown sign code update that he was lying. Noah Beals intentionally lied about Stacy Lynne to cover up his own mistakes. And he broadcast those lies to numerous third parties.

Based upon a review of Plaintiff's Complaint, Plaintiff does not specifically allege in her Complaint that the actions of Defendant Beals were willful or wanton.³ Moreover, Plaintiff's Complaint does not allege specific facts to support a conclusion that Beals' actions were willful and wanton. Indeed, the language set forth above alleges that Beals made the allegedly defamatory statements "to cover up his own mistakes." This does not meet the pleading requirements of the CGIA which requires that Plaintiff allege specific facts to support a reasonable inference that the employee was consciously aware or was acting with a conscious disregard of the probability that the employee's acts would result in injury to Plaintiff. C.R.S. § 24-10-110(5); *L.J. v. Carricato*, 413 P.3d 1280, 1288 (Colo. App. 2018).

Based on the evidence before the Court, the Court finds that Plaintiff's allegations do not sufficiently allege willful and wanton conduct. Because Plaintiff has not met the minimum pleading requirement, the Court finds that it does not have subject matter jurisdiction over Plaintiff's claim. Therefore, the Court grants Defendant's motion to dismiss for lack of subject

³ Plaintiff does set forth in her Complaint case law as to what "willful and wanton" conduct encompasses, but never alleges in the Complaint that Beals' actions were willful and wanton.

matter jurisdiction because Plaintiff has not sufficiently pled that Defendant's actions were willful and wanton. Plaintiff's claims are therefore dismissed, without prejudice.⁴

Further, in a defamation case involving a matter of public concern or pertaining to a public official, or public figure, a Plaintiff must allege that the defamatory statement was published with actual malice—that is, that the statement is made with the knowledge that the statement is false or with reckless disregard for whether the statement is true. *McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008). Proof that a Defendant makes a negligent statement is insufficient to set forth a valid claim. *Id.* Here, Plaintiff fails to allege in her Complaint that Defendant Beals statements were made with actual malice.

3. Request for Attorney's Fees

When a tort action is dismissed on defendant's motion prior to trial under C.R.C.P. Rule 12(b), the defendant shall have judgement for his reasonable attorney fees in defending the action. C.R.S. § 13-17-201. Additionally, in an action brought under the CGIA based on allegations that an act or omission of a public employee was willful and wanton, if the plaintiff does not substantially prevail on that claim, the court shall award attorney fees against the plaintiff in favor of the public employee. C.R.S. § 24-10-110(5)(a)(c).

Based on the dismissal of Plaintiff's claims, Defendant is entitled to recovery of its reasonable attorney's fees under both C.R.S. § 13-17-201 and 24-10-110(5)(a)(c).

⁴ The Court is further concerned as to whether the alleged statement made by Defendant Beals is defamatory at all. In Colorado, the elements of a cause of action for defamation are (1) a defamatory statement concerning another; (2) published to a third party; (3) with actual malice (if relating to a matter of public concern); and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication. *McIntyre* at 523. Here, the alleged defamatory statement made by Beals is not "concerning another." Because the Court has determined that the matter must be dismissed under C.R.C.P. Rule 12(b)(1), the Court does not address this issue.

ORDER

Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Plaintiff's Complaint is dismissed, without prejudice. Because the Court has dismissed the matter pursuant to C.R.C.P. Rule 12(b)(1), Plaintiff is ordered to pay Defendant's reasonable attorney's fees. Defendant shall submit an affidavit of attorney's fees incurred in defense of this action within fifteen (15) days of the date of this Order. Plaintiff may file a response to the request for attorney's fees within fourteen (14) days of the filing of Defendant's request.

SO ORDERED: April 3, 2019.



BY THE COURT:

Stephen J. Jouard
District Court Judge