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, CITY OF FORT COLLINS**	DATE FILED: April 7, 2020 5:03 PM FILING ID: 8C4B59A0A54C4 CASE NUMBER: 2020CV115 COURT USE ONLY
Andrew W. Callahan, #52421 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: acallahan@wicklaw.com	Case Number: 2020 CV 115 Courtroom: 3B

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

COMES NOW, Defendant Noah Beals, by and through his counsel, Wick & Trautwein, LLC, and for his Motion to Dismiss Plaintiff's Amended Complaint, states as follows:

Introduction

Defendant Noah Beals is an employee of the City of Fort Collins (the "City"). This lawsuit arises out of allegations that Defendant Noah Beals defamed Plaintiff Stacy Lynne in a series of communications with local business owners. This is the second time Plaintiff has brought these claims against Mr. Beals in Larimer County District Court. The first case (2018 CV 220) was dismissed for lack of subject matter jurisdiction by the Honorable Stephen J. Jouard on April 3, 2019, under the doctrine of sovereign immunity. In this new lawsuit, Plaintiff brings identical claims arising out of the same allegedly defamatory statements made by Mr. Beals. The result should likewise be the same, and this matter should be dismissed.

Dismissal of this case is appropriate for three reasons. First, Plaintiff should be precluded from bringing this second lawsuit under the doctrine of claim preclusion because this matter has been fully litigated and resolved in favor of Defendant in the first filed case. Second, Plaintiff's claims are *still* barred by the doctrine of governmental immunity as set forth in the Colorado Governmental Immunity Act (CGIA), which required this matter be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Third, this matter should be dismissed pursuant to the one-year statute of limitations for libel and slander because Plaintiff's first lawsuit conclusively demonstrates that Plaintiff's claim for defamation accrued more than one year before filing the instant lawsuit.

Rule 121 Certification: Undersigned counsel conferred with Plaintiff via email regarding this motion to dismiss. Plaintiff opposes the motion.

Factual Background

The following facts are taken from Plaintiff's Amended Complaint. Mr. Beals is an employee of the City, who conducted public meetings related to a municipal code revision. ¶ 12. During a meeting on February 1, 2018, Beals provided electronic "clickers" which recorded the audience's reactions to the various proposals, with the intent to report the results to the Fort Collins City Council. ¶¶17, 22. Plaintiff attended this meeting and then contacted various businesses to inform them that code revision meetings had occurred and that voting had taken place. ¶ 15. In response to inquiries from various businesses, Mr. Beals stated that "no votes were taken." ¶ 16. In addition, in an email to two members of the Fort Collins Chamber of Commerce, Mr. Beals stated: "There is someone not with the city contacting business owners. We want to be sure any info you get is correct, so please reach out if [you] have any questions." (Complaint, Ex. 2). Plaintiff also references Exhibit 10 as evidence that Mr. Beals told members of the public that

Plaintiff was on a "misinformation campaign." However, Exhibit 10 is actually a text message to Mr. Beals from Jeremy Call, who was a defendant in Plaintiff's first lawsuit regarding these statements. Plaintiff does not identify any other written statements made by Mr. Beals referencing Plaintiff or the meetings at issue.

Procedural History of the First Lawsuit

Plaintiff filed her first lawsuit arising out of the alleged defamatory statements made by Mr. Beals on December 4, 2018, in Larimer County. *See Stacy Lynne v. Noah Beals and Jeremy Call*, 2018 CV 220. Mr. Call settled with Plaintiff and was dismissed. Mr. Beals filed a motion to dismiss for lack of subject matter jurisdiction on basis that Mr. Beals was immune as a public employee under the CGIA, C.R.S. §24-10-118(2)(a). After the matter was fully briefed, Judge Stephen Jouard entered an Order on April 3, 2019, granting Mr. Beals' motion and dismissing the claim for lack of subject matter jurisdiction. A copy of that Order is attached hereto as Exhibit 1.[1] Plaintiff initially filed a notice of appeal, but subsequently filed a motion to dismiss her appeal. On December 19, 2019, the Court of Appeals granted Plaintiff's motion and dismissed the appeal with prejudice. *See* 2019 CA 1346.

ARGUMENT

I. Plaintiff's claim should be dismissed under the doctrine of claim preclusion.

Claim preclusion is the doctrine that prevents parties from perpetually relitigating the same conflict in multiple subsequent lawsuits. "The goal of the doctrine is to promote judicial economy by barring a claim litigated in a prior proceeding from being litigated again in a second proceeding." *Foster v. Plock*, 394 P.3d 1119, 1122 (Colo. 2017). "[C]laim preclusion bars a claim

[1] The Court's Order is attached hereto for convenience. "It is clearly both convenient and permissible for courts to recognize their own records, often in the same or related cases, as establishing that various proceedings or actions have already taken place". *Doyle v. People*, 343 P.3d 961, 965 (Colo. 2015)

in a current proceeding if four elements are met: (1) the judgment in the prior proceeding was final; (2) the prior and current proceeding involved identical subject matter; (3) the prior and current proceeding involved identical claims for relief; and (4) the parties to both proceedings were identical or in privity with one another. *Id.* "The best and most accurate test as to whether a former judgment is a bar in subsequent proceedings ... is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form." *Id.* at 1127, *quoting Farmers High Line Canal and Reservoir Co. v. City of Gold*en, 975 P.2d 189, 203 (Colo. 1999). "Thus, identity of subject matter can be evaluated by determining whether the same evidence would be used to prove the claims, even if the actions are different." *Id.*

Here, the identities of the parties are identical, as the first lawsuit was between Plaintiff and Defendant. Moreover, the subject matter is identical. In her first lawsuit, Plaintiff asserted a claim for defamation against Mr. Beals arising out of the exact same statements Mr. Beals allegedly made about "votes" taken at the public meetings. (*See* Order, Exhibit 1). The only question remaining is whether Judge Jouard's Order dismissing the case for lack of subject matter jurisdiction under the CGIA is a final judgment satisfying the first element.

The Court's order dismissing Plaintiff's first case under the CGIA was a final judgment because C.R.S. Section 24-10-118(2.5) provides that when a public employee raises by motion the issue of sovereign immunity, the trial court is to decide the issue and the court's decision "shall be a final judgment" subject to an interlocutory appeal, which appeal the Plaintiff initially pursued, but later voluntarily dismissed. *Martinez v. Estate of Bleck*, 379 P.3d 315, 322 (Colo. 2016) ("trial courts must resolve all issues pertaining to sovereign immunity prior to trial, including factual issues, regardless of whether those issues pertain to jurisdiction.") Thus, the CGIA clearly intends

for a trial court's determination on the issue of sovereign immunity to be an issue fully litigated on the merits and a final judgment, subject only to appeal.

In ruling on Mr. Beals's motion to dismiss the Plaintiff's defamation claim in the first case on the basis of sovereign immunity under the CGIA, Judge Jouard provided the following analysis:

> 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 5 Plaintiff. C.R.S. § 24-10-118(2)(a). The burden is on Plaintiff to prove jurisdiction. [Cite omitted].
>
> . . . .
>
> 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 matter jurisdiction because Plaintiff has not sufficiently pled that Defendant's actions were willful and wanton. Plaintiff's claims are therefore dismissed, without prejudice.

The Court clearly followed C.R.S. Section 24-10-118(2.5) in the first case by fully considering and deciding the sovereign immunity issue. Plaintiff could have requested leave to file an amended complaint since the Court dismissed her claim without prejudice, but she did not. Instead, she chose to file an appeal. On her own motion, that appeal was then dismissed with prejudice. (*See* Mandate, 2019 CA 1346).

Plaintiff has therefore already had a full and fair chance to litigate the merits of her claim against Mr. Beals. She should not be provided a second bite at the apple. This Court is entitled to take judicial notice of the prior proceedings, and the fact that Plaintiff's first lawsuit was dismissed on the merits. Defendant therefore moves pursuant to Rule 12(b)(5) for this court to enter an Order dismissing the case with prejudice pursuant to the doctrine of claim preclusion.

II. Plaintiff's claim should be dismissed pursuant to Rule 12(b)(1) because her new Amended Complaint still fails to allege a factual basis that Mr. Beal's actions were willful and wanton.

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:

> 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, C.R.S. 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 it 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).

Plaintiff alleges that Mr. Beals is a public employee (which he does not dispute), and she alleges a claim for defamation that is undisputedly considered a tort under common law. *See, Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). Thus, Plaintiff's Amended Complaint must be dismissed unless she has alleged a specific factual basis for a finding of willful and wanton conduct, as required under C.R.S. §§ 24-10-110(5)(a) and 24-10-118(2)(a).

A complaint cannot merely assert that a public employee's acts or omissions were willful and wanton. *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).

In *Martinez v. Estate of Bleck*, the Colorado Supreme Court reviewed three different definitions of willful and wanton conduct. 379 P.3d 315, 322-23 (Colo. 2016). The Court declined to choose a single definition, but reasoned that they all share a common feature - a conscious disregard of danger to others. *Id.* at 323. "Willful and wanton conduct is not merely negligent; instead, it must exhibit a conscious disregard for the danger." *Id.*

The Supreme Court's articulation of this test contemplates a public employee's conscious disregard for danger or risk to one's health or safety, not the type of harm to reputation caused by an alleged defamation. This is consistent with the exceptions to immunity for a public entity found in C.R.S. §24-10-106(1), all of which embody some act by a public entity or employee that creates

a danger or risk to a person's health or safety.[2] This interpretation is also consistent with the definition of "dangerous condition" found in C.R.S. §24-10-103(1.3), which defines it to mean "either a physical condition of a facility or the use thereof that constitutes an *unreasonable risk to the health or safety of the public*…" [Emphasis added].

Here, in order to carry her burden of demonstrating subject matter jurisdiction, Plaintiff must allege that Mr. Beals made defamatory statements about Plaintiff, *and* that Mr. Beals knew his statements were false, knew that those statements created a danger or risk to the health or safety of others, and consciously disregarded that risk. Plaintiff's allegations do not meet that high burden.

Plaintiff states that "Exhibit 1 sets forth specific facts to support a reasonable inference that Noah Beals was consciously aware that his actions (knowing false statements to third parties) created risk to Stacy Lynne." (Am. Complaint, ¶16(a)). Exhibit 1 is a picture of the meeting where the alleged votes took place. It contains no statements by Mr. Beals. The only actual statements by Mr. Beals identified in the Amended Complaint are (1) an allegation that Mr. Beals told business members that no votes were taken at the meeting (¶15), and; (2) an email by Mr. Beals attached as Exhibit 2. The email states: "There is someone not with the city contacting business owners. We want to be sure any info you get is correct, so please reach out if [you] have any questions." Plaintiff repeatedly invokes the phrase "misinformation campaign," but then goes on to allege that it was Jeremy Call, not Noah Beals, that accused Plaintiff of engaging in a misinformation campaign. ¶ 22.

Plaintiff does not identify any statements made by Mr. Beals directly about Plaintiff. Nor

[2] For example, operation of a motor vehicle, a dangerous condition of a public building, a dangerous condition caused by accumulation of snow and ice, etc. C.R.S. §24-10-106.

does she identify any statements by Mr. Beals in which he asserts to others that Plaintiff is lying. The only statements she identifies from Mr. Beals appear to be about whether or not "votes" were taken at a public meeting. Plaintiff does not allege that Mr. Beals was aware that that by stating no "votes" occurred at the meeting, he was creating a danger or risk to the safety of Plaintiff and consciously disregarded that risk.

The Court may resolve this issue as a matter of law on the pleadings given Plaintiff's inability to allege sufficient facts to sustain a claim of willful and wanton conduct under the applicable standard. The Court is not required to hold an evidentiary hearing or allow discovery where, as here, there are no facts in dispute as to jurisdiction that warrants such proceedings. *Finnie v. Jefferson County Sch. Dist. R-1,* 79 P.3d 1253, 1260 (Colo. 2003); *Tidwell v. City and County of Denver*, 83 P.3d 75, 86 (Colo. 2003). Plaintiff has not met her burden of demonstrating willful and wanton conduct, and the Amended Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

III. Plaintiff's Amended Complaint is barred by the one-year statute of limitations set forth in C.R.S. §13-80-103.

C.R.S. §13-80-103 states in relevant part: "The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced *within one year after the cause of action accrues,* and not thereafter: (a) The following tort actions:… libel, and slander." (emphasis added). Moreover, "a claim for relief based upon injury to reputation is now considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." *Taylor v. Goldsmith*, 870 P.2d 1264, 1265 (Colo. App. 1994), *citing* C.R.S. §13–80–108(1).

Plaintiff filed her first lawsuit alleging defamation against Mr. Beals on December 4, 2018.

See 2018 CV 220. Thus, it is conclusively established that she was aware of the alleged injury to her reputation by that date. She filed the instant lawsuit on February 14, 2020. More than one year has passed since she filed the first lawsuit. This Court may take judicial notice of the date on which the prior lawsuit was filed. "It is clearly both convenient and permissible for courts to recognize their own records, often in the same or related cases, as establishing that various proceedings or actions have already taken place". *Doyle v. People,* 343 P.3d 961, 965 (Colo. 2015). It is therefore appropriate to dismiss this lawsuit pursuant to Rule 12(b)(5) based on the applicable statute of limitations.

CONCLUSION

WHEREFORE, Defendant Noah Beals respectfully requests that this Court enter an order dismissing Plaintiff's Amended Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction under the CGIA, or in the alternative, pursuant to Rule 12(b)(5) under the doctrine of claim preclusion and for failure to commence this action within the applicable statute of limitations. Defendant further requests that he be awarded his reasonable attorney's fees for defense of this action pursuant to both C.R.S. § 24-10-110(5)(a)(c) and C.R.S. §13-17-201. 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 7th day of April, 2020.

WICK & TRAUTWEIN, LLC

By: *s/Andrew W. Callahan*
Andrew W. Callahan, #52421
Attorneys for Defendants

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** was filed via the Colorado Courts E-Filing System and served this 7th day of April, 2020, on the following:

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

Served via email to stacy_lynne@comcast.net & U.S. Mail.

s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file at Wick & Trautwein, LLC)