DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-2500 **Plaintiff: STACY LYNNE** **v.** **Defendants: NOAH BEALS, and CITY OF FORT COLLINS**	DATE FILED: May 5, 2020 9:39 AM CASE NUMBER: 2020CV115 COURT USE ONLY
	Case Number: 2020 CV 115 Courtroom: 3B

ORDER GRANTING DEFENDANT BEALS' MOTION TO DISMISS AMENDED COMPLAINT

Defendant Noah Beals moves to dismiss under Colo. R. Civ. P. 12(b)(1) and (b)(5) the Amended Complaint filed by Stacy Lynne. Under Colo. R. Civ. P. 121, § 1-15(1)(b), Lynne had 21 days to file a response to the motion, but she failed to do so. Accordingly, the Court deems the motion to be confessed, but still addresses Beals' arguments. Colo. R. Civ. P. 121, § 1-15(3). For the reasons set forth below, the motion is granted and Lynne's defamation claim against Lynne is dismissed.[1]

This lawsuit arises out of allegations that Beals, a Fort Collins employee, defamed Lynne in a series of communications with local business owners. This is Lynne's second action arising out of the same events. In the first case, 2018 CV 220, this Court dismissed her claims for lack of subject-matter jurisdiction. Lynne appealed that case but voluntarily dismissed the appeal, which the Court of Appeals granted, dismissing it with prejudice. *See* 2019 CA 1346. Accordingly, the judgment in

[1] The claims against the City of Fort Collins, which also filed a motion to dismiss, still remain because its motion isn't ripe.

2018 CV 220 is final. Undeterred by that outcome, Lynne has again asserted identical claims arising out of the same transaction or occurrence.

I. RELEVANT FACTUAL ALLEGATIONS.

The following facts are taken from the Amended Complaint. As part of his work for Fort Collins, Beals conducted public meetings related to a municipal code revision. *Id.* ¶ 12. During a meeting on February 1, 2018, Beals provided electronic clickers that which recorded the audience's reactions to the various proposals, with the intent to report the results to the Fort Collins City Council. *Id.* ¶¶ 17, 22. Lynne, who was present at the meeting, then contacted local businesses to inform them that code revision meetings had occurred and that voting had taken place. *Id.* ¶ 15.

In response to inquiries from local businesses, Beals stated that "no votes were taken." *Id.* ¶ 16. Beals also sent an email to two members of the Fort Collins Chamber of Commerce, stating: "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." *Id.*, Ex. 2. While Lynne attaches multiple exhibits to her amended complaint and asserts that they contain additional defamatory statements that Beals made, the exhibits don't support her assertions.

II. DISCUSSION.

Beals and Fort Collins seek dismissal of the amended complaint on three grounds. Each is discussed in turn.

A. Claim preclusion bars Lynne's new lawsuit against Beals.

Initially, Beals seeks dismissal of this action under the doctrine of claim preclusion under Colo. R. Civ. P. 12(b)(5). A complaint may be dismissed for failing to state a plausible claim under Colo. R. Civ. P. 12(b)(5). In ruling on a motion to dismiss, the Court accepts "all allegations in the complaint as true, and [it] view[s] them in the light most favorable to the non-moving party." *N.M. by and through Lopez v. Trujillo*, 397 P.3d 370, 373 (Colo. 2017). While the Court generally may not

consider any information or facts outside the pleadings, it "may consider documents referenced in a complaint … without converting a motion to dismiss into a motion for summary judgment." *City of Aurora v. 1405 Hotel, LLC*, 371 P.3d 794, 799–800 (Colo. App. 2016) (citing *Allen v. Steele,* 252 P.3d 476, 481 (Colo. 2011); *Walker v. Van Laningham,* 148 P.3d 391, 397 (Colo. App. 2006)). And, if the complaint refers to a document and that document is central to the plaintiff's claims, the Court may consider that document in ruling on a motion to dismiss. *Van Laningham*, 148 P.3d at 397 (citations omitted).

Further, the Court must determine whether the claim is plausible on its face under the standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Warne v. Hall*, 373 P.3d 588, 590 (Colo. 2016). Under *Iqbal*, while the Court accepts as true well-pleaded factual allegations, it doesn't accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." 556 U.S. at 678. And if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Indeed, allegations of conduct that's consistent with unlawful conduct but that may be "compatible with," or "more likely explained by, lawful" conduct don't "nudge" a claim from the conceivable to the plausible and must be dismissed. *Id.* at 680.

The doctrine of claim preclusion prevents parties from relitigating the same claim in later actions. "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 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 Golde*n, 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 doctrine of claim preclusion bars Lynne's present action against Beals because all elements are met. First, the identities of the parties in this action and 2018 CV 220 are identical: Lynne sued Beals there, as she's done here. Second, the two lawsuits' subject matter and claims are identical. In her first lawsuit, Lynne asserted a claim for defamation against Beals arising out of the same transaction and occurrence: Beals' statements arising from a February 2018 public meeting dealing with a municipal code revision. Lynne has, again, asserted a single defamation claim against Beals based on the same events.

Third, the Order of dismissal in 2018 CV 220 is a final judgment. As Beals correctly notes, Judge Jouard's order dismissing Lynne's earlier action dismissed her defamation claim under the CGIA, on the ground of sovereign immunity. And the CGIA provides that when a public employee raises by motion the issue of sovereign immunity, the court's decision "shall be a final judgment." Colo. Rev. Stat. § 24-10-118(2.5). The Court was indeed obligated to adjudicate that issue promptly. *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."). While Lynne appealed the adverse final judgment, she later dismissed with prejudice her appeal.

Accordingly, Lynne had an opportunity to litigate the merits of her claim against Beals. Beals' motion is granted and her defamation claim is dismissed with prejudice under the doctrine of claim preclusion.

B. Lynne's defamation claim is barred under the CGIA.

In the alternative, Beals contends that Lynne's claim is barred by the CGIA. As such, he asserts a sovereign-immunity defense. Under Colo. R. Civ. P. 12(b)(1), "the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings." *Medina v. State*, 35 P.3d at 452 (internal citations omitted). "A trial court may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion." *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). Moreover, the court need not treat the facts alleged by the non-moving party as true as it would under 12(b)(5). *Id.* Rather, 12(b)(1) "permits the court to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (internal quotations omitted). "Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve." *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924–25 (Colo. 1993).

Under 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 there. Colo. Rev. Stat. § 24-10-106(1). The immunity also extends to an employee of a public entity. *See id.* § 24-10-118.

So, a public employee acting within the scope of his employment is immune from liability for any claim or injury under a tort theory, unless his actions were willful and wanton:

> 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).

Id. § 24-10-118(2)(a). When a public employee raises the defense of sovereign immunity, the Court is obliged to address the issue. *Id.* § 24-10-118(2.5) (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.").

Lynne alleges that Beals, a public employee, engaged in willful and wanton actions, making him liable for defamation, a tort under common law. *See, Keohane v. Stewart,* 882 P.2d 1293, 1297 (Colo. 1994). Under the CGIA, 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.*

In *Martinez v. Estate of Bleck*, 379 P.3d 315, 322-23 (Colo. 2016), the Supreme Court observed that "willful and wanton conduct" means acting with 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.*

Here, Lynne's allegations fail to establish that Beals made allegedly defamatory statements about her. Nor do the allegations establish that he made them, knowing that his statements were false or that they created a danger or risk to the health or safety of others, and consciously disregarded that risk. Lynne alleges 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 Lynnee." Am. Compl. ¶ 16(a). But that exhibit is a photograph of the meeting where the alleged false statements were made, but, as a frozen image, there aren't any statements by Beals. And Beals' statements and his email to others aren't defamatory or demonstrate

that he made those statements willfully and wantonly. Ex. 2. More importantly, there aren't any statements that Beals made about Lynne. Accordingly, Lynne failed to meet her burden of pleading, and the Amended Complaint will be dismissed for lack of subject-matter jurisdiction.

C. Lynne's claim is barred by the one-year statute of limitations.

As an additional alternative ground, Beals seeks dismissal of the defamation claim because it's time-barred. In Colorado, defamation claims are subject to a one-year limitations period: "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). Colo. Rev. Stat. § 13-80-103(1)(a).

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).

Even if Lynne's defamation claim survived claim preclusion and sovereign immunity, it doesn't survive the limitations period. Her claim is untimely. It's undisputed that Lynne filed her first lawsuit alleging defamation against Mr. Beals on December 4, 2018. *See* 2018 CV 220. By that date, her claim had accrued because she knew of the alleged defamatory statements. Yet, she filed this action on February 14, 2020, more than one year after the claim accrued. This Court may take judicial notice of the date on which the prior lawsuit was filed. Accordingly, Lynne's claim is time-barred.

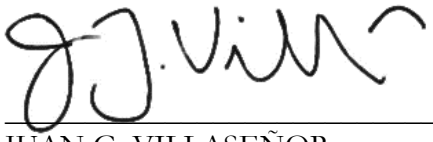
III. CONCLUSION.

For the reasons set forth above, Beals' motion to dismiss is granted. Her Amended Complaint is dismissed without prejudice for lack of subject-matter jurisdiction under the CGIA. In the alternative, the motion is also granted and her Amended Complaint is dismissed with prejudice under the doctrine of claim preclusion and because her claim is time-barred. At the conclusion of

the case, the Clerk is directed to enter judgment consistent with this Order. If Beals seeks attorney's fees, he must file such a request *after* the entry of final judgment. Colo. R. Civ. P. 121, § 1-22(1).

SO ORDERED this 5th day of May, 2020.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge