

DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Ft Collins, CO 80521 (970) 498-6100		DATE FILED: October 16, 2017 3:32 PM FILING ID: 540B7D78623B3 CASE NUMBER: 2017CV208
Plaintiff: CAROLINE STEINBRECHER v. Defendant: LARIMER COUNTY CORONER, JAMES WILKERSON, DETECTIVE HENRY STUCKY, PPD		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 No: 2017 CV 208 Courtroom: 5A
MOTION TO DISMISS AMENDED COMPLAINT		

COMES NOW Defendant Henry Stucky, by and through his attorneys, WICK & TRAUTWEIN, LLC, and pursuant to C.R.C.P. 12(b), respectfully moves the Court to dismiss this action against him. In support hereof, this Defendant states as follows:

I. INTRODUCTION

Plaintiff Caroline Steinbrecher, pro se, served on Loveland Police detective Henry Stucky [“Stucky”] an Amended Complaint naming him as a defendant in a civil action, along with Larimer County Coroner James Wilkerson. The Amended Complaint consists of seven pages of stream-of-consciousness, hand-written assertions relating to alleged actions and omissions in the investigation of the pharmaceutical overdose death of the Plaintiff’s young son. However, the Amended Complaint has no reasonably discernable causes of action or description of the legal remedy being sought.

As discussed further below, and as is supported by ample legal authority, this Court must dismiss the Plaintiff's Complaint pursuant to C.R.C.P. 12(b), both for failure to state a claim upon which relief can be granted, and also on jurisdictional grounds under the Colorado Governmental Immunity Act ["CGIA"], C.R.S. §24-10-101, et seq.

II. THE AMENDED COMPLAINT

The Amended Complaint, which is titled, "Amended Complaint for Summons- Failure to comply and failure to fulfill their duties," contains a seven-page narrative of the plaintiff's apparent grievances with the forensic and police investigation following her son's death on June 8, 2016. The first several pages of the Amended Complaint focus on Plaintiff's alleged demands to the Larimer County Coroner's office for release of tissue samples taken from her son, which she claims she has not received. Then, beginning on page 5 of the Amended Complaint, Plaintiff's narrative turns to assertions that Henry Stucky, in his capacity as a detective for the Loveland Police Department, allegedly engaged in a number of acts and omissions during his investigation of her son's death:

- Allegedly calling her and hanging up, not leaving a message;
- suggesting to her that a crime may have been committed in the death of her son;
- Talking to news reporters to say only that "there's an open death investigation" and talking to representatives of the pharmacy under investigation;
- Failing to respond to her hundreds of emails to report to her on the status of the death investigation;

- Keeping a bottle of clonidine in evidence for four months and failing to notice how it was labeled;
- Allegedly ignoring her many complaints and suspicions that the Larimer County Coroner's office was mishandling her son's tissue samples;
- Allegedly refusing to take her complaint against the Larimer County Coroner's office; and
- Allegedly having knowledge that the tissue samples sent for testing were not her son's tissues but that of another corpse.

However, after engaging in this narrative of alleged acts and omissions on the part of Detective Stucky, the Amended Complaint served on this defendant abruptly ends on page seven by simply stating the Plaintiff "wants answers" and wants to know "who are the criminals." Plaintiff fails to articulate any actual legal theories of recovery or even state a demand for the judgment she is seeking. She simply states she has "posted all [her] evidence on www.steinbrechersite.com."

As discussed below, even under the forgiving notice pleading standards of Colorado, the Court must conclude that the Amended Complaint fails to comply with the basic pleading requirements of C.R.C.P. 8 and must be dismissed in the first instance for failure to state a claim upon which relief can be granted. Notwithstanding that basis for dismissal, it is also clear that all of the assertions made about Stucky relate to his work as a police detective for the City of Loveland, invoking the protections of the CGIA. The Court must thus conclude that any claims against Stuckey, to the extent they have even

been properly made, are jurisdictionally barred by the notice requirements and immunity provisions of the CGIA.

III. ARGUMENT

A. Plaintiff's Amended Complaint must be dismissed under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted.

The purpose of a motion under C.R.C.P. 12(b)(5) is to test the formal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo.App. 2007); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996); *Dunlap v. Colorado Springs Cablevision*, 829 P.2d 1286, 1290 (Colo.1992). Though the Court must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff, *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo.App.2004), it must dismiss a complaint which “fails to give defendants notice of the claims asserted.” *Shockley v. Georgetown Valley Water & Sanitation Dist.*, 548 P.2d 928, 929 (1976).

Here, as noted above, the Amended Complaint does not give the defendants fair and sufficient notice of the claims asserted. It fails to even provide the basics required by C.R.C.P. 8, which states in pertinent part that a complaint shall contain the following: “...(1) if the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which the pleader claims to be entitled.” The Amended Complaint clearly provides no demand for judgment or statement of the relief being requested, to the extent the alleged transgressions outlined in the Plaintiff's narrative even form an actionable claim in the first place. There certainly is no legal theory or

basis cited by the Plaintiff to support any relief that is possibly being requested. The defendants are left to guess what that might be, or to consult the cited website outside of the four corners of the complaint, thus defeating even the basis pleading requirements of C.R.C.P. 8.

Accordingly, in the first instance, the Court should dismiss the Complaint pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted.

B. The Plaintiff's complaint against Detective Stucky is barred by the CGIA due to her failure to provide the statutorily-mandated notice of claim.

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. Therefore, to bring a claim against a public entity or one of its employees, the claim must fit within one of the specific areas set out in Section 24-10-106 for which the City's governmental immunity has been waived. Also, prior to bringing a tort claim against a public entity or one of its employees, the CGIA mandates that the claimant file written notice of the claim with the public entity within specified time limits:

“24-10-109. Notice Required - contents - to whom given - limitations. (1) Any person claiming to have suffered an injury by a public entity *or by an employee thereof* while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. *Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.*” [emphasis added].

The purposes of the notice requirement are to permit a public entity to conduct a prompt investigation of the claim, to remedy any dangerous condition, to make adequate fiscal arrangements to meet any financial liability and to prepare a defense to the claim. *Barham v. Scalia*, 928 P.2d 1381, 1385 (Colo.App. 1986). Notice of a suit against a public employee serves these same purposes, as a public entity is statutorily liable for the reasonable costs of the defense and reasonable attorneys fees of the public employee when a claim arises out of injuries sustained from an act or omission of the employee which occurred during the performance of his duties and within the scope of his employment, with certain exceptions. *See* C.R.S. § 24-10-110(1)(a). A public entity is similarly liable for any judgment entered against the public employee. C.R.S. § 24-10-110(1)(b).

As set forth in the statute, compliance with the mandatory notice provisions of the CGIA is a jurisdictional prerequisite to any action brought under the provisions of the Act. *Gallagher v. Bd. of Trs. for Univ. of N. Colo.*, 54 P.3d 386, 391 (Colo.2002); *Wallin v. McCabe*, 293 P.3d 81, 82 (Colo. App. 2011). Therefore, a claim is barred if proper notice is not given within the applicable time period. *Id.*; *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 923 (Colo. 1993). Further, the jurisdictional bar for failure to comply with the foregoing notice requirements applies to public employees who are sued individually. *See* C.R.S. § 24-10-118(1)(a); *Bresciani v. Haragan*, 968 P.2d 153, 156-158 (Colo. App. 1998).

Since the question of whether a plaintiff has complied with the CGIA's notice requirements is one of subject matter jurisdiction, it is governed by C.R.C.P. 12(b)(1). *Trinity Broadcasting*, 848 P.2d at 924. In resolving this question, the trial court is the finder of fact. *Id.*

The issue of notice must be determined before trial by the court, not reserved for determination by the jury at trial. *Id.*

Accordingly, if the public entity or employee raises a defense under the CGIA prior to trial, the trial court is required to determine whether the provisions of the Act apply and whether the court has subject matter jurisdiction over the claim. Moreover, it is important to note that in making this determination, a motion to dismiss for lack of subject matter jurisdiction is *not* treated like a Rule 12(b)(5) motion for failure to state a claim upon which relief can be granted or as a motion for summary judgment. *Id.* at 925. The burden of proving subject matter jurisdiction is on the party bringing the action against the public entity. *Delk v. City of Grand Junction*, 958 P.2d 532, 533 (Colo. App. 1998). Thus, the trial court is *not* to give the non-moving party the benefit of all reasonable doubts. *Trinity Broadcasting, Inc.* 848 P.2d at 925.

Applying this standard here, the Court should conclude that it lacks subject matter jurisdiction over the claims asserted by the Plaintiff against Detective Stucky, due to her failure to provide the mandatory written notice of any claim against this Loveland police officer. In the first instance, she has not alleged such compliance with the mandatory notice requirements, even though it is her burden to prove jurisdiction as noted above. Notwithstanding the lack of evidence of compliance on the face of the Amended Complaint, the Affidavit of Jason Smitherman, the Risk Manager for the City of Loveland, establishes that Plaintiff at no time has submitted written notice of any legal claim against Detective Stucky to the City that would comply with the statutory requirements of C.R.S. §24-10-109. *See, Exhibit A.*

Accordingly, notwithstanding the extensive shortcomings of the Amended Complaint under C.R.C.P. 12(b)(5), the Court is required to dismiss any claim against Detective Stucky as a matter of law, pursuant to C.R.C.P. 12(b)(1), based upon the jurisdictional bar of the CGIA.

C. The Amended Complaint is also jurisdictionally barred under the CGIA based on the immunity extended to Detective Stucky's alleged actions and omissions in investigating the death of Plaintiff's son.

Notwithstanding the grounds for dismissal discussed above, the Amended Complaint must also be dismissed on immunity grounds. While the Amended Complaint fails to sufficiently articulate a legal basis for the plaintiff's claims or state an actual demand for judgment, Plaintiff's litany of alleged actions or omissions on the part of Detective Stucky sound in tort. As noted above, the CGIA provides that a public employee is immune for liability for all claims that lie in tort or could lie in tort which arise out of injuries sustained from an act or omission of such employee which occurred during the performance of the employee's duties and within the scope of the employee's employment with the public entity. Sections 24-10-102, 24-10-105, and 24-10-118, C.R.S.; *Yonker By and Through Helstrom v. Thompson*, 939 P.2d 530, 534 (Colo. App. 1997). A public employee's immunity is waived for any claim that falls within one of six limited areas listed in §24-10-106, or for any act of the public employee that is willful and wanton. *Id.* Where, as here, the essence of the plaintiff's allegations are that a public employee was negligent in the performance of his discretionary duties, and it fails to fall within one of the limited areas for which immunity is waived, the court must conclude that the complaint is barred by the CGIA and it is properly dismissed. *Id.*; *see, also, Howard v. City and County of Denver*, 837 P.2d 255, 257-58 (Colo. App. 1992) (affirming dismissal of complaint against sheriff's department and manager of safety in performing criminal history investigation,

making bond recommendation and failing to serve warrants, where alleged actions and omissions of public employees were immune from liability under CGIA); *Moody v. Ungerer*, 885 P.2d 200, 205 (Colo. 1994) (state trooper's decision to end a traffic stop of a vehicle impeding traffic and following the vehicle to its destination rather than issuing the driver a citation was not willful and wanton conduct as a matter of law, and thus officer was immune from suit and complaint properly dismissed).

Therefore, notwithstanding the lack of the mandatory notice of claim under the CGIA, the Amended Complaint must also be dismissed under the CGIA on the grounds that the claims which appear to lie in tort – or could lie in tort -- are barred by the statutory immunity provided to Detective Stucky.

IV. CONCLUSION

Dismissal of the Plaintiff's Amended Complaint is warranted under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. Notwithstanding its insufficient pleading, however, it most certainly is jurisdictionally barred under the CGIA, requiring dismissal as a matter of law for that reason as well.

WHEREFORE, based upon the legal authority cited above, Defendant Henry Stucky respectfully requests the Court dismiss the Amended Complaint against him with prejudice, award him his reasonable costs and attorney's fees pursuant to C.R.S. § 13-17-201, and for whatever further relief the Court deems just and proper.

DATED this 16th day of October, 2017.

WICK & TRAUTWEIN, LLC

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

[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]

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION TO DISMISS AMENDED COMPLAINT** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 16th day of October, 2017, on the following:

Caroline Steinbrecher
P.O. Box 1321
Loveland, CO 80539

Via United States Postal Service, first class mail

David P. Ayraud
Larimer County Attorney's Office
P.O. Box 1601
Fort Collins, CO 80522

Via ICCES

s/ Jody M. Minch

[The original certificate of electronic filing signed by Jody M. Minch is on file at the office of Wick & Trautwein, LLC]

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Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com	Case No: 2017 CV 208 Courtroom: 5A
<p style="text-align: center;">AFFIDAVIT OF JASON SMITHERMAN</p>	

AFFIANT, Jason Smitherman, after having been first duly sworn upon oath, states as follows:

1. My name is Jason Smitherman. I am over the age of 18 years and have personal knowledge of the subjects of my statements in this Affidavit.
2. I am the Risk Manager for the City of Loveland ("the City"). As Risk Manager, my responsibilities include the investigation and handling of claims made against the City and its employees.
3. I have been the Risk Manager for the City since August 29, 2016.
4. I have reviewed the Amended Complaint filed by Caroline Steinbrecher in the above-captioned case, in which she names as a defendant Loveland Police Detective Henry Stucky. The Complaint appears to make a number of assertions regarding Detective Stucky's

alleged actions and omissions in investigating the death of the plaintiff's son, and in investigating her complaints about the Larimer County Coroner's handling of the tissue samples taken from her son.

5. As the Risk Manager for the City, I am familiar with the provisions of the Colorado Governmental Immunity Act ("CGIA"). I understand that §24-10-109 of the CGIA requires that persons bringing a tort claim against the City or its employees must provide written notice of the nature of the claim, as well as several specific pieces of information spelled out in the statute. My further understanding as Risk Manager is that the general purpose of the statutory notice required by §24-10-109 is to allow municipalities, such as the City, to anticipate a claim, investigate it, make financial arrangements to satisfy any potential liabilities, and prepare to defend against claims.

6. As Risk Manager, I generally receive all notices regarding claims against the City and its employees, including written claim notices that are submitted first to other officials of the City, including the City Council and the City Attorney, as required by §24-10-109.

7. I have researched my files in the office of Risk Management and conducted a further reasonable investigation with other City officials and employees, and I have determined that at no time has my office, City Council or the City Attorney received any written notice of the nature required by §24-10-109 as to the assertions made by Caroline Steinbrecher in her Complaint against Detective Henry Stucky.

FURTHER Affiant sayeth naught.

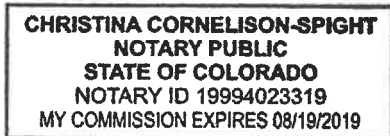

Jason Smitherman

STATE OF COLORADO)
) ss.
County of Larimer)

Subscribed and sworn to before me this 12th day of October, 2017, by Jason Smitherman.

Witness my hand and official seal.

My commission expires: 08/19/2019.




Notary Public