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DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LaPorte Ave Fort Collins, CO 80521	
Jacki Marsh, Plaintiff, v. John Fogle, Shawn Adams Defendant.	**▲ COURT USE ONLY ▲** Case Number: 2021CV30598 Div.: Ctrm:
J. Andrew Nathan, Reg. No. 3295 Timothy R. Fiene. No. 41508 NATHAN DUMM & MAYER P.C. 7900 E. Union Avenue, Suite 600 Denver, CO 80237-2776 Phone Number: (303) 691-3737 Email: *ANathan@ndm-law.com* *TFiene@ndm-law.com*	

MOTION TO DISMISS ON BEHALF OF DEFENDANT FOGLE

The Defendant, John Fogle, appearing separately from the other Defendant herein, by and through his attorneys at Nathan Dumm & Mayer P.C., hereby submits his Motion to Dismiss with supporting authority as follows:

CONFERRAL

The undersigned attempted conferral with Mr. Krenning concerning the legal bases of this motion through a letter on Thursday September 2, 2021. Mr. Krenning has noted that he **opposes** the Motion. Additionally, counsel conferred via telephone with, Mitch Murray, Counsel for Mr. Adams who does not oppose the relief requested herein.

INTRODUCTION

The Mayor of the City of Loveland, Plaintiff Jacki Marsh, raises several causes of action against a Loveland City Council Member, Mr. Fogle. Each of the claims against Mr. Fogle lie in tort and arise from alleged, yet non-specific, statements made in Mr. Fogle's capacity and role with City Council regarding public concerns about Ms. Marsh's alleged failure to obtain proper permitting prior to undertaking residential reconstruction and remodeling. The Complaint must be dismissed against Mr. Fogle, with prejudice, under rules C.R.C.P. 12(b)(1) and 12(b)(5) of the Colorado Rules of Civil Procedure; (1) as Mr. Fogle is entitled to immunity under the Colorado Governmental Immunity Act, ("CGIA"), (2) as the Complaint's various claims lack sufficient factual allegations to pass basic muster under *Warne v. Hall* or heightened standards enumerated in *Barnett v. Denver Publ'g.*, (3) as Ms. Marsh's Complaint is a SLAPP suit subject to dismissal under C.R.S. § 13-20-1101[1].

STANDARD OF REVIEW

A. Governmental Immunity Pursuant to C.R.C.P. 12(b)(1)

The CGIA states that sovereign immunity is a bar to any action against a public entity for injury which lies in tort, or could lie in tort, regardless of whether that is the type of action or the form of relief chosen by the claimant. § 24-10-106(1), C.R.S. (2014). Whether a public entity or individual is immune from suit under the CGIA is a question of subject matter jurisdiction and therefore must be determined pursuant to C.R.C.P. 12(b)(1). *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 923 (Colo. 1993).

[1] The Colorado Anti-SLAPP law is raised as a matter of preservation and is not fully addressed herein.

Under C.R.C.P. 12(b)(1), the Plaintiff has the burden of proving jurisdiction. *Id.* at 925. Unlike motions based on C.R.C.P. 12(b)(5) and C.R.C.P 56, when examining a C.R.C.P. 12(b)(1) motion pursuant to the CGIA, the trial court is authorized to make appropriate factual findings. *Denmark v. Colo.*, 954 P.2d 624, 627 (Colo. App. 1997). In making these factual findings, the court is not required to treat the facts alleged by the non-moving party as true, as it would under C.R.C.P. 12(b)(5). *Id.* at 628. The court has discretion to allow affidavits, documents and hold a limited evidentiary hearing, if necessary, to resolve disputed jurisdictional facts. *Ferrel v. Colo. Dep't of Corr.,* 179 P.3d 178, 183-84 (Colo. App. 2007). Thus, under *Trinity*, while a C.R.C.P. 12(b)(5) motion constrains the court by requiring it to take the Plaintiffs' allegations as true and draw all inferences in the Plaintiffs' favor, C.R.C.P 12(b)(1) permits the court to "weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity*, 848 P.2d at 925.

A court may not abdicate its responsibility to determine whether jurisdiction is barred under the CGIA. *Ferrel*, 179 P.3d at 183. "If…all relevant evidence has been presented to the trial court, [it] may decide the issue without remanding for an evidentiary hearing." *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 871 (Colo. App. 1996). Indeed, if the facts are undisputed, a court may decide the jurisdictional issue as a matter of law, and an evidentiary hearing on the issue of immunity is not necessary. *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001).

B. Failure to State a Claim under C.R.C.P. 12(b)(5)

The purpose of a C.R.C.P. 12(b)(5) motion is to test the formal sufficiency of a plaintiff's complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996); *Pub. Serv. Co. v. Van*

Wyk, 27 P.3d 377, 385 (Colo. 2001). If the substantive law does not support the claims alleged in a plaintiff's complaint, then the complaint should be dismissed. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). When evaluating a motion to dismiss under C.R.C.P. 12(b)(5), all averments of material fact contained in the complaint, as opposed to conclusory assertions or legal conclusions, are accepted as true. *Warne v. Hall*, 2016 CO 50 ¶27 (Colo. 2016)(adopting the federal *Twombly/Iqbal* pleading standards); *O'Neill v. Simpson*, 958 P.2d 1121, 1123 (Colo. 1998). Conclusory allegations are "not at all entitled to an assumption that they were true." *Warne*, at ¶27. Similarly, a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1965.

When evaluating dismissal under 12(b)(5), a court is not to look outside of the complaint; but may consider exhibits provided on a motion to dismiss that are referenced in the complaint yet not attached thereto. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

LEGAL ARGUMENT

A. Dismissal of All Claims Pursuant to C.R.C.P 12(b)(1) pursuant to the CGIA:

i. Ms. Marsh's claims against Mr. Fogle lie in tort for actions taken in his role with the City and are subject to dismissal under the CGIA.

Governmental entities and their employees are entitled to immunity from tort claims unless such claims fall within certain enumerated provisions or are accompanied by willful and wanton conduct. *Robinson v. State Robinson v. Colo. State Lottery Div.,* 179 P.3d 998, 1003 (Colo. 2008). The Complaint does not allege willful and wanton conduct.[2] The CGIA's definition of public employee is broad and specifically includes elected officers. Colo. Rev. Stat.

[2] If it had, the conduct would be subject to analysis on a CGIA 12(b) motion. Nonetheless, actions alleged do not appear to rise to the level of a "conscious disregard for [the] safety of others," "purposely committed without regard to the consequences or rights of others," or "implying an element of evil." *Martinez v. Estate of Bleck*, 2016 CO 58 ¶31 (Colo. 2016).

§ 24-10-103(4)(a). It is undisputable that Ms. Marsh's Complaint is comprised solely of common law tort claims, and thus is subject to evaluation pursuant to the CGIA. "Trespass to property, negligent or intentional, is a common law tort." *Wiess v. Bravo*, 666 F.2d 1328, 1335 (10th Cir. 1981); *Doe v. High-Tech Institute, Inc*., 972 P.2d 1060, 1065 (Colo. App. 1998)(intrusion is an invasion of privacy tort); *Han Ye Lee v. Colo. Times, Inc.*, 222 P.3d 957 (Colo. App. 2009)(intentional infliction of emotional distress is a tort).

Additionally, each of Ms. Marsh's claims arises from statements or allegations made during the public discourse surrounding a citizen concern brought to Mr. Fogle's attention in furtherance of his official capacity, as a City Council Member (Affidavit of Fogle, Ex. A, ¶2) and, as such, each of the tort claims against Mr. Fogle are subject to analysis under the CGIA. The issue of whether a government employee acts within the scope of his employment is properly resolved on a Rule 12(b)(1) Motion challenging subject matter jurisdiction under the CGIA.

Though not facially evident from the allegations of the Complaint, the manner in which Mr. Fogle obtained photographs of the interior of Ms. Marsh's home was both innocuous and in furtherance of his role as a City Council Member. As noted in the attached affidavit, Mr. Fogle received unsolicited photographs from a resident who was working at Ms. Marsh's home and expressed concern over apparently unpermitted work being completed at the home. (Ex. A, ¶1). This fact is specifically noted in paragraph 28 of the Complaint, as well.

As neither the trespass/intrusion claims, nor Mr. Fogle's receipt of photographs from a concerned citizen fit within an enumerated exception to the CGIA, Mr. Fogle is immune from suit. *See Robinson*, 179 P.3d at 1003 ("Pursuant to the CGIA, public entities are immune from

liability in all claims for injury that lie in tort or could lie in tort, unless the claim falls within an exception to that immunity.")

The remainder of Ms. Marsh's claims assert that alleged defamation occurred in furtherance of or in direct participation in Mr. Fogle's role as a City Council Member, and that these alleged statements resulted in emotional distress. Though the bulk of the allegations do not sufficiently describe the substance of Mr. Fogle's alleged defamatory statements, the singular post cited in paragraph 28 reflects that Mr. Fogle's statement was clearly in furtherance of his role as Council Member, as he specifically encourages the residents to tune into the City Council meeting to learn the truth regarding the contested building permit issues. (Ex. A, ¶3).

As Ms. Marsh's claims against Mr. Fogle are torts and arise from his actions as a City Council Member, and as there is no allegation of willful and wanton conduct, they must be dismissed because Mr. Fogle is entitled to immunity under the CGIA.

ii. Ms. Marsh's claims are subject to dismissal for failure to provide or plead compliance with notice provisions of subsection 109 of the CGIA.

Before initiating a lawsuit against a governmental employee, a party must provide written notice of a claim. C.R.S. § 24-10-109(1). Such notice requires concise but detailed statement of the factual basis for the claim, the nature and extent of alleged injury, amount of monetary damages sought, must be served upon the governmental entity within 182 days after the date of the discovery of the injury. *Id*. at § 109(1)(2). Notice under the CGIA is a jurisdictional prerequisite to suit and a party's failure to comply with the notice requirements "***shall forever bar any such action.***" *Id.* at §109(1)(emphasis added). Applicable law clearly establishes that claims against a government employee which includes torts of defamation, trespass, and

intentional infliction of emotional distress are subject to review for compliance with the CGIA's notice provision under subsection 109.

Furthermore, a party must allege in their complaint that they have complied with the notice requirements found in the statute. *Kratzer v. Colo. Intergovernmental Risk Sharing Agency*, 18 P.3d 766, 769 (Colo. App. 2000). The mere filing of a complaint is insufficient to comply with the CGIA's §109 notice provision; a plaintiff must provide notice and "properly serve such notice before filing a complaint." *Kratzer*, 18 P.3d at 769.

There is nothing in the record, nor anything cited or known to Mr. Fogle which would constitute notice compliant with §109 of the CGIA. Instead, Ms. Marsh, through her attorney, utilized the public comment period of a recent meeting to surprise Mr. Fogle with service of process. (Ex. B, RH Line, Richard Ball Letter, Aug 20, 2021). Not only has Ms. Marsh failed to provide compliant prior notice of the lawsuit against Mr. Fogle under the CGIA, but the Complaint has also does not contain any provision indicting compliance with the CGIA's notice provision. As Ms. Marsh's claims against Mr. Fogle are subject to the strict requirements of the CGIA the Complaint must be dismissed. Finally, as the failure to comply with the subsection 109, forever bars any action not preceded by Notice, the Complaint should be dismissed with prejudice.

B. Dismissal of All Claims Pursuant to C.R.C.P. 12(b)(5) for Failure to State a Claim:

i. The Complaint fails to state a claim for Trespass or Unreasonable Intrusion upon the Seclusion of Another (Claims 1 & 2)

Plaintiff relies on Mr. Fogle's assertion that he is in possession of photographs from the interior of her home as the sole speculative and conclusory basis for her Trespass and Intrusion claims. Conclusory allegations that are "equally consistent with non-tortious" conduct are not

entitled to an assumption of truth when evaluating a Rule 12(b)(5) motion to dismiss. *Warne*, 2016 CO 50, ¶27-28 (Colo. 2016).

To prevail on a claim for invasion of privacy claim based on intrusion upon the seclusion of another, "a plaintiff must show that another has intentionally intruded, physically or otherwise, upon the plaintiff's seclusion or solitude, and that such intrusion would be considered offensive by a reasonable person." *Doe v. High-Tech Institute, Inc*., 972 P.2d 1060, 1065 (Colo. App. 1998). Similarly, trespass requires physical intrusion upon the property of another without permission. *Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 682 (Colo. App. 2008). Each of these two claims should be dismissed under Rule 12(b)(5) as they are based upon pure speculation that is not supported by law, fact or reason.

Though there are myriad of mechanisms through which an individual may come to possess photographs in a manner not involving trespass or intrusion, the simplest and clearly non-tortious explanation is revealed in the Complaint itself. Paragraph 28 of the Complaint contains an online post by Mr. Fogle explaining that he was contacted by a contractor who was concerned about work being performed at Ms. Marsh's home without permits. In this case, it is more plausible - likely because it is true - that Mr. Fogle received photographs of the interior of Ms. Marsh's home from the concerned contractor, which documented work being performed without an appropriate permit. As the contractor was entitled to be on premises, and could reasonably be expected to document work being performed, the photographs do not give rise to a claim for trespass or intrusion. Further, there is no factual allegation in the Complaint that Mr. Fogle has ever been in the Mayor's home. Here, because there is an equally plausible, non-conclusory, non-speculative, and non-tortious explanation for the existence and possession of the

alleged photographs, Ms. Marsh's claims for trespass and intrusion must be dismissed pursuant to C.R.C.P. 12(b)(5) and *Warne.*

ii. The Complaint fails to state a claim for Outrageous Conduct and Intentional Infliction of Emotional Distress (Claims 3 and 6).

At the outset, it should be noted that a Colorado does not recognize independent actions for outrageous conduct *and* intentional infliction of emotional distress. Indeed, outrageous conduct is but one element of a claim for intentional infliction of emotional distress. As such, these "claims" will be analyzed together, because only one such claim is cognizable in law.

"To state a claim for intentional infliction of emotional distress (which is also known as outrageous conduct) a plaintiff must allege sufficient facts to show: '(1) the defendant engaged in extreme and outrageous conduct; (2) recklessly or with the intent of causing the plaintiff severe emotional distress; (3) causing the plaintiff to suffer severe emotional distress.'" *Maiteki v. Marten Transp. Ltd.,* 4 F. Supp. 3d 1249, 1256 (D. Colo. 2013)(quoting *Han Ye Lee v. Colo. Times, Inc.*, 222 P.3d 957, 966-67 (Colo. App. 2009)). Though the question of whether conduct rises to the level of outrageous is generally a question of fact, the trial court must address the threshold issue of whether the conduct is sufficiently outrageous as a matter of law. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). A claim for intentional infliction of emotional distress should be dismissed if reasonable people could not disagree that alleged actions "are so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 666. "The level of outrageousness required to create liability is extremely high. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient." *Green v. Quest Servs. Corp.*, 155 P.3d 383, 385 (Colo. 2006).

"Accusations of misconduct -- even false accusations that a person has engaged in criminal conduct-- fail to rise to the level of sufficient outrage." *Partminer Worldwide Inc. v. Siliconexpert Techs. Inc.*, 09-CV-00586-MSK- MJW, 2010 U.S. Dist. LEXIS 11498 at *11 (D. Colo. Feb. 10, 2010). Similarly, mere allegations that a party knowingly repeated false information fall far short of the 'exacting standard' required to support a claim for intentional infliction of emotional distress. *Mateki*, 4 F. Supp. 3d at 1256. Colorado case law is rife with examples of extreme conduct that fails to meet the high bar of outrageousness[3], but the aforementioned cases directly show that Ms. Marsh's factual allegations, even if the Court were to assume they were true, cannot under any circumstance meet the threshold bar to avoid dismissal. Although her conclusory allegations are in and of themselves insufficient, as such allegations must be supported by facts, they are insufficient to satisfy the *Warne* standard.

iii. The Complaint fails to state a claim for Defamation per se and per quod (Claims 4 & 5).

Prompt resolution of defamation claims via motions to dismiss or for summary judgment is a preferred course, because "the threat of protracted litigation could have a chilling effect upon constitutionally protected rights of free speech." *Barnett v. Denver Pub. Co.*, 36 P.3d 145, 147 (Colo. 2001). The determination of whether a statement is defamatory is a question of law for the court to decide. *Keohane v. Wilkerson*, 859 P.2d 291, 302 (Colo. App. 1993).

a Ms. Marsh's defamation claims do not contain sufficient specificity

[3] See e.g. *Green,* 155 P.3d at 565; *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1350 (Colo. 1988); *Culpepper v. Pearl St. Bldg., Inc*., 877 P.2d 877, 882 (Colo. 1994); *Reigel v. SavaSeniorCare L.L.C*., 292 P.3d 977, 990-91 (Colo. App. 2011).

It has long been held in Colorado that "each publication of a defamatory statement must be pleaded as a separate cause of action." *Lininger v. Knight*, 226 P.2d 809, 812 (Colo. 1951). In furtherance of this requirement, each specific instance of defamation must be pleaded "with a certain degree of specificity," to avoid dismissal. *Corporon v. Safeway Stores*, 708 P.2d 1385, 1390 (Colo. App. 1985). An allegation of defamation over a period of time that fails to set forth the words alleged to be defamatory and untrue, "is vague and fails to state a claim." *Walters v. Linhoff*¸ 559 F. Supp. 1231, 1234 (D. Colo. 1983).

In this matter, Ms. Marsh's defamation claims fail to satisfy the longstanding pleading requirements of such claims. Notably, Ms. Marsh lumps an alleged series of defamatory statements into two general pots, slander *per se* and *per quod*. In doing so, she fails to identify what was said, to whom, and when. Notably, in paragraph 13 on page two[4] of her Complaint, Ms. Marsh asserts Mr. Fogle made unclear statements "alleging that the mayor is a criminal and has violated numerous laws related to a home remodel project." To further cloud the facts of this allegation, paragraph 13 on page two indicates that these amorphous statements of malfeasance were made to the media, on social media, and directly into the record during unspecified City Council meetings, but fails to specify whatsoever the details about, when, where, or to whom the statements were made.

More egregiously, Ms. Marsh simultaneously accuses Mr. Fogle of making unspecified defamatory statements during an unknown timeframe through an alleged anonymous Facebook profile, (Compl. ¶¶17,18, 29), while at the same time asserting that this allegedly defamatory profile is actually operated by more than one person. (Compl. ¶¶30, 31, 38). In so doing, the

[4] The Complaint contains two paragraphs labeled 13 (See Compl. p. 2 and p. 10).

unspecified defamation claims further fail as the Complaint does not (or cannot) accurately attribute the non-specific, undated, online allegations directly to Mr. Fogle.

b. The defamation claims fail to allege actual malice.

When a public figure raises a claim for defamation, such claim is subject to a heightened burden requiring the plaintiff to demonstrate that the allegedly defamatory statement was made with "actual malice." *Barnett v. Denver Pub. Co*., 36 P.3d. 145, 147 (Colo. App. 2001). Actual malice is shown by demonstrating the statement was made with knowledge that it was false or with reckless disregard of whether it was true or false. Actual malice can be shown if the author entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity. *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118 (Colo. App. 1992). Whether the allegations in a defamation case is sufficient to support a finding of actual malice is a question of law, subject to review under a 12(b)(5) Motion. *Barnett,* 36 P.3d. at 147.

In support of her position that Mr. Fogle was "aware" of the falsity of his allegations, Ms. Marsh cites to an email from the Loveland City Attorney on August 13, 2021,which contains several indications that prior alleged statements could not have been made while entertaining serious doubt regarding their veracity. Namely, City Attorney Garcia's first bullet point, contains an equivocal statement which states, "***Currently***, the Mayor ***appears*** to be in compliance with all building code requirements in relation to the remodeling and reconstruction of her home." (Compl. ¶25)(emphasis added). This statement is temporal, and does not indicate the status of compliance prior to the email message. Additionally, the use of "appears" leaves the possibility that Ms. Marsh may not have been in compliance with applicable building codes

at the time of writing. Additionally, the third bullet point from the City Attorney's message unequivocally affirms that Ms. Marsh received some building permits in relation to the construction ***late***. (Compl. ¶25).

While the lack of specificity in defining what statements are allegedly defamatory makes it exceedingly difficult to support or deny an allegation of actual malice, the message from the City Attorney is completely inadequate to support such an assertion, as it does not show that the undated, unattributed, and unspecified statements, even if made, were made with knowledge that the statements were false or with reckless disregard for the truth.

c. Allegations of defamation are subject to a defense of "truth"

"Truth is an absolute defense to a defamation claim brought against a public figure." *Barnett*, 36 P.2d at 147. Further, "a party asserting a truth defense in a defamation action is not required to justify every word of the statement. It is sufficient that the substance, the gist, the sting, of the matter is true." *Id.*

As noted above, it is difficult, if not impossible, to parse what specific allegations were made by Mr. Fogle that were allegedly defamatory. The Complaint endeavors to attribute general statements over a general period of time asserting that Ms. Marsh engaged in inappropriate conduct by failing to procure building permits in advance of engaging in residential construction or remodeling. Parties need not look beyond the Complaint to find that there is some substance to any such statement. Notably, the City Attorney acquiesced that the Mayor was "late" in obtaining permits. Loveland Municipal Code has adopted the 2018 International Existing Building Code. Loveland Mun.Code 15.52.010. The International Existing Building Code addresses permits specifically and requires:

> Any owner or owner's authorized agent who intends to repair, add to, alter, relocate, demolish, or change occupancy of a building, or to repair, install, add, alter, remove, convert, or replace any electrical, gas, mechanical, or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, ***shall first*** make application to the *code official* and obtain the required permit.

2018 IEBC Sec. 105.1. (bold added by counsel). Loveland municipal code further establishes, "any person, firm or corporation violating any of the provisions of this code, as adopted and modified by the City, *shall be deemed guilty of a misdemeanor* and subject to penalties as set forth in Section 1.12.010 of the Loveland Municipal Code." Loveland Mun. Code 15.52.030(emphasis added by counsel).

While prosecutors, code enforcement, and police officers have discretion in enforcing the codes as written, City Attorney Garcia's message from August 13, 2021, notes, "The Mayor received some building permits late" lending credence to the fact that allegations that permits were not obtained in accordance with the law, even if made after the City Attorney's email, have some basis in truth. Even if the Court were presented with more specific allegations that Mr. Fogle made assertions that Ms. Marsh failed to comply with local law they cannot, as a matter of law, be defamatory, because such statements have some basis in truth. Plaintiff's defamation claims, for all these reasons, must be dismissed under CRCP 12(b)(5).

C. Plaintiff's Complaint is a violation of anti-SLAPP legislation.

While not directly raised here, should this matter move forward on any claim not dismissed pursuant to this Motion, Mr. Fogle reserves the right to assert his statutory rights to be free from Strategic Lawsuits Against Public Participation "SLAPP" pursuant to C.R.S. § 13-20-1101. The purpose of this statute is to curtail lawsuits that discourage public participation.

Specifically, the statute requires that Plaintiff establish that there is a "reasonable likelihood" that she will prevail on her claims. This standard is higher than the *Warne* standard of pleading.

The anti-SLAPP statute further requires a Defendant to file a special motion to dismiss within 63 days after service of the Complaint, or in this case by October 19, 2021. The Court has discretion under the Act to extend that time as it deems proper. Mr. Fogle asserts that the Court should first address this Motion under Rules 12(b)(1) and 12(b)(5), however. If this Motion cannot be resolved by October 19, then this Defendant anticipates requesting an extension of time to file the special motion or, if necessary, will file it.

REQUEST FOR ATTORNEY'S FEES AND COSTS

Section 13-17-201 of the Colorado Revised Statutes provides, in pertinent part:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under Rule 12(b) of the Colorado Rules of Civil Procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

As such, a court is required to award reasonable attorney fees and costs whenever a tort action is dismissed pursuant to Rule 12(b). As this Motion is brought solely pursuant to Rule 12(b)(1) and (5), an award of attorney fees is mandated upon dismissal.

Additionally, Colorado case law expressly grants attorney fees and costs if a lawsuit barred by the CGIA is dismissed. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 872-73 (Colo. App. 1996) ("[W]hile the consequences may be harsh, we conclude that, consistent with the supreme court's analysis in *Trinity Broadcasting*, and the plain language of § 13-17-201, an award of attorney fees is mandatory when a trial court dismisses an action under the [CGIA] for lack of subject matter jurisdiction."); *see also Wallin v. McCabe*, 293 P.3d 81, 84 (Colo. App.

2011); *Patterson v. James*, 2018 COA 173 ¶37 (Colo. App. 2018)(mandatory fees awardable jointly and severally against counsel and party). Accordingly, Defendant respectfully requests an award of attorney fees and costs.

CONCLUSION

For the reasons set forth in this Motion, Plaintiff's action against Mr. Fogle must be dismissed in its entirety, with prejudice.

Respectfully submitted,
NATHAN DUMM & MAYER P.C.

/s/Tim Fiene
J. Andrew Nathan, #3295
Timothy R. Fiene, #41508
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2021, a true and correct copy of the foregoing **MOTION TO DISMISS ON BEHALF OF DEFENDANT FOGLE** was served via the State of Colorado's ICCES e-filing system and upon the following via ICCES, email or by US Mail:

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