5-18-1978

City of Colorado Springs v. District Court In and For El Paso County

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 28175

CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EL PASO, STATE OF COLORADO, and JOHN F. GALLAGHER, a Judge of said Court,

Respondents.

BRIEF IN SUPPORT OF CITY'S PETITION FOR WRIT OF PROHIBITION

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and
HORN, ANDERSON & JOHNSON
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Colorado Springs, CO 80903
632-3545

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IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. _____

CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation, Petitioner, vs. THE DISTRICT COURT IN AND FOR THE COUNTY OF EL PASO, STATE OF COLORADO, and JOHN F. GALLAGHER, a Judge of said Court, Respondents.	BRIEF IN SUPPORT OF CITY'S PETITION FOR WRIT OF PROHIBITION

INTRODUCTION

This Petition raises issues of common interest to the State of Colorado and all of its political subdivisions regarding the limits of liability under the Governmental Immunity Act which was enacted by the Colorado Legislature in 1971 and effective in 1972. To date, there has been no opinion of the Supreme Court concerning the limitations on judgments contained in the Immunity Act.

Plaintiffs in the Trial Court sought recovery for damage to a single piece of their real property. For that reason, the discussion herein centers around the application of C.R.S. '73 24-10-114 (1) (a) which concerns the limitation of $100,000.00 in a case where an injury to a single property occurs. In §24-10-103 (2), the term "injury" is defined to mean death, injury to a person, damage to or loss of property of whatever kind, which would be actionable and tort if inflicted by a private person.

STATEMENT OF THE CASE

The City's Petition for Writ of Prohibition arises from the case of Gladin vs. Von Engeln, No. C-963, which was heard and determined by the Supreme Court on appeal. In the District Court of El Paso County, Colorado, the case was captioned Gladin v. Von Engeln, et al., Civil Action No. 76155. In connection with the Supreme Court's final opinion, the City of Colorado Springs was determined to be liable to the Plaintiffs therein both for a monetary judgment in the amount of $70,000.00 plus accrued interest and costs (a total now exceeding $88,000.00) and for a mandatory injunction which required the City to pay for the reconstruction of the lateral support to the Gladins' property. A copy of the Supreme Court's opinion is attached to this brief as Exhibit A.

After this Court's Mandate issued to the Court of Appeals, and the Court of Appeals' Mandate issued to the District Court of the County of El Paso, the City of Colorado Springs tendered to the Clerk of the District Court the sum of $100,000.00 pursuant to the provisions of §24-10-114 of the Governmental Immunity Act. The City therewith filed its Motion to Limit Judgment requesting the District Court to apply the funds towards satisfaction of the monetary judgment and towards compliance with the mandatory injunction and to release the City from further obligation to comply with said mandatory injunction contained in the District Court's Judgment. A copy of said Motion to Limit Judgment is attached hereto as Exhibit B. The District Court denied the City's motion, and a copy of said Order is attached hereto as Exhibit C.

Before filing this Petition, the City moved for a Reconsideration and Rehearing of the Motion to Limit Judgment, specifying with particularity the jurisdictional grounds upon which the Motion was based. A copy of the Motion for Rehearing and Reconsideration is attached hereto as Exhibit D, and the Court's denial thereof is Exhibit E.

As stated in the motions, after the City deposited with the Clerk of the District Court of El Paso County, Colorado, the sum of $100,000.00, the District Court allowed the Gladins to withdraw sufficient funds to satisfy their monetary judgment, leaving some $11,000.00 on deposit to be applied towards compliance with the mandatory injunction. However, the District Court has refused to release the City from further responsibility to comply with its mandatory injunction.

ARGUMENT

1. By refusing to grant the City's Motion to Limit Judgment, the District Court threatens actions exceeding its jurisdiction.

The Governmental Immunity Act, C.R.S. '73 24-10-101 et seq., and the limitation on judgments contained therein, C.R.S. '73 24-10-114, apply to actions for damages as well as actions for injunctive relief. In the Statement of Legislative Purpose contained in C.R.S. '73 24-10-102, the General Assembly of the State of Colorado declared one of its purposes in enacting the Governmental Immunity Act as follows:

> "The general assembly also recognizes the desirability of including within one Article all the circumstances under which the State or any of its political subdivisions may be liable in actions other than contract and that the distinction for liability purposes between governmental and proprietary functions should be abolished." (Emphasis supplied)

Similarly, in §24-10-105, the General Assembly stated:

> "It is the intent of this Article to cover all actions which lie in or could lie in tort regardless of whether that may be the type of action chosen by the claimant, and no public entity shall be liable for such actions except as provided in this Article." (Emphasis supplied)

It must be conceded that a mandatory injunction requiring affirmative action and expenditure of public funds not budgeted for such purpose differs markedly from an injunction seeking to restrain governmental activity. By requiring an expenditure of public funds to merely reconstruct the lateral

support of the Gladins' property, the District Court's mandatory injunction represents a recovery for the Plaintiffs just as though the money had been in fact paid to the Plaintiffs who then in turn would accomplish the reconstruction. And, there is no dispute among the parties that if the City is required to comply with the Court's mandatory injunction, it will have to expend at least $29,000.00 in excess of the $11,000.00 now deposited with the District Court, making a total recovery of at least $129,000.00 to the Plaintiffs.

Since the General Assembly's waiver of immunity in the Governmental Immunity Act limits recovery under any judgment involving injury to a single property to $100,000.00, it is apparent that no legislative consent has been given for recovery of such claims exceeding $100,000.00 and that the District Court thus lacks jurisdiction to require compliance with a mandatory injunction requiring a greater monetary expenditure than the limitation set forth in the statute. The law in this area has been accurately stated in 57 Am Jur 2d, Municipal, etc., Tort Liability, §72 wherein it is stated:

> "It is well established that by consenting to be sued the State does nothing more than waive its immunity from action. It does not thereby concede its liability in favor the claimant or create a cause of action in his favor which did not theretofore exist. Thus, liability of the State for tort cannot be predicated upon the fact that the State has entered its general statutory consent to be sued, directing the manner in which suits may be brought by those having claims against the State. Neither does a special statute permitting suits on particular claims concede the justice of the claims. Statutory consent to be sued merely gives a remedy to enforce a liability and submits the State to the jurisdiction of the Court, subject to its right to interpose any lawful defense." (Emphasis supplied)

The Supreme Court, in the case of Evans v. County Commissioners, 174 Colo. 97, 482 P.2d 968, recognized that the Legislature has the authority to give such a limited consent to claims. At page 105 of the Colorado Reports, the Supreme Court stated:

> "If the legislative arm of our government does not completely restore these immunities, then undoubtedly it will wish to place limitations upon the actions that may be brought against the State and its subdivisions. This, too, it has full authority to accomplish."

2. The Supreme Court has recognized that statutory limitations on judgments are mandatory and that excessive judgments must be reduced to the amount authorized by the statute creating the claim.

In the case of Jacobson v. Doan, 138 Colo. 496, 319 P.2d 975, the Supreme Court faced a situation on appeal wherein neither party to the case had raised the applicable statutory limitations on judgments in the trial court or on appeal. The Supreme Court, in reviewing the case, affirmed the liability as determined by the jury, but reduced the excessive judgment to the maximum statutory allowance. In doing so, the Supreme Court stated at Page 508 of the Colorado Reports:

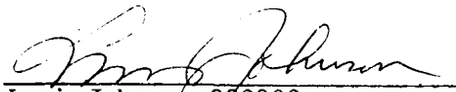
> "Though this case was not tried on the theory that Doan was an employee of defendants at the time of his injuries, yet we find his complaint and proof warrant recovery pursuant to C.R.S. '53 80-6-1, as limited by 80-6-4. Defendants' answer is broad enough to put in issue all matters required to be proven by the Plaintiff to entitle him to recovery under the statute, and all defenses pled or tendered were fully presented. The jury by its verdict resolved the issue of negligence in favor of the plaintiffs and against the defendant and, while it assessed damages in the total amount of $30,000.00, recovery under the statutory act is limited to $10,000.00, and the judgment must be reduced to that amount." (Emphasis supplied).

CONCLUSION

In enacting the Governmental Immunity Act, the General Assembly of the State of Colorado responded to this Court's direction in the case of Evans v. County Commissioners, supra. By reinstating governmental immunity and providing only for limited exceptions, the General Assembly limited the jurisdiction of the courts in Colorado with regard to claims pursuant to the Governmental Immunity Act. In this case, the District Court clearly threatens actions beyond the jurisdiction of the Court, and the Writ of Prohibition should issue to prevent such actions.

Respectfully submitted,

GORDON D. HINDS
and
HORN, ANDERSON & JOHNSON

By: 

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IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. C-963

JAMES F. GLADIN and FAYE J. GLADIN, Petitioners, v. R. D. VON ENGELN, individually and as General Partner of Interstate Eighth Street Company, a limited partnership, INTERSTATE EIGHTH STREET COMPANY, a limited partnership, and THE CITY OF COLORADO SPRINGS, a municipal corporation, Respondents.	MAR 6 - 1978 ON REHEARING OPINION MODIFIED

Certiorari to the Colorado Court of Appeals

EN BANC

REVERSED WITH DIRECTIONS FOR REMAND

Cleveland and Wengler
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Horn, Anderson & Johnson
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MR. JUSTICE GROVES delivered the opinion of the Court.

EXHIBIT A

This is an action for damages and for an injunction resulting from subsidence of real property of the plaintiffs, the Gladins. So far as is involved in this review, the defendants were R. D. Von Engeln, Interstate Eighth Street Company and the City of Colorado Springs. Von Engeln was the general partner in the limited partnership, Interstate Eighth Street Company, and under the facts of this case any liability of the individual is also that of the partnership and vice versa. We refer to them jointly as 8th Street Co.

The Gladins and 8th Street Co. owned adjoining real property, that of the Gladins being to the immediate south of that of the 8th Street Co. The north portion of the Gladin property and the south portion of the 8th Street Co. property sloped down to the north to Bear Creek, which creek bisected the 8th Street Co. property. In late 1970 the Gladins commenced construction of building upon their property. At about the same time the 8th Street Co., in order to make its property more usable, relocated the channel of Bear Creek further to the south, causing the slope of the 8th Street Co. property immediately south of the new channel to be considerably steeper. During this grading process a portion of the regraded slope lying immediately east of the Gladin's property gave way.

The City had been negotiating with 8th Street Co. for a right-of-way for electrical transmission lines

along the relocated creek channel. Instead of granting an easement, 8th Street Co. conveyed to the City the strip of land over which the lines would be located. This strip was adjacent to the Gladin property and encompassed the entire regraded slope and creek channel. City officials knew of the first slippage prior to the time the City accepted the deed. Thereafter, in May 1971, the City received an engineering report which stated that the regraded slope was dangerous to the Gladin's property. The City did nothing to correct the slope's instability. In 1973 there were further slippages with resultant damage to the improvements which the Gladins had constructed.

The jury found that the Gladins had total damages in the amount of $70,000. It found that 8th Street Co. had not been negligent, but rendered a verdict against it for damages predicated upon strict liability. It also found the City liable on the basis of negligence. It further rendered a verdict on the cross-claims of 8th Street Co. against the City for indemnification of all damages assessed against 8th Street Co. The trial court also issued an injunction, mandating 8th Street Co. and the City to restore lateral support to the plaintiffs' land. It stayed this injunction pending appeal.

The Colorado Court of Appeals, ___ Colo. App. ____, 550 P.2d 352 (1976), reversed as to both verdicts on damages and, thus, the matter of indemnification became moot. We

reverse the court of appeals and direct reinstatement of the judgments as to damages, but direct that the trial court enter judgment n.o.v. in favor of the City on the issue of indemnification. We uphold the trial court's issuance of the mandatory injunction.

I

The trial court instructed the jury as to the elements under which the 8th Street Co. could be held strictly liable. In this connection, the jury was instructed that, before it could find 8th Street Co. strictly liable, it must find that the "weight of the buildings, artificial additions and fill did not materially increase the lateral pressure and thus was not a proximate cause of the damage to plaintiffs' property." The court further instructed the jury that there was a legal presumption that the weight of buildings, artificial additions and fill on plaintiffs' land contributed to the subsidence, and that the burden of proof was upon the plaintiffs to overcome this presumption and to show that the weight of buildings, artificial additions and fill on plaintiffs' land did not materially contribute to the subsidences.

The court of appeals found Colorado Fuel & Iron Corp. v. Salardino, 125 Colo. 516, 245 P.2d 461 (1952), dispositive in its ruling that there cannot be strict liability for removal of support to land containing man-made structures. In Salardino the trial court had instructed that

C.F.&I. was strictly liable for damages both to the land in its natural state and to the improvements on the land. This court reversed. The opinion stated, "In order to recover for damages to a structure on the surface occasioned by the removal of lateral or subjacent support, the crux of the action is negligence."

Following the rule of Restatement of Torts § 817(2), we hold that the trial court's instructions on strict liability were correct, and to that extent we overrule Salardino.

Salardino did not rule concerning liability for unimproved land in its natural state which is damaged by removal of support. Rather, the effect of the holding was that if there were improvements on the land, strict liability could not be imposed. The application of strict liability should not be based upon whether the thing damaged is natural or artificial. Rather, the distinction must hinge upon whether an artificial condition created on the plaintiffs' land contributed to the injury, or whether the subsidence would have occurred even if the land had remained in its natural state. Miller v. State, 199 Misc. 237, 98 N.Y.S.2d 643 (1950); Williams v. Southern Ry. Co., 396 S.W.2d 98 (Tenn. App. 1965); and Klemme, The Enterprise Liability Theory of Torts, 47 Colo. L. Rev. 153 (1976).

II

8th Street Co. argues that, under the instructions given by the court, the evidence does not support the verdict against it. We find ample evidence in the record to support it.

III

The court of appeals held that liability could not be imposed upon the City solely for its failure to refurnish lateral support to the Gladin property, which support had been removed by the City's predecessor in title. In its opinion it cites Frederick v. Burg, 148 F. Supp. 673 (W.D. Pa. 1957); Green v. Berge, 105 Cal. 52, 38 P. 539 (1894); Carrig v. Andrews, 127 Conn. 403, 17 A.2d 520 (1941); Lyons v. Walsh, 92 Conn. 18, 101 A. 488 (1917); Paul v. Bailey, 109 Ga. App. 712, 137 S.E.2d 337 (1964); Beal v. Reading Co., 370 Pa. 45, 87 A.2d 214 (1952); and Restatement of Torts, § 817(1) and Comment j § 817. It further concluded that Moore v. Standard Paint & Glass Co., 145 Colo. 151, 358 P.2d 33 (1960) was distinguishable and not controlling. While some of these authorities support the opinion, in contrast, we regard Moore as controlling.

In Moore defendant's predecessor in title made an excavation upon its land. After defendant purchased the property, an unusually heavy rain flooded into the excavation and water seeped into the plaintiffs' adjoining building. The defendants contended that they could not be held liable in negligence because they had not created the condition on the land which resulted in plaintiffs' damage. This court rejected the contention and stated:

> "[The defendants were] under an affirmative duty not to permit [their] land to remain in an altered state if such altered state created a condition the

natural and foreseeable result of which would result in injury to the adjoining property, and the breach of this duty constitutes actionable negligence."

In the instant case, the trial court instructed the jury:

"Where land has been altered from its natural state so as to create a condition which a reasonably prudent person would anticipate might result in injury to adjoining property, the owner of such altered land has a duty not to permit such condition to remain on his land, but to correct such dangerous condition at the earliest practicable opportunity. The owner of such altered land has such duty whether or not he initially created the condition or whether or not the condition was negligently created.

"The failure to perform such duty may constitute negligence on the part of owner of the land on which such condition exists."

Under Moore and under these instructions, there was no error in the verdict against the City for negligence.

Restatement (Second) of Torts § 366 is in accord. It reads:

"Artificial Conditions Existing When Possession is Taken.

"One who takes possession of land upon which there is an existing structure or other artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm caused to them by the condition after, but only after,

(a) the possessor knows or should know of the condition, and

(b) he knows or should know that it exists without the consent of those affected by it, and

(c) he has failed, after a reasonable opportunity, to make it safe or otherwise to protect such persons against it."

The City of Colorado Springs contends that sections 817-819 (in chapter 39) of the Restatement of Torts contain the principles for determining liability in all lateral support cases and that section 366, Restatement (Second) of Torts, is not applicable. We disagree with this argument. While sections 817-819 are intended to determine the liability of an actor who actually withdraws lateral support, they are not determinative as to successor liability. This is indicated by the scope note to chapter 39 which provides:

> "The withdrawal of lateral support may subject the actor to absolute liability (§§817 and 818), or to liability for negligence (§819). Likewise, the withdrawal of subjacent support may subject the actor to absolute liability (§820), or to liability for negligence (§821). Although the general rules of the law of negligence have already been stated in volume II, they are specially applied in this Chapter to withdrawal of support, because it is desirable that the two types of liability for withdrawal of support be dealt with in one place in order that the relations of the two may be apparent." (emphasis added)

With regard to withdrawal of lateral support, the purpose of chapter 39 is to compare absolute liability of an actor with negligence liability of an actor. Thus, there is no reason for sections 817-819 to deal with the liability of successors since it is clear that only an actor can be held absolutely liable. Restatement of Torts §817, Comment j (1939). The scope note to chapter 39 also states: "The Chapter states the liability of a person who withdraws the support ...."

Further evidence that sections 817-819 are not intended to determine the liability of successors is found in the scope note to topics 4 through 8 of chapter 13 of the Restatement (Second) of Torts (1965).

> "Topics 4 to 8 in this Chapter do not state the rules which determine the liability for invading legally protected interests in the support of land, which are stated in Chapter 39 ...." (emphasis added)

Thus, chapter 39 would seem only to except the actual actor, the person who actually withdraws or invades the support, from the rules of sections 364-386. This, of course, coincides with the notion that chapter 39 is only intended to determine the liability of actors.

IV

The alleged indemnity by the City was predicated solely upon contract. Our review of the record does not show sufficient evidence to establish that a contract of indemnity was made. The trial court, therefore, should have directed a verdict in favor of the City on this issue.

V

Upon entry by the trial court of judgments under the jury's verdicts, the court issued a mandatory injunction against the 8th Street Co. and the City requiring them to restore the stability of plaintiffs' land. The plaintiffs had asked the jury to award them damages for full value of the property on the theory that the cost of repairing the

structural damage to the buildings plus the cost of restoring stability to the land would exceed the market value of plaintiffs' property, which was $107,000. Instead the jury awarded only $70,000 damage. It follows that, since 8th Street Co. and the City are liable for the subsidence and the verdicts did not allow damages for future subsidence, it was properly within the province of the court in equity to issue the mandatory injunction, affording protection against the occurrence of further damage. Wyman v. Jones, 123 Colo. 234, 228 P.2d 158 (1951); and Crisman v. Heiderer, 5 Colo. 589 (1881).

The cause is returned to the court of appeals for remand to the district court with directions that the judgements and injunction of the district court be reinstated, except that the district court be directed to enter judgment notwithstanding the verdict in favor of the City as to the cross-claims concerning indemnity.

MR. JUSTICE LEE and MR. JUSTICE CARRIGAN do not participate.

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 76133

Division No. 5

JAMES F. GLADIN and FAYE J. GLADIN, Plaintiffs, vs. R. D. VON ENGELN, Individually and as General Partner of Interestate-Eighth Street Company, a limited partnership, INTER-STATE-EIGHTH STREET COMPANY, a limited partnership, and THE CITY OF COLORADO SPRINGS, a municipal corporation, Defendants.	MOTION TO LIMIT JUDGMENT

COMES NOW Defendant, City of Colorado Springs, by its attorneys, and respectfully moves the Court that an order be entered limiting the judgment herein to the maximum recoverable under the "Colorado Governmental Immunity Act", Article 10 of Chapter 24 of the 1973 C.R.S., and as grounds for said Motion would state the following:

1. That the Judgment herein, which together with interest and costs, totals approximately $88,000, and the Mandatory Injunction directing the restoration of the embankment adjacent to the north boundary of the property of the Plaintiffs were entered subject to the conditions of the "Colorado Governmental Immunity Act"; that said Judgment has been affirmed by the Supreme Court of the State of Colorado and that a Mandate has issued from the Court of Appeals of the State of Colorado dated March 24, 1978.

2. That the cost of complying with this Court's order to repair the Plaintiffs' property is undisputed in the record and will exceed the sum of $40,000. Thus the total Judgment will exceed $128,000, which is more than the maximum recoverable against a municipal corporation under the laws of the State of Colorado and the "Colorado Governmental Immunity Act" limiting recoveries to a maximum of $100,000 on actions for injury to a single property.

EXHIBIT B

3. That the Judgment is joint and several and Plaintiffs should be obligated to recover any excess from the other Defendant R. D. Von Engeln.

4. That the Defendant City of Colorado Springs is without authority to expend any sum in excess of $100,000 in satisfaction of the Judgment and for compliance with the Mandatory Injunction entered by this Court.

5. That the Defendant City of Colorado Springs will comply with the conditions of the Mandatory Injunction and satisfy said Judgment within statutory limitations.

WHEREFORE, Defendant City of Colorado Springs prays that this Court enter and order limiting the obligation of this Defendant to the sum of $100,00 for a total satisfaction of said Judgment, including Injunctive Order, together with such other and further relief as to the Court may seem equitable.

Respectfully submitted,

GORDON D. HINDS, City Attorney

HORN, ANDERSON & JOHNSON

Louis Johnson Reg. No. 002003
Attorney for Defendant City of
Colorado Springs
501 Mining Exchange Building
Colorado Springs, CO 80903
632-3545

I hereby certify that I have mailed a copy of the foregoing to all counsel of record herein this 29th day of March, 19 75.

Horn, Anderson & Johnson

By

IN THE DISTRICT COURT WITHIN AND
FOR THE COUNTY OF EL PASO AND STATE OF COLORADO
Civil Action No. 76155
Div. 5

JAMES F. GLADIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	O R D E R
	)	
R. D. VON ENGELN, et al.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court for determination of a motion filed by Defendant City of Colorado Springs for an Order "Limiting the Judgment herein to the maximum recoverable under the Colorado Governmental Immunity Act." In substance, the Defendant contends that the cost of complying with the Mandatory Injunction when added to the amount of the jury verdict herein exceeds or will exceed the limitation imposed by 24-10-114 C.R.S. 1973.

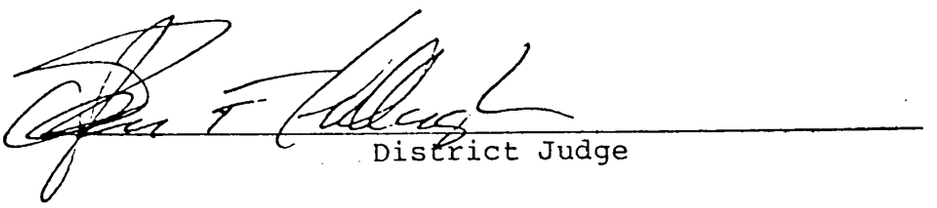
Having considered the record herein, the statutory provisions upon which Defendant City relies, and the arguments of counsel, the Court CONCLUDES that having failed to raise this issue in its Motion for a New Trial or by a Motion to Alter or Amend the Judgment, and having also failed to raise this issue on appeal, the Defendant City is now barred from doing so.

IT IS THEREFORE ORDERED by the Court that Defendant City's

Motion to Limit Judgment is hereby denied.

DONE IN CHAMBERS this 12th day of April, 1978.

BY THE COURT:



District Judge

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 76155

Division No. 5

JAMES F. GLADIN and FAYE J. GLADIN, Plaintiffs,	)	
vs.	)	MOTION FOR REHEARING AND RECONSIDERATION
R. D. VON ENGELN, et. al., Defendants.	)	

COMES NOW the Defendant City of Colorado Springs and respectfully moves the Court to rehear and reconsider the City's Motion to Limit Judgment and to alter and amend the Court Order of April 12, 1978, which denied said Motion. As grounds for this Motion, the City states:

1. The Court erred in determining that the City was now barred from raising the issue on limitation on judgment because the matter had not been raised on the prior appeal or in the Motion for New Trial following entry of judgment.

2. C.R.S. '73 24-10-114, when read in light of the Governmental Immunity Act, is a jurisdictional limitation on the authority of the Court to allow recovery against the State and its political subdivisions.

3. The Plaintiffs' claim made pursuant to the Governmental Immunity Act must by its very nature accept the limitations contained therein.

4. The City, having deposited the sum of $100,000.00 with the Clerk of the Court to be disbursed pursuant to Court order, has now tendered for recovery the entire sum for which it may be liable. The Court would exceed its jurisdiction requiring the City to expend any additional sums for the benefit of Plaintiffs herein.

5. Additional reasons and authorities are set forth in the Memorandum Brief which accompanies this Motion.

WHEREFORE, Defendant City prays that a rehearing be granted and that the Court alter and amend its order of April 12, 1978, by limiting any further recovery against the Defendant City of Colorado Springs,

Respectfully submitted,

GORDON D. HINDS
and
HORN, ANDERSON & JOHNSON

By: Gregory L. Johnson

Gregory L. Johnson, 000488
Attorneys for Defendant
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632-3545

I hereby certify that I mailed a copy of the foregoing to all other counsel of record herein this 17th day of April, 1978.

Horn, Anderson & Johnson

By _____

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 76155

Division No. 5

JAMES F. GLADIN and FAYE J. GLADIN, Plaintiffs,	)	
vs.	)	MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR REHEARING AND RECONSIDERATION
R. D. VON ENGELN, et. al., Defendants.	)	

Defendant, City of Colorado Springs, submits the following Memorandum in Support of its Motion for Rehearing and Reconsideration of a Court Order of April 12, 1978:

The Colorado Supreme Court has recognized on many occasions that jurisdictional errors may be raised at any time and are not waived. In the case of Whitten v. Coit, 153 Colo. 157, 385 P.2d 131, the Supreme Court at Page 174 of the Colorado Reports stated:

> "It has long been established as basic law that the validity of a judgment depends upon the Court's jurisdiction of the person and of the subject matter of the particular issue it assumes to decide. Considering what is meant by the term 'jurisdiction' it is well settled that this term includes the Court's power to enter the judgment, and the entry of a decree which the Court has no authority to enter is without jurisdiction and void. A void judgment may be attached directly or collaterally."

In the case of Evans v. County Commissioners, 174 Colo. 97, 482 P.2d 968, a landmark Colorado case on governmental immunity, the Supreme Court recognized principle that the State and its political subdivisions may be sued only to the extent to which the Legislature of the State of Colorado determines is reasonable and proper and thereafter gives its consent.

> "The effect of this opinion and its two contemporaries is simply to undo what the Court has done and leave the situation where it should have been at the beginning, or at least should be now: in the hands of the General Assembly of the State of Colorado. If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so. . . . If the legislative arm of our government does not completely restore these immunities, then undoubtedly it will wish to place limitations upon the actions that may be brought against the State and its subdivisions. This, too, it has full authority to accomplish." 175 Colo. at Page 105.

The effect of the Legislature's enactment of the Governmental Immunity Act is to manifest the consent of the State of Colorado for suits to be filed against it and its political subdivisions as defined in C.R.S. '73 24-10-106. The Legislature placed several limitations upon the liability of the State and its political subdivisions in the Governmental Immunity Act. The first was the requirement of notice (C.R.S. '73 24-10-109) and another is the limitation on judgments contained in C.R.S. '73 24-10-114.

It is respectfully submitted that the legislative re-establishment of the doctrine of sovereign immunity (C.R.S. '73 24-10-108), and the waiver of that sovereign immunity in the limited cases set forth (C.R.S. '73 24-10-106), submits the state and its political subdivisions to the jurisdiction of the court only to the extent provided in the Governmental Immunity Act. That is to say, the legislature restricted the waiver of immunity to claims for injury which did not exceed the sum of $100,000.00 in the case of an injury to one person and the sum of $300,000.00 for an injury to two or more persons, as defined in C.R.S. '73 24-10-114.

Even assuming arguendo that the limitation on judgments contained in C.R.S. '73 24-10-114 is not jurisdictional, it is still apparent from review of the record in this case and the applicable statutes, that the limitation was timely raised. C.R.S. '73 24-10-107 provides: "Where sovereign immunity is abrogated as a defense under 24-10-106, liability of the public entity shall be determined in the same manner as if the public entity were a private person." It thus appears that the Legislature intended that the liability of the City be determined as if it were a private party, and did not restrict the functions of the jury in any respect. C.R.S. '73 24-10-114 does not provide that a judgment in excess of $100,000.00 cannot be entered in a case against a City and other joint tort-feasors such as the case at bar. In such a situation, it merely provides that the maximum amount to be recovered from the City shall be $100,000.00. In this case, there were both private and public defendants, so that the excess judgment would be recoverable from the other defendants.

Respectfully submitted,

GORDON D. HINDS
and
HORN, ANDERSON & JOHNSON

By: _____

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IN THE DISTRICT COURT WITHIN AND
FOR THE COUNTY OF EL PASO AND STATE OF COLORADO
Civil Action No. 76155
Div. 5

JAMES F. GLADIN and FAYE J. GLADIN, Plaintiffs, vs. R. D. VON ENGELN, et al., Defendants.	O R D E R

This matter is before the Court on motion of Defendant City of Colorado Springs for reconsideration of the Court's ruling made April 12, 1978, denying said Defendant's Motion to Limit Judgment. Having again considered the issues raised by the Defendant's Motion to Limit Judgment, together with the arguments presented in the Motion for Rehearing, and the accompanying brief, the Court now CONCLUDES as follows:

1. The limitation on judgments contained in 24-10-114 C.R.S. 1973 is not jurisdictional, and Defendant's failure to raise the issue in timely manner constitutes a bar to the relief now sought.

2. Even assuming the limitation is jurisdictional, and that the statute referred to applies in this instance, the limitation in this case would be $300,000.00 since there were in fact two plaintiffs who sustained injury.

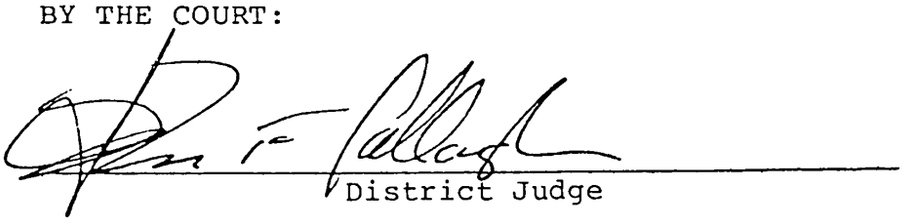
3. The statutory limitation is inapplicable to costs and expenses incurred in complying with a Mandatory Injunction.

EXHIBIT E

IT IS THEREFORE ORDERED by the Court that for the reasons stated herein, the motion of Defendant City of Colorado Springs for rehearing and reconsideration is denied.

DONE IN CHAMBERS this 27th day of April, 1978.

BY THE COURT:



District Judge