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On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 04 CA 1785	
LAVONNE ROBINSON, f/k/a LAVONNE BAZEMORE, individually and as representative of a class	▲ COURT USE ONLY ▲
Petitioner, v. COLORADO STATE LOTTERY et al, Respondents.	Case No.: 06 SC 385
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ANSWER BRIEF OF STATE DEFENDANTS	

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The Colorado State Lottery Division and Colorado State Lottery Commission (these will be jointly referred to as the "Lottery"), by and through its attorneys, the Office of the Colorado Attorney General and Assistant Attorney General Andrew M. Katarikawe, hereby submits its Answer Brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding that petitioner's claims against the state lottery, although pleaded in contract and equity, "sound in tort" and are therefore barred by the Colorado Governmental Immunity Act.
2. Whether the court of appeals erred in holding that the state lottery was entitled to an award of attorney fees under C.R.S. § 13-17-201.

STATEMENT OF THE CASE

I. Background

Colorado voters in 1980 passed an amendment creating article XVIII, § 2(7), which provides:

Any provision of this constitution to the contrary notwithstanding, the general assembly may establish a state-supervised lottery. Unless otherwise provided by statute, all proceeds from the lottery, after deduction of prizes and expenses, shall be allocated to the conservation trust fund of the state for distribution to municipalities and counties for park, recreation and open space purposes.

In 1982, the General Assembly passed a statute establishing the State Lottery Division to operate and supervise a statewide lottery. C.R.S. § 24-35-203. The Division includes both the Lottery Commission and the Lottery Director. C.R.S. § 24-35-202(2). The Colorado State Lottery Commission operates within the Colorado State Lottery Division and promulgates rules governing the operation of the statewide lottery. *See* C.R.S. § 24-35-208(2)(a), (c), and (d). The commission passes rules governing (1) the types of lotteries to be conducted; (2) the numbers and sizes of the prizes on the winning tickets or shares; and (3) the manner of selecting winning tickets or shares, §§ 24-35-208(2)(a), (c), and (d), C.R.S. During the time in question, one of the scratch lottery games offered by the Lottery was “Luck of the Zodiac”, which advertised on its face “Win up to \$10,000.”

II. Nature of Ms. Robinson’s Claims

Ms. Robinson alleges in her Complaint that she purchased several Lottery scratch tickets on July 24, 1998 that were emblazoned with the words “win up to \$10,000” [Vol. 1, p.1, ¶13], that by that time the Lottery knew that the advertised grand prize had been awarded 72 days earlier, *id.*, and that by engaging in such “wrongful conduct” [Vol. 1, p. 2, ¶13], the Lottery is taking money from scratch game players without providing them what they contracted for, *id.*, p. 2. She

characterizes the Lottery's action upon which she relied in purchasing the ticket as "wrongful conduct." On May 10, 2000, she filed a complaint based on this alleged "wrongful conduct" bringing the following seven claims:

- (1) breach of contract – express contract;
- (2) breach of contract – UCC express warranty;
- (3) breach of UCC implied warranties;
- (4) breach of implied covenant of good faith and fair dealing;
- (5) violation of C.R.S. § 24-35-206;
- (6) violation of the Colorado Consumer Protection Act; and,
- (7) restitution/unjust enrichment.

[Vol. 1, pp. 4-9].

Throughout her Complaint, Ms. Robinson repeatedly alleged that the Lottery made false representations and advertisements regarding the availability of a grand prize already awarded for the scratch game tickets she was induced to purchase.

[Vol. 1, p. 5, ¶¶ 26, 31; p. 6, ¶ 39; p. 7, ¶ 43; p. 8, ¶ 46; p. 9, ¶51].

III. Course of Proceedings Below

Ms. Robinson filed her Complaint in the trial court on May 10, 2000, and it was dismissed on January 18, 2001, for failure to exhaust administrative remedies. She appealed to the court of appeals, which by order dated August 1, 2002

reversed the dismissal and remanded the case to the trial court to determine the issue of governmental immunity. On July 19, 2004, the trial court granted the Lottery's rule 12(b)(1) motion after determining that the Ms. Robinson's claims lie in tort and are therefore barred by the CGIA. State Defendants then moved for attorney fees, which the court granted in an order dated October 19, 2004. Ms. Robinson again appealed to the court of appeals. On May 4, 2006, the court of appeals affirmed the dismissal of all claims against the Lottery, agreeing with the trial court that Ms. Robinson's claims lie in tort and are therefore barred by the CGIA. It also affirmed the award of attorney fees. Ms. Robinson then petitioned to this Court, which granted certiorari on April 9, 2007. Plaintiff filed her opening brief on July 24, 2007.

SUMMARY OF THE ARGUMENT

With the specific exceptions provided by statute, the CGIA bars suits against public entities and employees which lie in tort or could lie in tort, regardless of whether that may be the type of action or form of relief chosen by the plaintiff. Ms. Robinson's claims allege that the Lottery made misrepresentations of fact and fraudulently concealed the fact that the top prize was no longer available, and that this conduct induced her to purchase lottery tickets under the mistaken belief that

she had a chance of winning \$10,000. These claims properly lie in tort, not contract. Although Ms. Robinson characterizes her claims as contractual and equitable, the claims “lie in tort or could lie in tort” for purposes of the CGIA, and were thus correctly dismissed for the court’s lack of subject matter jurisdiction.

Ms. Robinson urges this Court to reverse the attorney fees awarded against her pursuant to C.R.S. § 13-17-201 upon the Lottery’s prevailing on its C.R.C.P. 12(b)(1) motion. She argues that such award of attorney fees is only proper for claims brought as torts but not in contract. Because she did not raise this argument in the courts below, she waived it. Moreover, because her opening brief does not address any of the arguments she raised in the courts below for reversal or reduction of the fees awarded to the Lottery, she should be deemed to have abandoned those arguments.

Regardless, before affirming the trial court’s award of attorney fees, the court of appeals considered the trial court’s reasons and authority and concluded that both the award and amount were proper.

The court of appeals’ order affirming both the dismissal of Ms. Robinson’s action and award of fees should be affirmed.

ARGUMENT

I. Ms. Robinson's Claims Were Properly Dismissed For Lack of Subject Matter Jurisdiction.

A. Standard of Review

The dismissal of Ms. Robinson's case below is subject to *de novo* review. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). *Id.*, at 924. Under C.R.C.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction, and the standard of appellate review is highly deferential. *Id.*, at 925. *See also Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). (Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the trial court's findings of jurisdictional fact unless they are clearly erroneous). However, if the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law, in which case appellate review is *de novo*. *Id.* *See also, Swieckowski ex rel Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997) ("Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous. However, if,

as here, the underlying facts are undisputed, the issue is one of law, and an appellate court is not bound by the district court's determinations”) (internal citations omitted).

B. Actions Against Public Entities that Lie in Tort or Could Lie in Tort Are Barred by the CGIA, Unless Sovereign Immunity is Expressly Waived

The CGIA bars all tortious actions brought against a public entity or its employees unless such immunity has been expressly waived. C.R.S. § 24-10-108.

1. The Lottery is a public entity

The lottery division and lottery commission are statutory creations within the Colorado Department of Revenue, C.R.S. §§ 24-1-117; 24-35-201; 24-35-207, and are public entities for purposes of the CGIA. C.R.S. § 24-10-103(5).

2. Ms. Robinson’s claims lie in tort or could lie in tort

Unless sovereign immunity has been expressly waived, the CGIA bars actions brought against a public entity that lie in tort or that could lie in tort. C.R.S. § 24-10-108. To determine whether immunity has been waived to allow an action to proceed against the public entity therefore, it is necessary first to determine whether the action is a tort action for purposes of the CGIA. Since the distinction between tort and non-tort cases is not always clear, this Court has

instructed that “a court must first examine the nature of the injury and remedy asserted in each case to determine whether a particular claim is for compensatory relief for personal injuries and is therefore a claim which lies or could lie in tort for the purposes of the CGIA”. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1176 (Colo. 2000). By artful drafting, Ms. Robinson attempts to package her tort action as contractual and equitable to avoid the CGIA’s immunity bar. She asserts in her opening brief that she is not seeking compensatory relief for personal injuries but contractual damages and equitable relief. [Op Brf at p.10.] She also avers that “[she] is not asserting that the Lottery tortiously induced her to enter into an unfavorable contract, but rather is asserting that the Lottery breached its contractual duty to provide her with a chance to win one of the represented and advertised prizes”. *Id.*

Initially, it is well established that in Colorado, the form of relief chosen by the plaintiff is not dispositive of whether her claims lies in tort for CGIA purposes.

As this Court stated in *Conners*:

We acknowledge that the practice of looking at the injury and remedy as part of the determination of whether a claim lies in tort or could lie in tort is arguably inconsistent with the CGIA’s language. The CGIA states that public entities are immune from suit for “injuries which lie in tort or could lie in tort regardless of whether that may be the type of action or *the form of relief* chosen

by the claimant.” (emphasis in original) ... This language could mean that a trial court must not look at the type of relief at issue when deciding whether the CGIA operates to bar a claim against the government. ... Thus, the form of relief alone, whether damages or equitable relief, does not govern the characterization of a claim as a tort or other type of action (emphasis added).

Conners, 993 P.2d at 1176. *See, also, City and County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 764 (Colo.1992) (“Under the Governmental Immunity Act, how the plaintiff characterizes its claim is not the question. The dispositive question is whether the claim is a tort claim or *could be a tort claim* for purposes of analysis under the Governmental Immunity Act”) (emphasis in original).

However, a review of Ms. Robinson’s allegations and claims for relief demonstrates that her action lies squarely in tort and that the remedies she seeks are compensatory damages for personal injuries within the meaning contemplated by the CGIA.

The essence of Ms. Robinson’s “Factual Allegations” [Vol. 1, p.2], is that the Lottery continued to advertise the availability of prizes and to sell tickets when it knew that the advertised prizes were no longer available and that the purchasers had no chance of winning the prizes [Vol. 1, p. 2, ¶¶ 8-11], and that through “[s]uch wrongful conduct”, the Lottery “brings in millions of dollars per year” by

“induc[ing]” individuals such as herself to purchase its prize-less tickets. [*Id.*, ¶¶ 12, 13]. In a similar vein, each of her claims for relief is permeated with tort language alleging in some fashion that the Lottery deceived and induced her and others to purchase tickets by advertising or representing the availability of prizes it knew to be unavailable. [Vol. 1, p. 5, ¶¶ 26, 30-31; p. 6, ¶9; p. 7, ¶42; p. 9, ¶¶ 49, 51.] The cases cited by Ms. Robinson do not compel a different result than that reached by the courts below.

In *Conners*, supra, the plaintiff was a former city employee who brought an action against the city alleging violations of the Colorado Civil Rights Act (“CRA”), and the city moved to dismiss the action based on the theory that her claims lie or could lie in tort. This Court’s analysis concerned whether actions for reinstatement and back pay brought under the CRA were actions seeking compensatory damages for personal injuries for purposes of the CGIA. *Id.*, at 1174. The case did not implicate allegations of misrepresentation or false advertising. Significantly, though, the Court noted in its discussion that misrepresentation is an action in tort which involves equitable relief, *id.*, at 1176, and that a claimant who seeks compensatory relief for injuries suffered as a consequence of prohibited conduct brings a claim which lies in tort or could lie in tort for the purposes of the CGIA. *Id.*

Even assuming *arguendo* that Ms. Robinson's purchase of a lotto game ticket constituted the formation of a contract, that does not alter the nature of her action, which is based on allegations of misrepresentation. *See, e.g., Keller v. A.O. Smith Havestore Products, Inc.*, 819 P.2d 69, 72 (Colo. 1991) ("It is thus clear that a contracting party's negligent misrepresentation of material facts prior to the execution of an agreement may provide the basis for an independent tort claim by a party detrimentally relying on such negligent misrepresentations"); *Connors, supra*, at 1176 (some torts may involve equitable forms of relief, including misrepresentation).

Ms. Robinson contends that she is seeking contractual damages and equitable relief, not compensatory relief for personal injuries. Op Brf at p.10. Yet, she prays for "actual damages" *id.*, ¶B, "appropriate damages, including restitution of the revenues received either after a represented and advertised prize was no longer available or when it was unwinnable", *id.*, ¶C, and additional damages in the form of unclaimed prize money, *id.*, ¶F. This relief, if granted, would undoubtedly be in compensation for the Lottery's alleged tortious conduct.

Black's Law Dictionary 416 (8th Ed., 1st Reprint 2004) defines actual damages as: "An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses", and defines it as synonymous

with compensatory damages, which it defines as: “Damages sufficient in amount to indemnify the injured person for the loss suffered”, and further defines it as synonymous with real damages and tangible damages.

Ms. Robinson’s claims are thus variants of claims for fraud or fraudulent concealment, false advertising, misrepresentation, or deceit arising from the Lottery’s alleged misrepresentation of fact which, necessarily, allegedly occurred prior to her purchase of the tickets and the purported formation of any contract. A comparison of the elements of claims for fraud and misrepresentation with the language of Ms. Robinson’s Complaint further proves that her claims sound in tort.

To establish a prima facie case of tortious fraud or fraud in the inducement, a plaintiff must show: (1) that the defendant made a false representation of material fact; (2) that the defendant making the representation knew it was false; (3) that the Plaintiff did not know of the falsity; (4) that the representation was made with the intent that it be acted upon; and, (5) that the representation resulted in damage to the plaintiff. *Brody v. Brock*, 897 P. 2d 769, 775-776 (Colo. 1995).

In order to prevail on the tort claim of deceit based upon misrepresentation, a plaintiff must prove that she justifiably relied on a material false representation or took action justifiably relying on the assumption that the concealed fact did not exist. *Trimble v. City and County of Denver*, 697 P.2d 716, 724-725 (Colo. 1985).

A false representation consists of oral or written words, conduct, or a combination of word and conduct that creates an untrue or misleading impression in the mind of another. *T.A. Pelsue v. Grand Enterprises, Inc.*, 782 F. Supp. 1476, 1488 (D. Colo. 1991); *Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1263 (Colo. 2000) (“negligent misrepresentation is a tort claim based not on principles of contractual obligation but on principles of duty and reasonable conduct”) (internal citations omitted).

Elements of the tort of fraudulent concealment are: (1) concealment of a material fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the defendant that such fact is being concealed; (3) ignorance of the fact by the Plaintiff; (4) an intention that the concealment be acted upon by the plaintiff; and, (5) action on the concealment results in damages. See, *Ballow v. PHICO Insurance Co.*, 875 P.2d 1354, 1361 (Colo. 1993). False advertising is a common law tort. See, e.g., *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 700-01 (5th Cir. 1981). False advertising and deceptive trade practices are subsets of misrepresentation, fraud, and concealment. *Classic Auto Sales v. Schocket*, 832 P.2d 233, 236 (Colo. 1992).

In the instant case, each of Ms. Robinson’s claims for relief alleges some form of tortious fraud or misrepresentation, akin to the elements outlined above,

occurring prior to her purchase of the scratch game tickets and formation of any alleged contract. (v.4, p.1115) Therefore, Ms. Robinson's claims, all of which are based on alleged misrepresentations of fact, lie in tort and not in contract, and her claims for damages seek to recover money she spent on the purchase of lottery tickets plus a share of the implied windfall the Lottery presumably collected from the sale of advertised but allegedly prize-less tickets.

A further review of Ms. Robinson's action confirms that it does not lie in contract.

A key to determining whether an action lies in contract is the source of the duty alleged to have been breached, forming the basis of the action. *See, e.g., Town of Alma*, 10 P.3d at 1262. Contract obligations arise from promises made between parties. *Id.* A breach of a duty which arises under the provisions of a contract must be addressed under the contract, while a breach of a duty arising independently of any contract may support a tort action. *Id.*, at 1263. Tort obligations usually emanate from duties imposed by law meant to protect citizens from the risk of harm to their persons or their property, regardless of agreement or contract. *Id.*, at 1262. Even certain common law claims that sound in tort, but are expressly designed to remedy economic loss, may exist independent of a breach of contract claim. *Id.*, at 1263.

As the court of appeals observed below in *Robinson v. Colorado State Lottery Division*, 155 P.3d 409, 412-13 Colo. App. 2006) (cert. granted April 9, 2007).

The essence of [Ms. Robinson's] claims was that the defendants negligently misrepresented to her the possibility that she could win one of the advertised and represented prizes and thereby defendants fraudulently induced her to purchase scratch game tickets. ... Therefore, her contract claims are based on her asserted reliance upon defendants' alleged negligent misrepresentation or fraudulent inducement and the injuries resulting from that reliance.

Therefore, Ms. Robinson's claims are variants of claims for misrepresentation or fraudulent inducement, arising from the Lottery's alleged misrepresentations of fact and not on some unfulfilled promise by Lottery to perform some act in the future, and they lie in tort for purposes of the CGIA. As such, unless immunity is waived for the torts allegedly committed by the Lottery, her claims are barred by the CGIA and the trial court has no subject matter jurisdiction to hear them.

3. Ms. Robinson's claims do not fall within an area where sovereign immunity is waived by the CGIA

The waiver of sovereign immunity in Colorado is as only set forth in the CGIA, which provides in pertinent part as follows:

C.R.S. § 24-10-106(1):

Sovereign immunity is waived by a public entity in an action for injuries resulting from:

- (a) The operation of a motor vehicle...;
- (b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;
- (c) A dangerous condition of any public building;
- (d)(I) The dangerous condition of a public highway, road, or street ... if paved, or ... if unpaved, ... any public highway, road, street or sidewalk ...;
- (d)(II) A dangerous condition caused by the failure to realign a stop sign or yield sign...;
- (d)(III) A dangerous condition caused by the accumulation of snow and ice ...;
- (e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical power, or swimming facility[;]
- (f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility...;
- (g) The operation and maintenance of a qualified state capital asset

C.R.S. §§ 24-10-105, 24-10-106(1) & 108:

24-10-105. Prior waiver of immunity – effect. It is the intent of this article to cover all actions which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant. No public entity shall be liable for such actions except as provided in this article[.] ...Nothing in this section shall be construed to allow any action 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 to be brought against a public employee except in compliance with the requirements of this article.

24-10-106. Immunity and partial waiver. (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant...

24-10-108. Sovereign immunity a bar. Except as provided in section 24-10-104 to 24-10-106, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action of form of relief chosen by a claimant....

(emphases added)

In the plain language of the CGIA therefore, how a claimant characterizes her cause of action has no effect on the CGIA's bar against actions that lie in tort or could lie in tort. *See Berg v. State Board of Agriculture*, 919 P.2d 254, 257 (Colo. 1996) (dispositive question of whether claim lies in tort or could lie in tort is

determined by examination of pleadings and undisputed evidence rather than form of complaint).

Misrepresentation, false advertising and related claims do not fall within any area where the CGIA has waived immunity. Therefore, since her claims lie in tort Ms. Robinson's suit against the Lottery is barred by the CGIA and was properly dismissed.

II. The Award of Attorney Fees Against Ms. Robinson Should Be Affirmed

A. Standard of Review

"Appellate courts review an award of attorney fees and costs for an abuse of discretion, which occurs when 'the findings and conclusions of the trial court as so manifestly against the weight of the evidence as to compel a contrary result.'"

Haystack Ranch, LLC v. Fazzio, 997 P.2d 548, 556 (Colo. 2000) citing *In re Water Rights of Hines Highlands Ltd. Partnership*, 929 P.2d 718, 728 (Colo. 1996). In addition, "An award of attorney's fees must be reasonable. The determination of reasonableness is a question of fact for the trial court and will not be disturbed on review unless it is patently erroneous and unsupported by the evidence" *Hartman v. Freedman*, 591 P.2d 1318, 1321-2 (Colo. 1979).

**B. Ms. Robinson Has Waived Argument Raised
for First Time in Opening Brief**

Ms. Robinson asserts that she framed her action in contract, and that since it was her purported contract action that was dismissed, the award of attorney fees against her under C.R.S. § 13-17-201 was error because that section only applies to tort actions. Op Brf at 23. She raises this new argument for the first time in her opening brief. Since she did not raise it in the courts below, she must be deemed to have abandoned it. *See, e.g., Moody v. People*, 159 P.3d 611, 614 (Colo. 2007) (“[it is a] basic principle of appellate jurisprudence that arguments not advanced on appeal are generally deemed waived”); *Colby v. Progressive Cas. Ins. Co.* 928 P.2d 1298, 1301 (Colo. 1996) (“Issues not decided by the lower court may not be addressed for the first time on appeal”); *People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) (“It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal”).

This argument may not be considered now because she waived it by failing to raise it below.

**C. Award of Attorney Fees to Lottery Was
Mandated by C.R.S. § 13-17-201**

Pursuant to C.R.S. § 13-17-201, C.R.S. § 13-16-113(2), and C.R.C.P. 121 § 1-22, the Lottery is entitled to its reasonable attorney fees and costs.

C.R.S. § 13-17-201 provides as applicable here that:

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. (Emphasis added.)

This section was enacted to discourage the unnecessary litigation of tort claims, and applies whenever a tort action is dismissed prior to trial pursuant to a rule 12(b) motion. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417, 424 (Colo. App. 1994) cert den'd 513 U.S. 1150 (1995). Thus, by its plain language, it applies to this case inasmuch as Ms. Robinson's action was occasioned by the Lottery's alleged tortious misrepresentation of fact, was barred by the CGIA, and was dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). See, *Smith v. Town of Snowmass Village*, 919 P.2d 868, 873 (Colo. App. 1996) ("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 GIA for lack of subject matter jurisdiction").

Denying the Lottery its attorney fees mandated by C.R.S. § 13-17-201 would allow a plaintiff to defeat that section's purpose of discouraging litigation of

unnecessary tort claims by, as here, slapping a contract label on an otherwise tort claim. See, e.g., *Abrahamson v. City of Montrose*, 77 P.3d 819, 823 (Colo. App. 2003) (denying attorney fees to public-entity defendant prevailing on a C.R.C.P. 12(b)(1) motion “would not give effect to the General Assembly’s intent to deter the institution or maintenance of unnecessary litigation concerning tort claims”).

Ms. Robinson cites *Sweeney v. United Artists Theatre Circuit, Inc.*, 119 P.3d 538 (Colo.App.2005) in support of her argument that because she brought her claims in contract, the award of fees mandated in tort actions should not apply to her. *Sweeney* involved premises liability issues which the plaintiff failed to commence within the applicable tort time frame, and he brought it as a contract claim after the statute of limitation barred it in tort. The plaintiff pleaded it in contract and using contract theories, but the trial court dismissed it pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which any relief could be granted, not, as here, for lack of subject matter jurisdiction. The court of appeals concluded that since it was his contract claim that was dismissed, attorney fees were not available under § 13-17-201. *Id.*, at 541. Here, in contrast, Ms. Robinson’s claims were brought under tort theories of misrepresentation and fraudulent inducement.

**D. Ms. Robinson Has Abandoned Arguments
Advanced in Courts Below By Not Addressing
Them In Opening Brief**

Concerning the trial court's award of \$52,514.00 in attorney fees and costs to the Lottery, Ms. Robinson argued to the court of appeals below that:

The trial court erred in awarding these costs and fees to the Lottery, because the Lottery did not meet its burden of proof with regard to the hourly rate it used to value its attorney time, some of the fees were based on attorney time devoted to superfluous arguments on which the Lottery did not prevail, and the trial court improperly awarded "attorney fees" for time devoted to this matter by non-lawyers. In addition, the trial court also erroneously awarded the Lottery costs for expenses occasioned by its failure to restrict its discovery in this matter to those matters properly within the scope of C.R.C.P. 12(b)(1).

[Ms. Robinson's opening brief in court of appeals below, Case 04CA1785, p. 19-20.]

Because she does not address these arguments in her opening brief, they should not be considered by this Court. See, e.g. People v. Czemerynski, 789 P.2d 1100, 1107 (Colo. 1990) (issues not raised in appellant's initial brief will normally not be considered by the court").

CONCLUSION

State Defendants Colorado State Lottery Division and Colorado State Lottery Commission respectfully request that this Court affirm the court of

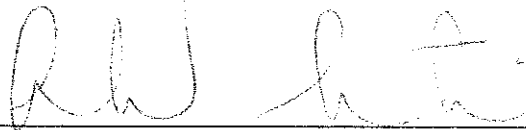
appeal's order affirming the trial court's dismissal of Ms. Robinson's claims with prejudice, and affirm the award of attorney fees.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **STATE DEFENDANTS' ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of September 2007 addressed as follows:

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