Supreme Court, State of Colorado
Colorado State Judicial Building
Two East 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals
Case Number: 04CA1785

FILED IN THE SUPREME COURT
OCT 11 2007
OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

Petitioner: Lavonne Robinson, f/k/a Lavonne Bazemore, individually and as representative of a class

Respondents: Colorado State Lottery Division, an agency of the State of Colorado; and Colorado State Lottery Commission, an agency of the State of Colorado

COURT USE ONLY

Case Number: 06SC385

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I. For purposes of the Colorado Governmental Immunity Act, petitioner's claims against the Lottery do not lie in tort and cannot lie in tort, and are therefore not barred by the Act.

It is undisputed that the Colorado Governmental Immunity Act (CGIA) grants immunity "only from 'actions for injuries which lie in tort or could lie in tort,' not from other types of actions or from actions that are excepted from the CGIA's grant of immunity." *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1173 (Colo. 2000) (quoting C.R.S. § 24-10-106(1)). Thus, for example, public entities have no immunity from actions for damages arising in contract. *Id.* Nor is a public entity immune from "claims best characterized as equitable and non-compensatory in nature." *Id.* at 1174.

"[G]overnmental immunity under the Act is immunity from actions seeking *compensatory damages for personal injuries*." *Id.* at 1173 (emphasis added). To determine whether a claim is barred by governmental immunity, "a court must 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." *Id.* at 1176 (emphasis added).

Here, it is undisputed that the purchase of a lottery ticket creates a binding contract between the purchaser and the Lottery, based upon the Lottery's offer of the chance to win a prize, and the customer's acceptance of that offer by purchasing a ticket. *See* Opening Brief at 13 (citing record and case law). In her complaint, petitioner alleges that the Lottery breached the contract by failing to deliver that which it offered and petitioner accepted with her payment of the ticket price – namely, the chance to win one of the represented and advertised prizes. Petitioner further alleges that the Lottery was unjustly enriched by its retention of money that was paid for a chance to win prizes that, as petitioner later discovered, were unavailable, unwinnable, or previously claimed at the time of the purchase and sale of the ticket. *See* R. Vol. 1 at 1-12.

Petitioner seeks damages, restitution of money paid and received when prizes were unavailable or unwinnable, and injunctive relief against the future sale of instant scratch tickets for games that do not have a represented or advertised prize available. *Id.* at 10. Because petitioner's claims against the Lottery are contractual in nature and do not seek compensatory damages for personal injuries, petitioner contends that they are not barred by the CGIA. Opening Brief at 12-19.

The Lottery disagrees. The Lottery says that, "[b]y artful drafting, [petitioner] attempts to package her tort action as contractual and equitable to

avoid the CGIA's immunity bar." Answer Brief at 8. According to the Lottery, "a review of [petitioner'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 with the meaning contemplated by the CGIA." *Id.* at 9. More specifically, the Lottery says that the complaint contains words and phrases like "induce" and "wrongful conduct," *id.*, and that each claim 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." *Id.* at 10. The Lottery notes that petitioner's prayer for relief, at the end of the complaint, includes a request for "actual damages," which the Lottery apparently equates with "compensatory damages for personal injuries." *Id.* at 11-12. The Lottery says that petitioner's claims are, in reality, "variants of claims for fraud or fraudulent concealment, false advertising, misrepresentation, or deceit" arising from misrepresentations that occurred prior to contract formation, *id.* at 12, and are therefore tort claims barred by the CGIA. *Id.* at 12-15.

The Lottery is mistaken. First, it is hardly surprising that petitioner's complaint should include allegations of deceit and false representations intended to induce lottery players to purchase tickets. The complaint does, after all, include

a claim against Texaco (individually and as representative of the putative class of defendant retailers) for violation of the Colorado Consumer Protection Act (CCPA), based on deceptive trade practices, false representations, and nondisclosure of material information. *See* R. Vol. I at 8-9. Whether or not petitioner's CCPA claim against Texaco sounds in tort is irrelevant to governmental immunity, since – as the court of appeals held, slip op. at 10-13 – Texaco is not a public entity entitled to immunity under the CGIA.

Even as to claims against the Lottery, allegations of deceit and false representations would not be inappropriate, especially since the complaint seeks equitable, declaratory, and injunctive relief, including the funding and establishment of an ombudsman to ensure future compliance with regulatory rules and consumer protection standards. *See* R. Vol. I at 10. As petitioner has previously pointed out, Opening Brief at 15, a claim does not sound in tort merely because the complaint contains factual statements that might be construed as allegations of negligent misrepresentation or fraud. Indeed, as previously noted, *id.*, an assertion of fraudulent inducement as the basis for the return of money paid under a contract sounds in contract, not tort, and seeks an equitable remedy rather than tort damages. *Aaberg v. H. A. Harman Co.*, 144 Colo. 579, 581-84, 358 P.2d 601, 602-04 (1960).

Moreover, even if petitioner's complaint were to include tort claims against the Lottery that were barred by the CGIA, the remaining claims not sounding in tort would not be barred. *See, e.g., Berg v. State Bd. of Agric.*, 919 P.2d 254, 259 (Colo. 1996) (rejecting defendants' distinction between "complaints that lie strictly in contract and those that lie in a contract/tort combination," and holding that promissory estoppel and breach of contract claims were not barred by CGIA, even though tortious misrepresentation claim was); *CAMAS Colo., Inc. v. Bd. of County Comm'rs*, 36 P.3d 135, 138-39 (Colo. App. 2001) (claims for fraud and misrepresentation were barred by CGIA, but claims for breach of contract, quantum meruit, rescission, restitution, and injunction were not).

Nor it there any merit to the Lottery's suggestion that petitioner's claims are barred by the CGIA because the factual basis for her claims might also satisfy the elements of tort claims for fraud, false advertising, and misrepresentation that would be barred. *See* Answer Brief at 12-15. This Court has repeatedly rejected the argument that a claim in a complaint is based in tort, and therefore barred by the CGIA, merely because it shares the same underlying factual basis with a tort claim that would be barred by the CGIA, or because it is "similar to" a tort claim that would be barred by the CGIA. *See Conners*, 993 P.2d at 1176 (civil rights claim not barred by CGIA merely because underlying factual basis could also be

the basis for a common-law tort claim); *Berg*, 919 P.2d at 259 (promissory estoppel claim, although "similar to" tortious misrepresentation claim barred by CGIA, was based in contract and not barred by CGIA). Rather, to determine whether a claim is barred by governmental immunity, "a court must 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." *Conners*, 993 P.2d at 1176 (emphasis added).

Contrary to the Lottery's contention, none of the five remaining claims against the Lottery[1] is barred by the CGIA under the *Connors* standard. The first claim for relief ("Breach of Contract – Express Contract") alleges the existence of a contract and the parties' exchange of consideration – specifically, money in exchange for a chance to win advertised and represented prizes. *See* R. Vol. I at 4-5. The claim alleges that the Lottery failed to perform in accordance with that contract by, among other things, failing to provide the chance to win prizes that, as it turned out, did not exist or were unwinnable. *Id.* at 5. Requested remedies

[1] Insofar as the complaint's statutory claims for violation of C.R.S. § 24-35-206 and the CCPA could be construed to encompass claims against the Lottery as well as against Texaco and other retailers, petitioner has abandoned those claims, as the court of appeals noted. Slip op. at 9.

include damages or restitution of the money paid for tickets that were purchased when prizes did not exist or were unwinnable, as well as injunctive and declaratory relief. *Id.* at 5, 10. Although the Lottery points out that the prayer for relief at the end of the complaint includes a request for "actual damages," which has been equated with "compensatory damages," *see* Answer Brief at 11-12, there is nothing in the complaint to suggest that petitioner is seeking "compensatory damages *for personal injuries*," *Conners*, 993 P.2d at 1176 (emphasis added), or any other damages beyond those that are routinely available in a contract case.

The second claim for relief ("Breach of Contract – UCC Express Warranty") alleges that the Lottery, in the course of selling instant scratch tickets, printed "affirmations and descriptions" of the available prizes on the tickets themselves (e.g., "**win up to $10,000**") as well as in advertisements, and those "affirmations and descriptions" became part of the basis of the bargain between the parties. *See* R. Vol. I at 5. The Lottery's failure to provide a product that conformed to those "affirmations and descriptions" was a breach of express warranty. Again, there is no suggestion of any claim for "compensatory damages for personal injuries."

The third claim for relief ("Breach of UCC Implied Warranties") alleges that the Lottery impliedly warranted that its scratch tickets were merchantable in that they were fit for the particular purpose of providing the consumer with the chance

to a win a certain prize. *Id.* at 6. The tickets were, however, not merchantable as such. *Id.* Again, there is no suggestion of any claim for "compensatory damages for personal injuries," or any other indicia of a tort claim.

The fourth claim for relief ("Breach of Implied Covenant of Good Faith and Fair Dealing") alleges that the Lottery breached its contractual duty of good faith and fair dealing by, among other things, representing and advertising prizes that did not exist, or were unavailable or unwinnable. *Id.* The nature of the injury alleged includes "the loss of the benefit of the bargain and the monies paid for the lottery tickets." *Id.* at 7. No personal injuries are alleged, nor is there any suggestion that petitioner seeks compensatory damages for personal injuries.

The seventh claim for relief ("Restitution/Unjust Enrichment") alleges that petitioner and other members of the putative plaintiff class have conferred a benefit upon the Lottery in the form of monies paid for scratch tickets that they would not have purchased had they known that the represented and advertised prizes were unavailable, unwinnable, or previously claimed; that the Lottery appreciated and benefited from the money paid; and that the circumstances described in the complaint make it equitable for the Lottery to retain the profits. *Id.* at 9. The requested relief is restitution of the profits, *id.*, and there is no claim for "compensatory damages for personal injuries." This equitable claim sounds in

contract, not tort, and is not barred by the CGIA. *See, e.g., GEICO Gen. Ins. Co. v. Pinnacol Assurance*, 56 P.3d 1218, 1219 (Colo. App. 2002) (claim for reimbursement was equitable claim not barred by CGIA); *CAMAS*, 36 P.3d at 138-39 (claims for quantum meruit, rescission, and restitution were not barred by the CGIA).

In sum, all five of the claims against the Lottery seek the return of money paid as contractual consideration, based on the Lottery's failure to satisfy express or implied contractual or quasi-contractual obligations. The claims also seek injunctive and declaratory relief. There is no indication, anywhere in the complaint, that any of petitioner's claims against the Lottery are for "compensatory damages for personal injuries." The claims are not barred by the CGIA.

II. The court of appeals has wrongly expanded the scope of C.R.S. § 13-17-201 to provide for an award of attorney fees in an action for breach of contract and equitable relief.

A. This issue is properly before this Court.

In her petition for writ of certiorari, petitioner sought review of the decision of the court of appeals to affirm the award of attorney fees in favor of the Lottery under C.R.S. § 13-17-201. *See* Pet. at 2. The sole basis for review was that the court of appeals had, in a published opinion, wrongly expanded the scope of

section 13-17-201 to provide for an award of attorney fees in an action for breach of contract and equitable relief. *Id.* at 15-17. Petitioner pointed out that the ruling below conflicted with another recent decision of the court of appeals, *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538 (Colo. App. 2005), which held that, where a claim should have been founded in tort but was instead framed as a contract claim, the dismissal of the "purported contract claim" under C.R.C.P. 12(b) did not authorize an award of attorney fees under section 13-17-201. Pet. at 16 (discussing *Sweeney*). Petitioner noted that, although *Sweeney* was issued in the course of appellate briefing below and addressed by both sides in their respective briefs, the opinion below never mentioned *Sweeney* or discussed its rationale. *Id.* Petitioner stated that "[t]he conflict between two panels of the court of appeals in recent opinions merits this Court's intervention, particularly since the opinion below effective mandates an award of attorney fees in all cases where a public entity successfully invokes the CGIA, even where the plaintiff is seeking to pursue contract claims." *Id.* at 16-17.

In its brief in opposition to the petition for writ of certiorari, the Lottery never suggested that petitioner had waived the argument that section 13-17-201 does not authorize the award of attorney fees upon the dismissal of an action for

breach of contract and equitable relief. Instead, the Lottery merely asserted that *Sweeney* was distinguishable. *See* Brief in Opposition at 3-5.

Now, after this Court has granted certiorari on this issue and the opening brief has been filed, the Lottery asserts that petitioner has waived argument on the issue by raising it for the first time in the opening brief, and this Court may not consider argument on the issue. Answer Brief at 19.

The Lottery is mistaken. First, as noted in the petition for certiorari as well as the opening brief, *see* Opening Brief at 21, the issue was, in fact, raised in the court of appeals. On March 10, 2007, shortly before the Lottery's answer brief was due in the court of appeals, the decision in *Sweeney* was issued. In its subsequently-filed answer brief in the court of appeals, the Lottery acknowledged the decision in *Sweeney* and its holding, but argued – incorrectly – that *Sweeney* was distinguishable because it involved a dismissal under C.R.C.P. 12(b)(5), whereas the instant case involves a dismissal under C.R.C.P. 12(1), and "an award of attorney fees is mandatory when a district court dismisses a case for lack of subject matter jurisdiction under the CGIA." State Defendant-Appellees' Answer Brief (dated March 23, 2005) at 19-20. In her reply, petitioner also discussed *Sweeney*, and asserted that, "consistent with *Sweeney*, because the claims in this case are expressly framed as contract claims, '§ 13-17-201, which authorizes

attorney fee awards when a tort claim is dismissed prior to trial is inapplicable.' " Appellant's Reply Brief (dated June 14, 2005) at 12 (quoting *Sweeney*).

Second, if the Lottery had any doubt about whether the issue had been raised below, it could have brought that to the attention of this Court in its brief in opposition to the petition for writ of certiorari, arguing waiver instead of merely contending – as it had done in the court of appeals – that *Sweeney* was distinguishable. The Lottery should not now be permitted to avoid this Court's resolution of this issue on the merits. As the Supreme Court of the United States has held in numerous cases, "a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived." *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marked omitted)). This important issue, which was argued below, and has now been argued in both the certiorari proceedings and the briefs in this Court, should be resolved on its merits.

B. C.R.S. § 13-17-201 does not authorize an award of attorney fees in this action for breach of contract and equitable relief.

C.R.S. § 13-17-201 provides for an award of attorney fees "[i]n 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." Because § 13-17-201 is in derogation of the common-law American Rule that requires parties to bear their own legal expenses, the provision must be strictly construed. *Sotelo v. Hutchens Trucking Co.*, Case No. 05CA2054, ___ P.3d ___, ___, 2007 Colo. App. LEXIS 1120, at *2-*3 (Colo. App. June 14, 2007). Moreover, an award of attorney fees is available under § 13-17-201 only if the *entire* action is properly dismissed under C.R.C.P. 12(b). *Sotelo*, ___ P.3d at ___, 2007 Colo. App. LEXIS 1120, at *3-*6.

After asserting that this Court should not consider the issue of whether section 13-17-201 authorizes attorney fees in this case, the Lottery contends that an award of fees to the Lottery was nevertheless mandated by section 13-17-201. *See* Answer Brief at 19-21. The Lottery does not make any serious effort to distinguish *Sweeney*, other than to state – falsely – that, unlike the contract claim in *Sweeney*, petitioner's claims here "were brought under tort theories of misrepresentation and fraudulent inducement." *Id.* at 21. The Lottery does not even mention any of the other cases, cited in the opening brief, that have followed *Sweeney*'s holding that plaintiff's characterization of the claims in the complaint, and not what should or might have been pleaded, determines whether an award of

attorney fees is mandated under section 13-17-201. *See, e.g., Kennedy v. King Soopers, Inc.*, 148 P.3d 385, 388 (Colo. App. 2006).

The Lottery offers a single policy reason for its construction of section 13-17-201. According to the Lottery, "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." Answer Brief at 20-21.

Expanding the scope of section 13-17-201 to encompass contract claims is hardly merited by the Lottery's concern about a flood of litigation in which plaintiffs are "slapping a contract label on an otherwise tort claim." If a court encounters a complaint that consists of nothing but meritless or statutorily-barred tort claims with contract labels "slapped" on them, the court has the authority to assess attorney fees under C.R.S. § 13-17-102, based on the filing of one or more claims that lack substantial justification – that is, are substantially frivolous, groundless, or vexatious. *See* C.R.S. § 13-17-102(4). There is no good reason to require a court to award attorney fees whenever a contract claim is dismissed under C.R.C.P. 12(b) and the court believes that an equally unavailing tort claim could have been pleaded. Nor does the language of section 13-17-201 require such a result.

Here, petitioner framed her action in contract, and it was the purported contract action that was dismissed. Hence, in accordance with the reasoning in *Sweeney*, the court of appeals should have held that § 13-17-201 was inapplicable. The award of attorney fees under § 13-17-201 warrants reversal.

CONCLUSION

The judgment of the court of appeals should be reversed, as to both the dismissal of claims against the Lottery and the award of attorney fees pursuant to C.R.S. § 13-17-201.

Dated this 9th day of October 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of October 2007, service of the foregoing was effected by placing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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