COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 26, 2018 9:49 PM FILING ID: F2B72B39E24FA CASE NUMBER: 2017CA1852
Appeal from: Douglas County District Court District Court Judge: The Honorable Paul A. King District Court Case Number: 2016CV30834	
In the Case Of: Sharon Nelson, an individual, Appellee, **v.** The County of Douglas, a municipality; and Kristin Laniar, an individual, Appellants.	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 2017CA1852
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ANSWER BRIEF	

C.A.R. 32(h) CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☑ It contains 6,086 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

□ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☑**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Alexandra Bellanti
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Pursuant to C.A.R. 30(f),a duly signed original is on file in the office of The Bret Beattie Law Firm, LLC

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Pursuant to C.A.R. 28(b), appellee need not make a statement of the issues "unless the appellee is dissatisfied with the appellant's statement." C.A.R. 28(b). Plaintiff- Appellee is satisfied with Defendant-Appellants' statement, and as such, adopts the statement.

II. STATEMENT OF FACTS.

Pursuant to C.A.R. 28(b), appellee need not make a statement of the case "unless the appellee is dissatisfied with the appellant's statement." C.A.R. 28(b). Plaintiff- Appellee is satisfied with Defendant-Appellants' statement, and as such, adopts the statement.

III. SUMMARY OF THE ARGUMENTS.

This appeal concerns the statutory interpretation of the term "motor vehicle" for the purposes of the waiver provision of the Colorado Governmental Immunity Act, (hereinafter, "CGIA"). Plaintiff-Appellee first argues that both *Herrera v. City and Cty. Of Denver,* 221 P.3d 423 (Colo.App.2009) and *Roper v. Carneal,* 411 P.3d 889 (Colo.App.2015) are dispositive of the issues raised by Defendant-Appellants.

Plaintiff-Appellee further argues that the intent and purpose of CGIA is to both protect the public from unlimited claims against public entities and allow for

common law negligence theories to apply where an injury is caused by the negligence of a public employee. Relevant to this case, the CGIA contains a waiver of immunity where a person's injuries are a result of the operation of a motor vehicle. In the present case, Plaintiff was involved in a collision with a county snowplow, which Plaintiff asserts meets the statutory definition of a "motor vehicle." In 2007, the CGIA adopted the definition of "motor vehicle" contained in the Uniform Motor Vehicle Law (hereinafter, "UMVL"). Under the relevant case law, and as a matter of statutory interpretation, the definition of "snowplow" contained in C.R.S. §42-1-102(91) and the definition of "motor vehicle" contained in C.R.S. §42-1-102(58) are not mutually exclusive. A plain reading of the statute demonstrates that while the definition of "motor vehicle" contains provisions concerning both the design and generally accepted use of a particular mode of transportation, the statutory definition of "snowplow" only describes the relevant design. As such, there is no conflict between the statutory provisions and they are not mutually exclusive. Further, construing these provisions as mutually exclusive would be inconsistent with the intent and statutory scheme of the CGIA. Under the UMLV, the definitions of "authorized service vehicles," "authorized emergency vehicles," and "snowplow" all describe vehicles that are publically owned and operated by governmental agencies. *See,* C.R.S.§ 42-1-102(6), (7), (91). These

definitions encompass all, or nearly all, of the vehicles driven by governmental employees in the course and scope of their employment, including police vehicles, public utility trucks, tow trucks, snowplows and fire engines, and each of these definitions uses only the word "vehicle," and not "motor vehicle" to describe these groups of vehicles. Under the scheme proposed by Defendant-Appellants, no publically owned vehicle would constitute a "motor vehicle," and the waiver of immunity under the CGIA would not be applicable in any situation. This would undermine the intent of the statute, which is "to provide for compensation to persons injured by the negligent conduct of government employees.

Next, Plaintiff-Appellee argues that she has carried her burden to establish the district court's subject matter jurisdiction over her claims. The undisputed facts and evidence demonstrate that the snowplow in question constituted a "motor vehicle" under the analysis announced by a division of this Court in *Roper v. Carneal,* 411 P.3d 889 (Colo.App.2015). Defendant- Appellant makes no effort to distinguish the facts in this case from those in *Roper,* and as such, the principals of stare decisis should control, and the Court should remand this case to the district court for further proceedings.

Finally, Plaintiff-Appellee argues that she should be entitled to an award of attorney's fees pursuant to C.R.S. §13-17-104(4), as the district court's ruling

following the *Trinity* hearing was entirely consistent with established precedent. The Defendant-Appellant makes no arguments that would require this Court to come to different conclusions than it did in *Roper* or *Herrera*. As such, this appeal lacks substantial justification and Plaintiff-Appellee should be entitled to an award of attorney's fees.

VI. ARGUMENTS.

a. As a Matter of Statutory Interpretation, a "Snowplow" Can Be a "Motor Vehicle" as Defined in the UMVL, and by Adoption, the CGIA.

i. Standard of Review.

Plaintiff-Appellee agrees with Defendant-Appellant's statement that issues of statutory interpretation are reviewed de novo. *Devora v. Strodtman,* 282 P.3d 528, 531 (Colo.App.2012)(stating "Statutory interpretation is a question of law that we review de novo."). However, Defendant-Appellants; argument that the Court, after a review of the relevant statutory language, should find that the terms "snowplow" and "motor vehicle" are mutually exclusive was directly addressed by a division of this court in *Herrera v. City & Cnty. Of Denver,* 221 P.3d 423 (Colo.App.2009), and as such, *Herrera* is dispositive. Plaintiff-Appellee therefore asserts that this issue should be decided pursuant to the principles of stare decisis. "The principles of stare decisis have long been the rule in Colorado." *People v.*

Blehm, 983 P.2d 779, 788 (Colo. 1999), *holding modified by Moore v. People*, 2014 CO 8, 318 P.3d 511. This doctrine "is a fundamental component of the rule of law, as it promotes stability, certainly, and uniformity of judicial decisions." *Ingold v. AIMCO/Bluffs, L.L.C. Apartments,* 159 P.3d 116, 125 (Colo.2007). The Colorado Supreme Court has explained that "stare decisis should be adhered to in the absence of sound reason for rejecting it." *Blehm,* 983 P.2d at 788. The Defendant-Appellants' attempt to distinguish this matter from the analysis performed by the Court in *Herrera* essentially asserts that the *Herrera* court deviated from the general principals of statutory interpretation and did not consider the plain language of the statutes at issue. A reading of the *Herrara* decision demonstrates that the court properly analyzed the language and reached the conclusion that the definitions of "snowplow" and "motor vehicle" are not mutually exclusive. *Herrera,* 221 P.3d at 426-428. As such, there is no sound reasoning that would support a departure from precedent, and this Court should find that the definitions of "snowplow," and "motor vehicle," are not mutually exclusive, consistent with its decision in *Herrera.*

ii. Statement of Preservation.

Plaintiff-Appellee agrees that Defendant-Appellant has preserved this issue for appeal.

iii. The CGIA Waiver Provision at Issue is Expressly Limited to "Motor Vehicles" as Defined in the UMVL.

Plaintiff-Appellee does not dispute that the CGIA waiver provision at issue in this case is expressly limited to "motor vehicles." However, as more fully discussed below, Defendant-Appellant's proposed narrow interpretation of the relevant definitions contained in the UMVL is inappropriate and contrary to the purpose of the CGIA.

1. The Purpose and Intent of the CGIA.

"The CGIA establishes governmental immunity from suit against public entities and their employees in tort cases, but then waives immunity under certain circumstances and also provides exceptions to certain waivers." *Springer v. City & Cty. of Denver,* 13 P.3d 794, 798 (Colo. 2000). "Thus, while on the one hand the purpose of the CGIA is to protect the public against unlimited liability and excessive fiscal burdens, its purpose on the other hand, is to allow the common law of negligence to operate against governmental entities except to the extent it has barred suit against them." *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001). It is the province of the legislature to determine the appropriate balance between the immunity afforded to public entities with the waivers allowing individuals to seek redress for the negligence of public employees. *Id.* "Because the CGIA derogates the common law, its grant of immunity must be strictly construed." *Id.* On the

other hand, "its waiver provisions are interpreted broadly." *Id.* When reviewing whether or not the waiver provisions apply to a particular case, Courts "look to the statutory language, giving words and phrases their plain and ordinary meaning, and interpreting the statute in a way that best effectuates the purpose of the legislative scheme." *Id.*

2. The Motor Vehicle Exception to Governmental Immunity.

The CGIA "creates an exception to the general rule providing public entities with immunity in tort cases by waiving such immunity when a person's injuries are a result of the operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment." *Henderson v. City & Cty. of Denver*, 300 P.3d 977, 978, (Colo.App.2012). "Divisions of this court have recognized that "[t]he General Assembly's intent in excluding the operation of motor vehicles from governmental immunity was 'to provide for compensation to persons injured by the negligent conduct of government employees.'" *Roper v. Carneal*, 411 P.3d 889, 891 (Colo.App.2015); (*quoting Herrera v. City & Cnty. of Denver,* 221 P.3d 423, 425–26 (Colo. App. 2009) (quoting *Grabler v. Allen,* 109 P.3d 1047, 1051 (Colo. App. 2005)). While the legislature did not initially define "motor vehicle," in 2007, the general assembly amended the CGIA to define

"motor vehicle" by referring to the definition in section 42-1-102. *Henderson,* 300 P.3d at 983.

iv. A "Snowplow" can be a "Motor Vehicle" Under the Plain Language of the UMVL.

1. While the UMVL Differentiates Between "Vehicles" and "Motor Vehicles," Such Distinction is Not Dispositive in this Case.

When construing a statute, courts "first to the language of the statute, giving words their plain and ordinary meaning; if the plain language of the statute demonstrates a clear legislative intent, we look no further." *Young v. Brighton Sch. Dist. 27J,* 352 P.3d 571, 576 (Colo.2014). The reviewing court gives preference to the common and accepted meanings of terms within a statute, and "will not adopt statutory constructions that defeat legislative intent or that lead to unreasonable or absurd results." *Id.* Overall, the Courts strive to "read the statutory design as a whole, giving consistent, harmonious, and sensible effect to all of its parts." *Id.*

Analysis of the provisions of the UMVL, and by adoption, the CGIA, relevant to the determination of this case requires consideration of three definitions contained in the UMVL. C.R.S. §42-1-102(91) states:

> (91) "Snowplow" means any vehicle originally designed for highway snow and ice removal or control or subsequently adapted for such purposes which is operated by or for the state of Colorado or any political subdivision thereof.

C.R.S. §42-1-102(91). C.R.S. §42-1-102(58) states:

> (58) Motor vehicle means any self-propelled vehicle that is designed primarily for travel on the public highways and that is generally and commonly used to transport persons and property over the public highways or a low-speed electric vehicle; except that the term does not include electrical assisted bicycles, low-power scooters, wheelchairs, or vehicles moved solely by human power.

C.R.S. §42-1-102(58). Finally, C.R.S. §42-1-102(112)states:

> (112) "Vehicle" means a device that is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. "Vehicle" includes, without limitation, a bicycle, electrical assisted bicycle, or EPAMD, but does not include a wheelchair, off-highway vehicle, snowmobile, farm tractor, or implement of husbandry designed primarily or exclusively for use and used in agricultural operations or any device moved exclusively over stationary rails or tracks or designed to move primarily through the air.

C.R.S. §42-1-102(112). The definitions themselves are instructive as to their interpretation. Specifically, the UMVL definitions for "vehicle," and "snowplow," contain only descriptions of a design of a particular mode of transportation, and do not touch upon the generally accepted use for either. A vehicle is a device designed to move on wheels or endless tracks. A snowplow is a vehicle that is designed for highway snow and ice removal. On the other hand, the definition for "motor vehicle" describes both a design and a use. *Henderson,* 300 P.3d at 983. Specifically, a "motor vehicle is primarily designed to travel on public

highways *and* is generally and commonly used to transport persons and property over those highways." *Id.* Reading all three of these definitions together demonstrate that they are not mutually exclusive, as only the definition for "motor vehicle" provides for a generally accepted use. As is relevant here, nothing in the plain language of the statute prevents a "snowplow" from being a vehicle designed for snow and ice removal, which is also designed to travel on public highways, and is generally and commonly used to transport persons or property over those highways[1]. Since there is no conflict between the two statutory provisions, it is unnecessary to reconcile the provisions. And since the legislature did not include both description of the design and use of a snowplow within its definition, it is clear that the legislature intended for the relevant provisions of the UMVL to be read together.

2. A "Snowplow" can be both a "Vehicle" and a "Motor Vehicle" Under the UMVL.

[1] Conversely, the definition of "special mobile machinery" states that these vehicles are "designed for the transportation of persons or cargo over the public highways . . . and is only incidentally operated or moved over the public highways." C.R.S. §42-1-102(93.5)(a)(II). Since the definition of "special mobile machinery" also describes both a design and a use, these two definitions are mutually exclusive. A vehicle cannot both commonly and regularly travel over public highways and also only incidentally travel over public highways. *See, e.g. Henderson v. City & Cty. of Denver*, 300 P.3d 977, 983–84 (Colo.App.2012).

As stated above, there is no conflict between the provisions of C.R.S. §42-1-102(58) and (91), and they may therefore be read together to effectuate the intent of the legislature. Additionally, the issue of whether the definition of "snowplow" stated in C.R.S. §42-1-102(91) supported the contention that a snowplow is not a "motor vehicle" was directly addressed by a division of this Court in *Herrera v. City & County of Denver,* 221 P.3d 423 (Colo.App.2009). In that case, the Court stated:

> The inclusion of similar, overlapping terms indicates that terms defined in the statute are not mutually exclusive. The statute defines "authorized emergency vehicle," "authorized service vehicle," "motorcycle," "school bus," "snowplow," and "truck." § 42–1–102(6), (7), (55), (88), (91), (108), C.R.S.2009. Clearly, each of these terms is also encompassed by the statutory definition of "vehicle." *See* § 42–1–102(112). In addition, some or all of these terms may fall under the statutory definition of "motor vehicle." *See* § 42–1–102(58).

Herrera, 221 P.3d at 427-428. This analysis is also supported by the language of the definitions themselves. The sections of C.R.S. §42-1-102 referenced by the Defendant-Appellant that only refer to "vehicles," rather than "motor vehicles," "authorized emergency vehicle," "authorized service vehicle," and "snowplow," relate to definitions pertaining to groups of vehicles that are being used for governmental purposes. These definitions were intended by the legislature to

encompass a wide variety of vehicles that could be used by a government entity, such as police bicycles, off- road vehicles, and snowmobiles, which are expressly excluded from the definition of "motor vehicles," as well as automobiles, trucks, and electric vehicles, which clearly fall within the definition of "motor vehicle." The evidence in this case demonstrates that the snowplow in question qualifies as both a "vehicle," and a "motor vehicle," under the UMVL, and by adoption, the CGIA.

3. Construing "Snowplow" and a "Motor Vehicle" as Mutually Exclusive is Not Consistent with the Statutory Scheme and Intent of the CGIA.

Defendant-Appellant's suggested interpretation of the UMVL, and by adoption the CGIA, could have wide reaching negative effects. If Defendants' suggested statutory interpretation is adopted, it would essentially render the motor vehicle exception to the CGIA void. Under the UMLV, the definitions of "authorized service vehicles," "authorized emergency vehicles," and "snowplow" all describe vehicles that are publically owned and operated by governmental agencies. *See,* C.R.S.§ 42-1-102(6), (7), (91). These definitions encompass all, or nearly all, of the vehicles driven by governmental employees in the course and scope of their employment, including police vehicles, public utility trucks, tow trucks, snowplows and fire engines, and each of these definitions uses only the

word "vehicle," and not "motor vehicle" to describe these groups of vehicles. Under this logic, no publically owned vehicle would constitute a "motor vehicle," and the waiver of immunity under the CGIA would not be applicable in any situation. This would undermine the intent of the statute, which is "to provide for compensation to persons injured by the negligent conduct of government employees." *Roper v. Carneal*, 411 P.3d 889, 891–92 (Colo.App.2015).

Additionally, the language of the CGIA itself does not support Defendant-Appellant's proposed interpretation. The CGIA states, in relevant part:

> (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 except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:
> (a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment, except emergency vehicles operating within the provisions of section 42-4-108(2) and (3), C.R.S.;

C.R.S. § 24-10-106. The specific exception to the waiver of immunity for "emergency vehicles operating within the provisions of section 42-4-108(2) and (3)" refers only to "emergency vehicles," not emergency "motor vehicles," demonstrating that the legislature did not intend for the two terms to be mutually exclusive. C.R.S. §42-4-108(2) and (3). The existence of the exception to the waiver shows that the legislature intended emergency

vehicles, as defined by C.R.S. 42-1-102(6), which only uses the term "vehicles," and not "motor vehicles," to be subject to the waiver of immunity unless certain circumstances were present. This directly contradicts Defendant-Appellants' argument that the legislature intended to exclude all vehicles not designated as "motor vehicles" under the UMVL from the waiver provisions of the CGIA. As such, the Court should decline to adopt Defendant-Appellants' proffered interpretation, and allow Plaintiff-Appellee to move forward with her claims.

v. *Herrera* is Dispositive in this Case.

Defendant-Appellant attempts to distinguish this case from *Herrera v. City & County of Denver,* 221 P.3d 423 (Colo.App.2009), by arguing that the *Herrera* Court did not analyze the language in the UMVL to determine, from a plain language interpretation, whether a "snowplow" is defined as a "motor vehicle." In *Herrera*, a division of this Court considered whether a snowplow constituted a motor vehicle in light of the 2007 amendments to the CGIA. *Herrera,* 221 P.3d at 426. On appeal, the plaintiff argued that the district court erred in dismissing his claim against the defendants by ruling that "a snowplow does not fall within the statutory definition of 'motor vehicle,' as to which governmental immunity is waived under the CGIA." *Id.* at 426. The City and County of Denver, much like

the Defendant-Appellant here, argued that "the inclusion of a separate definition for "snowplow" in section 42-1-102(91), C.R.S.2009, demonstrates the General Assembly's intent that a snowplow cannot be a motor vehicle." *Id.* The Court did not find this argument persuasive, observing that "[n]othing in the statute provides that defined terms are mutually exclusive, and the statute includes examples of defined terms falling into multiple categories." *Id.* at 427. It explicitly stated that "[u]nder the statute, a 'vehicle' is 'a device that is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks,' § 42–1–102(112), which can also be a 'motor vehicle.'" *Id.* The Court went on to conclude that "a snowplow can be a motor vehicle" and stated that "the proper inquiry here is whether the snowplow, or dump truck with a snowplow blade attached, is a vehicle that is generally and commonly used to transport persons and property." *Id.*

This case is directly analogous and dispositive of the issue at hand. First, the *Herrera* court after analyzing the provisions of CGIA "in the context of the statute as a whole, [determined that the statue] does not indicate that the General Assembly intended to immunize the government from negligent acts committed by the driver of a snowplow." *Id.* at 426. Further, Defendant-Appellants ask that the Court find that the definitions of "snowplow" and "motor vehicle" are mutually exclusive, and that a snowplow can never constitute a "motor vehicle." While it is

true that the *Herrera* Court did not make an explicit list of those devices that constitute "vehicles" but not "motor vehicles," "the analysis in *Herrera* focused on whether the statutorily defined terms 'motor vehicle' and 'snowplow' were mutually exclusive." *Roper v. Carneal,* 411 P.3d 889, 894-895 (Colo.App.2015). After determining that they were not, the *Herrera* court enunciated that the proper inquiry was whether the snowplow in question "is a vehicle that is generally and commonly used to transport persons and property," and thus constituted a "motor vehicle" for the purpose of the waiver of immunity. *Herrera,* 221 P.3d at 427. In doing so, the Court struck a balance that allowed municipalities to dispute whether a particular snowplow constituted a "motor vehicle," while preserving one of the most basic purposes of the CGIA, "to allow a person to recover for personal injuries caused by a public entity." *Id.* at 426. As such, the principals of stare decisis should control in this matter, and the Court should remand this case for further proceedings.

b. The Trial Court did not Err in Finding Plaintiff Carried her Burden of Proof at the *Trinity* Hearing Establishing that the County's Snowplow is a "Motor Vehicle" as Defined in the UMVL, and by Adoption, the CGIA.

i. Standard of Review

Plaintiff-Appellee agrees with Defendant-Appellant's statement regarding the standard of review as it pertains to the de novo review of the trial court's determinations following the *Trinity* hearing in this case. *City & Cty. of Denver v. Crandall*, 161 P.3d 627, 632–33 (Colo. 2007)(stating "We review a trial or appellate court's legal conclusion de novo. Where, as here, the jurisdictional facts in evidence at the *Trinity* hearing are undisputed, the issue is one of law.)(internal citations omitted). However, Defendant-Appellant makes the argument that the undisputed facts of this case demonstrate that the County's snowplow is "special mobile machinery" and not a "motor vehicle." This issue was directly addressed by a division of this court in *Roper v. Carneal,* 411 P.3d 889 (Colo.App.2015), and as such, is dispositive. Plaintiff-Appellee therefore asserts that this issue should be decided pursuant to the principles of stare decisis. "The principles of stare decisis have long been the rule in Colorado." *People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999), *holding modified by Moore v. People*, 2014 CO 8, 318 P.3d 511. This doctrine "is a fundamental component of the rule of law, as it promotes

stability, certainly, and uniformity of judicial decisions." *Ingold v. AIMCO/Bluffs, L.L.C. Apartments,* 159 P.3d 116, 125 (Colo.2007). The Colorado Supreme Court has explained that "stare decisis should be adhered to in the absence of sound reason for rejecting it." *Blehm,* 983 P.2d at 788. The Defendant-Appellant has made no attempt to distinguish the matter at hand from the facts and circumstances presented in the *Roper* case. As such, there is no sound reasoning that would support a departure from precedent, and this Court should find that the snowplow in question constitutes a "motor vehicle," and not "special mobile machinery," consistent with its decision in *Roper*.

ii. Statement of Preservation

Plaintiff-Appellant agrees that Defendants have preserved for appeal.

iii. Plaintiff has Carried Her Burden to Establish Subject Matter Jurisdiction.

As relevant here, the CGIA "provides that immunity is waived by a public entity in an action for injuries resulting from the operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment." *Young v. Jefferson Cty. Sheriff*, 292 P.3d 1189, 1191(Colo.App.2012)(internal citations omittied); *See also,* C.R.S. 24-10-106(1)(a). "Under the CGIA, the plaintiff has the burden of establishing that the public entity is not immune and, thus, the trial court has jurisdiction over his or her

tort claim." *Henderson*, 300 P.3d at 980. "Although the burden falls upon the plaintiff, the burden is a relatively lenient one." *Tidwell ex rel. Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 86 (Colo. 2003). Here, Defendant-Appellant only disputes that the snowplow in question qualifies as a "motor vehicle."

"The CGIA incorporates the definition of 'motor vehicle' from section 42-1-102." *Roper,* 411 P.3d at 892. Section 42-1-102(58) defines a "motor vehicle" as "any self-propelled vehicle that is designed primarily for travel on the public highways and that is generally and commonly used to transport persons and property over the public highways. . . " C.R.S. § 42-1-102(58). As such, courts in this state have held that "a 'motor vehicle' must be (1) designed primarily for travel on the public highways and (2) generally and commonly used to transport persons and property over the public highways. *Roper*, 411 P.3d at 894. Despite Defendant-Appellant's assertions, the undisputed evidence in this case demonstrates that Plaintiff has met her burden to establish a waiver of governmental immunity in this case.

1. Evidence Presented at the Trial Court Establishes that the County's Snowplow was Primarily Designed for Travel on the Public Highways.

Defendant-Appellants state that the trial court erred in finding that the snowplow was designed for the purpose of travel on the county roads because it

did not consider the primary propose for the vehicle's design. Defendant-Appellants are apparently attempting to argue that the snowplow was not primarily designed for travel on public highways, although they do not present any argument as to what the snowplow was primarily designed for if not travel on public highways. Based on the undisputed facts of this case, however, it is clear that the snowplow's only purpose was to traverse county roads to remediate snow and ice.

At the *Trinity* hearing held by the district court on September 14, 2017, Plaintiff presented testimony from Rod Meredith, the Director of Public Works Operations for Douglas County, Colorado. R. Tr. (9/14/2017), p. 5 11.11-18. Mr. Meredith testified that the snowplow in question was a modified tandem axle dump truck, with a large spreader mounted onto the chassis, a pump system installed, and a plow attached to the front. R. Tr. (9/14/2017), p. 9 ll. 21-25, p. 10 ll. 1-25, p. 11 ll. 1-3. He further testified that the snowplow's primary purpose was to remediate snow on the county roadways, and that the snowplow could travel over the highways whether or not it was remediating snow. R. Tr. (9/17/2014), p. 11 ll. 8-16, p. 12 ll. 16-21. Mr. Meredith also stated that while the attachment of the plow limited the truck's ability to travel in tight spaces, it was still designed to fit within a standard lane of travel. R. Tr. (9/14/2017), p. 13 ll. 5-14.

The relevant considerations here are directly analogous to the analysis performed by a division of this Court in *Roper*. In that case, the Court stated as follows:

> The undisputed evidence shows that the snowplow, as modified, is a dump truck designed to remove snow and ice from the public highways (specifically, county roads). The snowplow must necessarily travel on the public highways to perform this function. We are not persuaded by defendants' argument that the snowplow is designed primarily for road maintenance rather than travel. Because the snowplow's maintenance function—plowing snow on county roads—requires travel on the public highways, the snowplow is necessarily designed for both purposes. The record does not indicate that the snowplow is designed to function anywhere other than on the public highways. To the contrary, defendants acknowledge that it is used exclusively on county roads. Therefore, we conclude that the snowplow is "designed primarily for travel on the public highways." § 42–1–102(58).

Roper, 411 P.3d at 895. The analysis is the same in this case. The only purpose of the modified truck is to remediate snow and ice on county roads. R. Tr. (9/14/2017), p. 15 ll. 18-20. As such, its primary design was for travel on public highways. Plaintiff has clearly met her burden with regard to the snowplow's primary purpose.

2. The Evidence Presented to the Trial Court Establishes that the County's Snowplow was Generally and Commonly Used to Transport People and Property Over the Public Highways.

Defendant-Appellant next argues that Plaintiff has failed to establish that the County's snowplow was commonly used to transport people and property over the public highways. At the *Trinity* hearing, Mr. Meredith testified that the snowplow regularly carried sand and gravel, as well as a driver, and occasionally a passenger while it was performing its primary purpose of snow and ice remediation on public roads. R. Tr. (09/14/2017), p. 17 ll. 13-19, p. 18 ll. 12-14. Again, this point was directly addressed by the Court in the *Roper* decision, which stated:

> Here, the record shows that the snowplow carries a mixture of sand and salt held in the truck's bed, which it spreads over the roadway while plowing snow. In our view, the sand and salt mixture constitutes "property" under any ordinary sense of the term. *See Springer,* 13 P.3d at 799 (in interpreting statutes, we give words their plain and ordinary meaning); *Black's Law Dictionary* 1335–36 (9th ed. 2009) (defining "property" as "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised"); *Webster's Third New International Dictionary* Unabridged 1818 (2002) (defining "property" as "something that is or may be owned or possessed"). The snowplow transports this sand and salt mixture over the public highways as part of its function in maintaining those highways. Thus, we conclude that the snowplow is generally and commonly used to transport property (salt and sand) over the public highways, as required to meet the "motor vehicle" definition.

Roper, 411 P.3d at 895. There are no facts or circumstances in this case that deviate in any way from the description of the snowplow in *Roper,* and as such, this analysis is controlling. Plaintiff, therefore, has met her burden to demonstrate

that the snowplow in question regularly transports persons and property on the roadways.

3. The County's Snowplow is Not "Special Mobile Machinery."

Defendant-Appellant next argues that the snowplow in question constitutes "special mobile machinery," rather than a "motor vehicle." Under Colorado law, the definitions of "special mobile machinery" and "motor vehicle" are mutually exclusive." *Roper,* 411 P.3d at 894. This is because "special mobile machinery" is only "incidentally" operated on public roadways, which is "plainly incompatible with the general and common use of motor vehicles: transportation over the public highways." *Id.*

When considering whether a modified vehicle meets the definition of "special mobile machinery", the *Roper* Court stated that the relevant inquiry was whether the modified vehicle meets two elements: "(1) the vehicle must be "redesigned or modified by the addition of mounted equipment or machinery" and (2) it must be "only incidentally operated or moved over the public highways." *Roper,* 411 P.3d at 896; *quoting,* § 42–1–102(93.5)(a)(II). Defendant-Appellant here focuses only on the first requirement, while completely ignoring the second requirement, that the special mobile machinery must only be "incidentally" operated or moved over public roadways.

Here, as in the *Roper* case, "[t]he undisputed facts show that the snowplow is exclusively driven over the public highways." *Id.* at 897; *see also* R. Tr. (9/14/2017), p. 15 ll. 18-20. Given that its sole purpose is to plow snow and ice on public roads, "without the driving on the highways that the truck does in this case, the asserted "primary" purpose of the truck—plowing snow—would cease to exist." *Id.* The trial court's determination that the snowplow in question constitutes a "motor vehicle" is supported by the evidence presented at the *Trinity* hearing and the applicable case law. As such, Plaintiff has sufficiently established that the snowplow constitutes a "motor vehicle," and has carried her burden to establish that governmental immunity has been waived as to her claims.

iv. *Roper* is Dispositive.

Defendant-Appellant contends that *Roper v. Carneal,* 411 P.3d 889 (Colo.App.2015), is not dispositive in this case. In *Roper*, a division of this Court considered whether a snowplow constituted a "motor vehicle," or "special mobile machinery," under the definitions stated in C.R.S. 42-1-102. *Roper,* 411 P.3d at 893. In this case, a division of the Court of appeals found the following facts relevant to its determination:

- The snowplow driven by Carneal was a dump truck with special modifications.

- These modifications included the addition of a bed and hydraulic dumping system, mounting of a snowplow blade, mounting of a tailgate sander, and mounting of yellow and blue emergency lights to the top of the truck.
- As modified, the snowplow is used exclusively on county roads to remove snow and ice.
- The snowplow carries a sand and salt mixture in the truck's bed, which it spreads over the roadway while plowing snow.
- The cab of the snowplow can seat at least two people. However, it is generally assigned only one operator.

Id., at 893. The exact same facts, as described in the testimony of Mr. Meredith, are present in this case. As discussed in greater detail above, the Court, following a thorough analysis of the definitions of both "motor vehicle," and "special mobile machinery," in C.R.S. §42-1-102 found that the snowplow in question constituted a "motor vehicle" for the purposes of the waiver of immunity under the CGIA. Defendant-Appellants make no effort to distinguish the facts of this case from those in *Roper*, nor do they offer an alternative analysis explaining why the outcome in this case should be different. As such, there is no sound reasoning that would support a departure from established precedent. The Court should, therefore, find that the snowplow in question in this case constitutes a "motor vehicle," consistent with its decision in the *Roper* case.

c. Plaintiff-Appellee Should be Entitled to an Award of Attorney Fees and Costs for this Appeal.

The decisions handed down by divisions of this Court in *Roper* and *Herrera* are entirely dispositive of the matter at hand. "An appeal 'lacks substantial justification' and is 'substantially frivolous' under section 13–17–102(4) when the appellant's brief fails to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error, supported by legal authority." *Tidwell v. Bevan Properties, Ltd.*, 262 P.3d 964, 969 (Colo. App. 2011). The Defendant-Appellants have not presented any novel issues, suggested that the law has shifted, or shown that "sound reasons exist and . . . the general interests will suffer less by departure . . . from strict adherence." *Blehm,* 983 P.2d at 788-789. Rather, they have merely presented redundant arguments that have already been addressed by divisions of this Court. The trial court's ruling following the *Trinity* hearing was entirely consistent with established precedent. As such, this appeal lacks substantial justification. As such, Plaintiff-Appellee should be entitled to an award of attorney fees pursuant to C.R.S. §13-17-102(4).

CONCLUSION

As demonstrated above, Defendant-Appellants have failed to make an argument that would distinguish the analysis of this case from the decisions of this Court in *Roper* and *Herrera.* Additionally a reading of the UMVL, and by adoption, the CGLA, as narrow as the reading suggested by Defendant-Appellants

would render the motor vehicle exception to the CGLA essentially void. As such, Plaintiff-Appellant respectfully requests that this Court decline to adopt the Defendant-Appellants' suggested interpretation, and find that the terms "motor vehicle" and "snowplow" in the UMVL are not mutually exclusive, in accordance with its decision in *Herrera,* and remand this case to the district court for further proceedings. Additionally, the undisputed facts of this case show that the snowplow in question constitutes a "motor vehicle" and not "special mobile machinery." As such, Plaintiff-Appellee respectfully requests that this Court rule in accordance with its decision in *Roper,* and find that the snowplow constitutes a "motor vehicle" for the purposes of the waiver provision of the CGLA, and remand this case to the district court for further proceedings. Finally, Plaintiff-Appellee respectfully requests that she be awarded attorney's fees incurred in this appeal, as the arguments of Defendant-Appellants lack substantial justification.

Respectfully submitted this 26th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER BRIEF** was served on this 26th day of April, 2018, via ICCES electronic service to all counsel of record:

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