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<td>COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from:
Douglas County District Court

District Court Judge: The Hon. Paul A. King

District Court Case Number: 2016CV30834
In the Case of:

Plaintiff: SHARON NELSON,

Appellee,

v.

Defendants: COUNTY OF DOUGLAS and KRISTIN LANIAR,

Appellants.</td>
<td>DATE FILED: May 31, 2018 12:37 PM
FILING ID: B08506ED2A7C9
CASE NUMBER: 2017CA1852

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<td colspan="2">REPLY BRIEF</td>
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C.A.R. 32(h) CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with all requirements of C.A.R. 28 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 3,516 words (reply brief does not exceed 5,700 words).

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

OFFICE OF THE COUNTY ATTORNEY
DOUGLAS COUNTY, COLORADO

By: *s/ Dawn L. Johnson*
Dawn L. Johnson, Reg. No. 48451
Senior Assistant County Attorney

Pursuant to C.A.R. 30(f), a duly signed original is on file in the Office of the County Attorney, Douglas County, Colorado

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I. INTRODUCTION

In the trial court, Plaintiff did not address the statutory construction of "motor vehicle" as defined in the UMVL and, in turn, the CGIA. Instead, Plaintiff argued only that *Herrera* and *Roper* previously decided that a snowplow was a "motor vehicle" for purposes of the CGIA. On appeal, Plaintiff raises statutory construction arguments that she failed to make below. Plaintiff's efforts to delve into the statutory construction of the UMVL and CGIA on appeal inherently concede that the construction argument raised by Defendants is not addressed in *Herrera* or *Roper*, but Plaintiff's belated construction challenge has been waived.

Notwithstanding Plaintiff's waiver of the majority of her arguments on appeal, Plaintiff's Answer Brief also fails to present a valid substantive basis for construing the snowplow at issue to be a "motor vehicle" such as would waive the County's governmental immunity. Plaintiff's arguments largely ignore the plain language of the statute and standard principles of statutory construction in an effort to impose negligence liability in an area where the legislature has expressly refused to do so. Moreover, even if the Court were to conclude that Plaintiff's construction of the UMVL is not precluded by the plain language of the statute, the evidence presented to the trial court does not support a determination that the snowplow was a "motor vehicle" and not "special mobile machinery." As a result, Plaintiff has failed to meet

her burden of establishing jurisdiction, and her remaining claims should be dismissed with prejudice on governmental immunity grounds.

II. ARGUMENT

A. Plaintiff Has Waived Her Statutory Interpretation Arguments.

"Our judicial system depends upon the orderly presentation and preservation of issues." *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61 ¶ 18. Accordingly, "[a] basic principle of appellate jurisprudence is that arguments not advanced in the trial court and on appeal are generally deemed waived." *Id.*; *see also Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22 ¶ 2 ("We do not consider 'arguments never presented to, considered or ruled upon by' the district court.") (citation omitted). "To preserve an argument as to *why* a particular decision is appropriate, a party must timely raise that specific argument." *Core-Mark Midcontinental Inc.*, 2016 COA 22 ¶ 26 (emphasis in original).

In the proceedings below, Plaintiff argued that prior decisions from divisions of this Court had concluded that a snowplow was a "motor vehicle" for purposes of the CGIA's waiver of governmental immunity. R. Court File, pp. 47-50; R. Tr. (9/14/2017), p. 28, ll.1-24. Plaintiff did not, however, address the statutory construction of the UMVL or the CGIA in her arguments below. *See id*. On appeal, Plaintiff's Answer Brief now focuses largely on construction of the CGIA and the

term "motor vehicle" as it is defined in the UMVL. (*See* Answer Br. at 6-14.) Because Plaintiff failed to raise these arguments in the trial court, she has not properly preserved them for review, and the Court should not consider them. *See, e.g.*, *Core-Mark Midcontinental Inc.*, 2016 COA 22 ¶ 25-27 (refusing to consider arguments not explicitly made in the trial court).

B. A "Snowplow" Is Not A "Motor Vehicle" As Used In The UMVL.

1. The definitions of "snowplow" and "motor vehicle" are not compatible.

Plaintiff contends that the definition of a "snowplow" can be construed as consistent with the definition of a "motor vehicle" because the definition of a "snowplow" only addresses the vehicle's design and not its use. Plaintiff's argument appears to rely on the fact that the definition does not specifically include the words "and is used for," or words to that effect. Plaintiff's assertion that the definition of "snowplow" does not address the vehicle's intended use is belied by the plain language of the statute.

The definition of "snowplow" set forth in the UMVL unambiguously addresses the use for which such vehicles are intended:

> '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). Plaintiff seems to suggest that this definition, identifying a class of vehicles designed for a specific use, does not address this class of vehicles' use because the definition does not go on to specify that the use for which they were designed is, in fact, the use to which they are put. Plaintiff's assertion that these vehicles are used for some other purpose is directly contrary to the plain language of the definition; if the vehicles are originally designed for or modified to be used for a specific purpose, it is axiomatic that they *are* used for that purpose. The definition therefore does specify the usage for this category of vehicles.

Because the statute explicitly defines the usage for snowplows, it is inconsistent with the definition of "motor vehicle." Namely, a "snowplow" is used for highway snow and ice removal or control, while a "motor vehicle" is generally and commonly used to transport persons and property over public highways. C.R.S. § 42-1-102(58); C.R.S. § 42-1-102(91). The separate and distinct purpose and use of these categories of vehicles precludes a construction that two terms are coextensive. *See Henderson v. City of Denver*, 2012 COA 152 ¶ 39 (comparing the definitions of "motor vehicle" and "mobile machinery" and finding the two to be mutually exclusive, explaining "we see that mobile machinery is not primarily designed to perform a motor vehicle's general and common use, and that its common use is different.").

2. Plaintiff's proffered construction is contrary to well-established principles of statutory construction.

Plaintiff effectively asks this Court to conclude that the General Assembly's usage of two different terms throughout C.R.S. § 42-1-102 is merely incidental and that the specific designation of one of two separately defined terms was, in fact, indiscriminate. Plaintiff's argument is contrary to the well-established principle that the General Assembly's use of different terms reflects an intent on the part of the legislature to attribute different meanings to those terms. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008) ("In interpreting statutory language, we presume that the legislature did not use language idly. Rather, the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings."); *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003) (holding legislature's use of similar but differing terms in Title 42 reflected an intent to afford those terms different meaning, explaining "[w]e do not 'presume that the legislature used language 'idly and with no intent that meaning should be given to its language.'"") (citation omitted).

The Colorado Supreme Court rejected a similar argument just one month ago in *People v. Rediger*, 2018 CO 32. In *Rediger*, the People argued that the legislature's use of the term "public employee" in C.R.S. § 18-9-110 included any employee who served a governmental function even if not employed by the

governmental entity. 2018 CO 32 ¶ 22. The Colorado Supreme Court rejected the People's argument, pointing out that the term "public servant" was defined in the statute to encompass "any person participating . . . in performing a governmental function[.]" *Id.* The Court concluded that if, as the People maintained, the legislature had intended a similarly broad construction of the term "public employee," that concept was already encompassed by the term "public servant," which would have rendered the legislature's decision to instead use the term "public employee" superfluous. *Id.* In doing so, the Court reiterated:

> Our precedents clearly instruct, however, that 'the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings.' And we may not construe a statute so as to render any statutory words or phrases superfluous. Accordingly, in our view, 'public employee' must mean something different than 'public servant.'

Id.

As *Rediger* and numerous other Supreme Court decisions have emphasized, courts may not construe statutory language in a manner that assumes the legislature's use of specific terminology was unintentional, particularly where, as here, those differing terms are expressly and separately defined. The General Assembly's definitions of various categories of vehicles as, in some instances, only "vehicles," and, in numerous other instances, as "motor vehicles" reflects the legislature's intent that those differing terms be afforded different meaning.

3. Construing the UMVL in accordance with its plain language is not inconsistent with the CGIA.

Plaintiff's Answer Brief offers no explanation for the legislature's use of separate terminology in defining various classes of vehicles that credits the General Assembly's usage as intentional. Instead, Plaintiff argues that the legislature's differentiation between "motor vehicles" and "vehicles" should not be construed as intentional because other government-owned and operated vehicles could potentially be impacted. Contrary to Plaintiff's assertion, construing the legislature's differentiation of a "snowplow" to be a "vehicle," but not a "motor vehicle," is consistent with both the CGIA and the UMVL.

As a preliminary matter, Plaintiff's argument is one of public policy and not of statutory construction. Such matters are not within the province of the courts, but are instead more properly left to the General Assembly. *See Bd. of Cty. Comm'rs v. Colo. Dept. of Public Health & Environment*, 218 P.3d 336, 343 n.11 (Colo. 2009) (rejecting Department's public policy argument where it lacked in the statutory language, finding "[t]he Department may be correct that such a limitation on its authority is problematic from a public policy standpoint. However, such public policy concerns are properly addressed to the General Assembly."); *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest,

warrant or mandate."); *Jordan v. Safeco Ins. Co.*, 2013 COA 47 ¶ 35 (holding that the General Assembly may change a law in a way that, in some cases, is detrimental to a covered class, but the court is not at liberty to impose policy restrictions on the actions of the legislature).

Furthermore, construing the UMVL in accordance with its plain language as reflecting the legislature's differentiation between "vehicles" and "motor vehicles" would have limited impact on the scope of governmental immunity.[1] Plaintiff correctly notes that "authorized emergency vehicles" are defined as "vehicles" but not "motor vehicles." *See* C.R.S. § 42-1-102(6). However, the definition of "authorized emergency vehicles" further specifies that such vehicles must be operated "to protect and preserve life and property in accordance with state laws regulating emergency vehicles[.]" *Id.* If and to the extent vehicles of the fire department, police vehicles, ambulances and other special-purpose vehicles owned and operated by or for a governmental agency were not operated for such purposes and in accordance with state laws governing emergency vehicles, they may well

[1] Plaintiff claims without any support that snowplows, authorized emergency vehicles and authorized service vehicles comprise all or nearly all of the vehicles driven by government employees in the scope of their employment. (Answer Br. at 12.) Contrary to Plaintiff's unsubstantiated assertion, Douglas County has a substantial number of automobiles that are driven by County employees in the scope of their employment.

qualify as a "motor vehicle" for purposes of the CGIA. If, on the other hand, such vehicles *are* operated to preserve life and property in accordance with state laws regulating emergency vehicles, liability should not attach to the governmental entity in any event. Thus, Plaintiff's assertion that a plain language interpretation of the UMVL could have "wide reaching negative effects" lacks merit.

Construing a "snowplow" to be a "motor vehicle" is also inconsistent with the intent of the CGIA and the UMVL. Relying on *Roper v. Corneal*, 2015 COA 13 ¶ 10, Plaintiff argues that the intent of the CGIA is "to provide for compensation to persons injured by the *negligent* conduct of government employees." (Answer Br. at 13 (emphasis added).) However, in the specific context of government employees operating a *snowplow*, the legislature has concluded that mere negligence should *not* warrant liability. As Defendants explained in their Opening Brief, Title 42 limits the liability of snowplow drivers to "the consequences of a reckless or careless disregard for the safety of others." C.R.S. § 42-4-224(5)(b). Construing a "snowplow" to be a "motor vehicle" for purposes of the CGIA creates the untenable situation of creating a negligence cause of action under the more general provisions of the CGIA *even though* the legislature has more specifically raised the standard of liability for snowplow operators under Title 42. *Cf. Beren v. Beren*, 2015 CO 29 ¶ 11 ("If different statutory provisions cannot be harmonized, the specific provision

controls over the general provision.") Plaintiff's Answer Brief makes no attempt to reconcile this conflict.

Ultimately, Plaintiff's efforts to construe the UMVL and the CGIA to provide for a negligence cause of action against the County and its former employee arising out of her operation of a County-owned snowplow are inconsistent with the plain language of the UMVL as well as the intent of the CGIA and UMVL. The plain language of the UMVL unambiguously differentiates a "snowplow" from a "motor vehicle," and the General Assembly has specifically determined mere negligence on the part of a snowplow operator is insufficient to establish liability. As a result, a "snowplow" is not a "motor vehicle" under the CGIA, and Douglas County has not waived governmental immunity from Plaintiff's claims.

C. Alternatively, The Evidence Adduced In The Trial Court Demonstrates That The Snowplow At Issue Is Special Mobile Machinery.

In her Answer Brief, Plaintiff repeatedly concedes that the evidence presented to the trial court was that the sole purpose and use for the snowplow at issue was remediation of snow and ice on County roads. Notwithstanding this concession, Plaintiff argues that this evidence establishes that the snowplow was primarily designed for travel on public highways and that the snowplow was generally and commonly used to transport persons and property over public

roadways, rendering it a "motor vehicle" within the meaning of the UMVL. Plaintiff's argument is contrary to the language of the UMVL and inconsistent with evidence adduced at trial.

At the *Trinity* hearing before the trial court, Rod Meredith, the only witness, testified that the snowplow at issue was designed for highway snow and ice removal and control. R. Tr. (9/14/2017), p. 11, ll. 8-9, p. 15, ll. 18-20. Plaintiff, relying on *Roper*, contends that such evidence establishes that the vehicle is *primarily* designed for travel over the highways. Plaintiff's position runs contrary to the definition of "snowplow" set out in the UMVL. Under the UMVL, a "snowplow" is designed (whether originally, or through subsequent modification) for "highway snow and ice removal and control[.]" C.R.S. § 42-1-102(91). The *defining characteristic* of this class of vehicles is their design for snow and ice removal and control. Given the UMVL's emphasis on this design, the conclusion that a snowplow is *primarily* designed for travel over the public highways, as opposed to being designed for snow and ice removal and control, is incongruous.[2]

[2] Plaintiff quotes at length from the *Roper* Court's decision finding that the snowplow in that case was not "special mobile machinery" in opposing this alternative determination. If the Court were to reject Defendants' argument that a "snowplow" and a "motor vehicle" are mutually exclusive under the plain language of the UMVL, reconsideration of the analysis set forth in *Roper* as an avenue for resolving the conflict over liability for negligent operation of a snowplow as set forth in Section B.3, *supra*.

Similarly, the evidence adduced before the trial court is not consistent with the trial court's conclusion that the snowplow was generally and commonly used to transport persons and property over public roadways. For example, Mr. Meredith testified that while the snowplow had a cab with room for a passenger, the passenger seat was only rarely occupied and then only for purposes of instructing on use of the snowplow for snow and ice removal and control. R. Tr. (9/14/2017), p. 16, ll. 6-24. Even assuming such a passenger could be construed to be using the vehicle for transport over public highways—which itself is doubtful—the instances in which the snowplow was used for such purposes were rare, and would not qualify as a general and common use for the vehicle. Furthermore, Mr. Meredith specifically testified that the snowplow was *not* used to transport the sand and salt used for roadway maintenance from one place to another. R. Tr. (9/14/2017), p. 20, ll. 14-24. In fact. Mr. Meredith testified that when the County needed to transport those materials, it would use County trucks and *not* the snowplow. *Id.* This evidence, which was uncontradicted, defeats any evidentiary basis for concluding that the snowplow at issue meets the definition of a "motor vehicle" under the UMVL such as would waive the County's immunity from suit.

D. Plaintiff Is Not Entitled To Attorney's Fees.

Plaintiff concludes her Answer Brief with a request for an award of attorney's

fees, arguing that Defendants have not raised any novel issues in this appeal. (Answer Br. at 26.) Even if the Court were to conclude that the snowplow at issue is a "motor vehicle" within the meaning of the UMVL and, in turn, the CGIA, no award of attorney's fees is warranted in this case.

Colorado appellate courts have demonstrated a reluctance to award attorney's fees other than in extreme cases. As the Colorado Supreme Court has explained:

> [A]ppellate courts in Colorado have refused to impose or affirm sanctions assessed by the trial courts where a genuine disputed issue in the matter is presented, where a proponent makes an argument that although lacking in precedential authority, nonetheless is supported by logic, and where the appeal was brought in good faith, notwithstanding that the pleadings, affidavits, and depositions disclose, as a matter of law, that no genuine issue exists. The past reluctance by state appellate courts to impose sanctions in the nature of attorney fees and court costs derived from the general principles established by DR 7-101 and DR 7-102 of the Code of Professional Responsibility which obligated an attorney to zealously represent his or her client even when such representation may require the lawyer to advance innovative claims seeking an extension, modification, or reversal of existing law. Such advocacy, even though based on arguments that are 'extremely unlikely to prevail on appeal . . . cannot be said necessarily [to be] frivolous.' Hence the purpose underlying the award of attorney fees and costs is to deter 'egregious conduct,' and not to discourage legal theories that, while having no support in our extant decisional law, nevertheless may be persuasive by virtue of the unique character of the case. Accordingly, as a general rule, we have declined to impose this sanction except in cases that are clear and unequivocal.

Wood Bros. Homes, Inc. v. Howard, 862 P.2d 925, 935 (Colo. 1993) (internal citations omitted).

Since the passage of the 2007 amendment to the CGIA, application of the term "motor vehicle" to a "snowplow" has not been addressed by the Colorado Supreme Court and has only twice been addressed by divisions of this Court. The arguments raised here present novel arguments regarding the statutory construction of those terms and are supported by well-established principles of statutory construction. Defendants have in good faith raised a novel issue regarding the construction of the UMVL that was not discussed, let alone resolved, in *Herrera*. Plaintiff's assertion that Defendants have not raised a novel issue is belied by the very fact that she has delved into an extensive statutory analysis of the terminology used in the UMVL rather than simply relying on *Herrera's* analysis of the statutory language.

Furthermore, this appeal presents a matter of public significance for all counties in Colorado, evidenced in part by the fact that Colorado Counties, Inc. ("CCI") has filed an *amicus* brief. As CCI's brief points out, the issues raised in this appeal have significant impacts for county governments and county officials tasked with providing the essential service of clearing roads within their jurisdictions of snow and ice. (*See* Br. of *Amicus Curiae* Colo. Counties, Inc. in Supp. of Cty. of Douglas, Colo. at 1-2.) The cost of those services, and the attendant liability of the counties for providing such services, ultimately fall to the taxpayers within their jurisdictions and thus directly impact Colorado residents generally.

This appeal involves an issue of public significance and presents novel questions of statutory construction. As such, even if the Court were to deny Defendants' appeal, the Court should deny Plaintiff's request for an award of attorney's fees. *See Bd. of County Com'rs, Fremont County v. Colorado Ctys. Cas. and Prop. Pool*, 888 P.2d 352, 357 (Colo. App. 1994) ("Claims involving novel questions of law for which no determinative authority exists are not frivolous, groundless, or vexatious.").

III. CONCLUSION

WHEREFORE, for the reasons set forth herein and in Defendants' Opening Brief, Defendants/Appellants, Kristin Lanier and the County of Douglas respectfully request that this Court vacate the trial court's September 14, 2017 *Trinity* Order denying Defendants' motion to dismiss on governmental immunity grounds and grant Defendants' motion to dismiss with prejudice.

Respectfully submitted this 31st day of May, 2018.

OFFICE OF THE COUNTY ATTORNEY
DOUGLAS COUNTY, COLORADO

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF was electronically filed and served on all parties of record via ICCES, this 31st day of May, 2018.

s/ Cindy Hancock

Pursuant to C.A.R. 30(f), a duly signed original is on file in the Office of the County Attorney, Douglas County, Colorado