

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 14, 2020 1:55 PM FILING ID: D9CAB1C18589D CASE NUMBER: 2020CA216</p>
<p>Appeal District Court, City and County of Denver, Colorado The Honorable Robert L. McGahey, Jr. Case No: 2019CV32714</p>	
<p>Plaintiff-Appellant: ELIZABETH MORIN, v. Defendant-Appellee: ISS FACILITY SERVICES, INC., and CITY AND COUNTY OF DENVER.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">OPENING BRIEF</p>	

Appellant, by and through counsel, Bovo Law, LLC, respectfully submits her Opening Brief as follows:

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:

A. 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 2747 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

B. 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.



Signature of attorney or party

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I. Introduction

The underlying case is a personal injury action that arose out of an incident when Appellant Elizabeth Morin, while walking on the west side of level five of the Denver International Airport, fell on an unmarked water hazard, left by the Appellees, and suffered injuries. Appellant asserted claims against the Appellees for; premises liability, negligence, negligent hiring, and negligent supervision.

The last day of the Appellant's statute of limitations fell on a Saturday, July 13, 2019. Appellant filed her Complaint , [CF, p. 1-8], on the first full business day after July 13, 2019, which was Monday, July 15, 2019. The Appellees' filed a motion to dismiss, [CF, p. 26-34], for failure to file within the statute of limitations. The District Court, in noting that the circumstances here present an extremely close call, [CF, p.84], granted Appellees' motion to dismiss. Further, the District Court found that Appellant did not lack substantial justification in choosing to maintain the lawsuit, rather than voluntarily dismissing it, awarded attorney fees and costs in its final order, as mandated pursuant to C.R.S. § 13-17-201.

II. Statement of the Case

This appeal stems from the dismissal of Appellant's claims and the awarding of attorney fees for allegedly failing to file the complaint within the statute of limitations. The judgment appealed is the Final Order granting Defendants' Motion for Attorney Fees and Bill of Costs, on December 20, 2019, [CF, p. 79-82], for the Order granting Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Colo. R. Civ. P. 12(B)(5) and Request for Oral Argument, on October 29, 2019, [CF, p. 83-85], by the Honorable Judge Robert L. McGahey, Jr., Denver District Judge. The final orders are issued by a Colorado District Court and subject to appellate court's jurisdiction pursuant to C.R.S. § 13-4-102(1).

III. Issue Presented

The issue presented to the Court is whether a complaint, whose claims' statute of limitations end on a Saturday, may be filed on the first full business day after a court is closed on the Saturday, and still be within the statute of limitations, as intended pursuant to C.R.S. § 24-11-110.

IV. Statement of Facts

The date of the incident in the subject matter is July 13, 2017, and the statute of limitations that applies in this matter is two years from the date of the incident. C.R.S. § 13-80-102(1)(a). The Plaintiff had agreed that the anniversary date time computation method controls for calculating a period of years versus the day time computation as defined in C.R.C.P. 6(a)(1), thus making July 13, 2019 the statute of limitations. [CF, p. 42].

July 13, 2019 was a Saturday and the District Court was closed. The Plaintiff filed her Complaint on July 15, 2019. [CF, p. 1].

The Defendants filed their Motion to Dismiss on August 23, 2019, [CF, p. 26-34], stating the Plaintiff is barred by the applicable statute of limitations as the Complaint was not filed “within” the two years of the incident, which implied the Complaint should have been filed no later than July 13, 2019, regardless of the fact that the date was a Saturday and the District Court was closed. The District Court concluded that it was a close call and granted the Defendants motion based on the language in *Williams v. Crop. Prod. Servs., Inc.*, 361 P.3d 1075,1077-78 (Colo. App. 2015).

Finally, the District Court concluded that the Plaintiff did not lack substantial justification in choosing to maintain the lawsuit, rather than voluntarily dismiss it.

Unfortunately, the District Court's hands were tied, as the award of fees is mandatory pursuant to C.R.S. § 13-17-201. [CF, p. 55]. The District Court latter granted attorney fees of \$3,801.00 and \$219.00 in costs. [CF, p. 71].

V. Summary of the Argument

Pursuant to C.R.S. § 24-11-110, when the statutory limitation date falls on a legal holiday, or when the court is closed on a Saturday or Sunday, the statutory date is extended, providing a uniform method for determining when the statutory period ends. *Matthews v. City & County of Denver*, 20 P.3d 1227 (Colo. App. 2000); *Austin v. Weld County*, 702 P.2d 293 (Colo. App. 1985). Here, the statute of limitation date was Saturday, July 13, 2019. The District Court was closed on the Saturday, and the Plaintiff filed her lawsuit on the next business day, Monday, July 15, 2019. The Plaintiff did not file her Complaint past the statute of limitation, but “within” the statute of limitation, as pursuant to C.R.S. § 24-11-110 the statutory period ended on Monday, July 15, 2019. *Matthews v. City & County of Denver*, 20 P.3d 1227 (Colo. App. 2000).

VI. Argument

A. Standard of Review

The standard of review for a district court's dismissal of an action based on a statute of limitations defense is *de novo*. *SMLL, L.L.C. v. Peak Nat'l Bank*, 111 P.3d 563, 564 (Colo. App. 2005). Further, the legal conclusions of the district court are reviewed *de novo*, and the factual findings are reviewed for clear error. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000). While the date of accrual of a claim is usually a question of fact, if the undisputed facts clearly establish the date in question, the issue may be decided as a matter of law. *Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 158-59 (Colo. App. 1995). Here, the facts material to the resolution of this legal issue are not in dispute, therefore the standard of review is *de novo*.

The Court will be asked to interpret a statute. The Court's primary goal is to discern and give effect to the General Assembly's intent. *Krol v. CF & Steel*, 307 P.3d 1116 (Colo. App. 2013). The Court will look first to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. *Id.* The Court will read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme,

giving consistent, harmonious, and sensible effect to all of the statute's language. *Id.* After the Court has done this, if it determines that the statute is not ambiguous, it will enforce it as written and will not resort to other rules of statutory construction. *Id.*

Lastly, the Court will be asked to interpret a rule of procedure. The Court interprets a rule of procedure according to its commonly understood and accepted meaning. *City & Cnty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1275 (Colo. 2010). Words and provisions should not be added to a rule, and the inclusion of certain terms in a rule implies the exclusion of others. *Id.*

B. Issue Preserved

The Appellant argued in her Response to Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Colo. R. Civ. P. 12(B)(5), [CF, p. 42], that pursuant to C.R.S. § 24-11-110, Plaintiff filed her Complaint "within" the statute of limitation when she filed the Complaint on July 15, 2019. The Court determined in its Order [CF, p. 84], that the Plaintiff's statute of limitation was July 13, 2019 and awarded \$3,801.00 in attorney fees and \$219.00 in costs in its Order on December 20, 2019. [CF, p.82].

C. Legal Argument

It is undisputed that Plaintiff's cause of action arose on July 13, 2017. [CF, p. 83]. Appellant agrees that tort actions, such as Plaintiff's, "must be commenced within two years after the cause of action accrues." C.R.S. § 13-80-102(1)(a). Thus, Plaintiff's two-year anniversary of Plaintiff's cause of action arising was Saturday, July 13, 2019. [CF, p. 84]. The Plaintiff filed her complaint on Monday, July 15, 2019. *Id.*

The Appellant argues that the Complaint was filed timely on the Monday after the statute of limitation on Saturday. The District Court in its analysis argued that "the word "year" as used in Colorado statutes "means a calendar year" and [...] therefore precludes a method of computation of years that would require counting days. Thus, a cause of action must be filed on or before the statutory specified anniversary date following accrual of the action." *Williams v. Crop. Prod. Servs. Inc.*, 361 P.3d 1075, 1077-78 (Colo. App. 2015). Further, the District Court opined that C.R.C.P. 6(a)(1) does not apply to computation of statutory time periods. *Id.* at 1078, 1078-79.

Appellant agrees with the District Court that C.R.C.P. 6(a)(1) does not apply and that the Complaint should be filed "within" two calendar years

after the cause of action pursuant to C.R.S. § 13-80-102(1)(a). The issue here, is that the *William's* Court did not address what happens when the statute of limitation date falls on a court holiday or date that the court is closed, i.e. Saturday. What the Appellant agrees with here, is how to calculate the statute of limitation date. The question is, is it acceptable to file a Complaint with the court on a Monday, when the statute of limitation was the preceding Saturday?

One simply needs to look at C.R.S. § 24-11-110 to find that the answer is yes, it is acceptable to file a Complaint on Monday, when the statute of limitation was the preceding Saturday when the court was closed. It provides that, “on any day when the public office concerned is closed, or on a Saturday, any document is required to be filed with any public office of the state of Colorado, its departments, agencies, or institutions, ... then any such filing ... shall neither be abated nor defaulted, but the same shall stand continued to the next succeeding full business day at such public office...”

In a similar case, *Matthews v. City & County of Denver*, 20 P.3d 1227 (Colo. App. 2000), the statute in question required the party to file their notice “within” 180 days. Both here and in Appellant’s action, the statutory requirement is to file “within” or on or before the statutory date. The

Matthew's Court opined, citing *Austin v. Weld County*, 702 P.2d 293 (Colo. App. 1985), when the statutory statute of limitation date was a Sunday, and the document was required to be filed "within" that date, the document filed the next day, on Monday, was timely. *Matthews*, 20 P.3d 1227 (Colo. App. 2000).

The court noted that under C.R.S. § 24-11-110 if "any" filing termination date falls on a day when the public office is closed shall be continued to the next succeeding full business day. Accordingly, because the word "any" generally means "all", the court determined that C.R.S. § 24-11-110 was controlling. *Id.* The court further noted that there was no intent on the part of the General Assembly to shorten the statutory limit and thus create a trap for the unwary when the statute of limitation falls on a legal holiday or the office is closed. *Id.* C.R.S. § 13-80-102(1)(a) is similar in nature as it provides no method to shorten the statute of limitation, only defining it. C.R.S. § 24-11-110 does not result in a tolling, waiver, or extension of the statutory date. It merely allows the statutory date to be given effect and provide a uniform method for determining when a statutory period begins and ends. *Matthews*, 20 P.3d 1227 (Colo. App. 2000).

To be clear, the Supreme Court in *Antonopoulos v. Town of Telluride*, 532 P.2d 346 (Colo. 1975) ruled that statutory provisions for tolling statutes of limitation were applicable to extend notice periods for items like the government immunity act, because it would be incongruous to extend the time for bringing suit and yet bar the same person for failing to file a timely notice. Impliedly it is ok, pursuant to a statute, such as C.R.S. § 24-11-110, to extend the time for filing a lawsuit. The court stated “such an anomaly was clearly not within the contemplation of the legislature in enacting the immunity act.” Therefore, C.R.S. § 24-11-110 would allow the suit to be filed on the following Monday. *Austin v. Weld County*, 702 P.2d 293 (Colo. App. 1985).

VII. Conclusion

Plaintiff has shown that her Complaint was filed “within” the statutory limitation on Monday, July 15, 2019 pursuant to C.R.S. § 24-11-110. The District Court in its Order, [CF, p. 84], without addressing C.R.S. § 24-11-110, opined that it was a close call, but ordered that the Plaintiff did not file “within” the statute of limitation. Further, the Court ordered that Plaintiff must pay attorney fees and costs. [CF, p. 82].

The Appellant requests this Court to opine that the Plaintiff did file her Complaint “within” the statute of limitations when she filed it on Monday, July 15, 2019, and to remand to the District Court to accept the filed Complaint as timely filed, and to allow Plaintiff to continue her action. In so doing, the Appellant requests this court to reverse the District Court’s order of attorney fees and costs.

DATED: May 14, 2020.

Respectfully Submitted,
BOVO LAW, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2020, I served a true and correct copy of the above and foregoing OPENING BRIEF on the following via ICES:

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