

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: February 18, 2014 2:48 PM CASE NUMBER: 2012CV2550 <b>Case No.: 12 CV 2550</b> <b>Div.: 5</b> <b>Courtroom: 4e</b>
<b>In re the Lower North Fork Fire litigation</b>	
<b>ORDER re: nuisance and trespass claims</b>	

This matter is presently before the court on Rule 12 motions. The present Order addresses nuisance and trespass claims which have been lodged against several governmental agencies or their employees.

**1. Procedural posture of case**

The origins of the present litigation have been reviewed by the parties many times and will not be repeated by the court.

In the present posture of this litigation, the parties may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their agents or employees, on the other.

The formal names of the parties involved in this litigation are difficult to understand.<sup>1</sup> To simplify the present Order, and without prejudice to any party, the court usually refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities or employees who are opposing the homeowners as “defending parties.”

The present Order is addressed to all of the claiming parties who have advanced claims alleging that one or more of the defending parties is (are) liable to them on theories of nuisance or trespass. The court addresses the present Order to particular parties or arguments only to the extent necessary to explain its ruling.

**2. Applicable law**

**(a) general rule**

Colorado law places strict limitations upon the right of citizens to sue the state for damages. Most of the applicable statutes are found in the Colorado Governmental Immunity Act, sec. 24-10-101, et. seq., C.R.S. (the “CGIA”).

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<sup>1</sup> Most of the homeowners, for example, are technically Respondents in Interpleader.

In general, the CGIA bars lawsuits against the state which “lie in tort or could lie in tort...” Sec. 24-10-106(1), C.R.S. A cogent explanation of this phrase is found in Robinson v. Colorado State Lottery Division, 179 P.3d 998, 1003 (Colo. 2008). There are a small number of exceptions to this general rule; these are set forth in later subsections of sec. 24-10-106, C.R.S.

The present controversy involves causes of action characterized by the claiming parties as claims for nuisance and trespass. These are tort claims, or claims which either “lie in tort or could lie in tort...”. See *Rest 2d Torts* sec. 822 (nuisance); sec. 158 (trespass).

The torts of nuisance and trespass do not fall within any of the exceptions to the rule of sovereign immunity contained in the CGIA. Upon first reading, therefore, it would appear that the claiming parties’ claims for nuisance and trespass are barred.

**(b) exception to general rule; 2012 amendment to CGIA**

One of the consequences of the Lower North Fork Fire was the passage of an amendment to the CGIA. The amendment, which is codified at sec. 24-10-106.1, C.R.S., provides in its entirety as follows:

**§ 24-10-106.1. Immunity and partial waiver--claims against the state--injuries from prescribed fire--on or after January 1, 2012**

(1) Notwithstanding any other provision of this article, the state shall be immune from liability in all claims for injury that 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 or section 24-10-106. In addition to any other claims for which the state waives immunity under this article, sovereign immunity is waived by the state in an action for injuries resulting from a prescribed fire started or maintained by the state or any of its employees on or after January 1, 2012.

(2) Nothing in this section shall be construed to constitute a waiver of sovereign immunity if the injury arises from any act, or failure to act, of a state employee if the act is the type of act for which the state employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided under subsection (1) of this section, the state shall also have the same immunity as a state employee for any act or failure to act for which a state employee would be or heretofore has been personally immune from liability.

(4) No rule of law imposing absolute or strict liability shall be applied in any action against the state for an injury resulting from a prescribed fire started or maintained by the state or any of its employees. No liability shall be imposed in any such action unless negligence is proven.

(emphasis added by the court).

### **3. Application of immunity statutes**

It is somewhat difficult to parse the language of the above-quoted statute. It would seem, however, that, among other things, (i) the statute waives immunity for the state, but not for individuals employed by the state; and (ii) the only causes of action as to which immunity is waived are those based upon negligence.

The torts of nuisance and trespass are not founded upon the commission of negligent acts. See Saint John's Church in Wilderness v. Scott, 194 P.3d 475, 479 (Colo. App. 2008) (elements of nuisance); Hoery v. U.S., 64 P.3d 214, 217 (Colo. 2003) (elements of trespass).

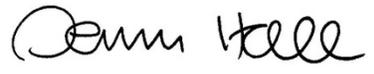
Applying the language of sec. 24-10-106 and sec. 24-10-106.1, C.R.S., the court must conclude that claims of nuisance or trespass lodged by the claiming parties are causes of action which are barred by the general doctrine of sovereign immunity, and that none of the exceptions to that doctrine apply in the circumstances of the present litigation.

### **4. Conclusion**

Claims of immunity are addressed to the court's subject matter jurisdiction, and are to be determined by the trial court pursuant to Rule 12(b)(1), C.R.C.P. Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 2003).

The court finds that the provisions of the CGIA bar claims against the defending parties for nuisance and trespass. As to those claims, therefore, the defending parties' motions to dismiss pursuant to Rule 12(b)(1) are GRANTED.

Date: February 18, 2014

  
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Judge