COLORADO COURT OF APPEALS

DATE FILED: September 3, 2020
CASE NUMBER: 2019CA860

Court of Appeals No. 19CA0860
City and County of Denver District Court No. 17CV32604
Honorable Robert L. McGahey, Jr., Judge

Heartland Biogas, LLC,

Plaintiff-Appellee,

v.

Colorado Department of Public Health and Environment,

Defendant-Appellant.

ORDER AFFIRMED

Division VI
Opinion by JUDGE YUN
Dunn, J., concurs
Richman, J., dissents

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 3, 2020

Holland & Hart LLP, Stephen G. Masciocchi, Kevin McAdam, Jessica J. Smith, Denver, Colorado, for Plaintiff-Appellee

Philip J. Weiser, Attorney General, Maritza Dominguez Braswell, Deputy Attorney General, Eric R. Olson, Solicitor General, Patrick L. Sayas, Senior Assistant Attorney General, Allison R. Ailer, Assistant Attorney General, Denver, Colorado, for Defendant-Appellant

¶ 1 Heartland Biogas, LLC (Heartland), sued the Colorado Department of Public Health and Environment (CDPHE), alleging, among other claims, that the CDPHE's regulatory actions constituted a taking of Heartland's property without just compensation, in violation of article II, section 15 of the Colorado Constitution. The CDPHE moved to dismiss Heartland's regulatory takings claim under C.R.C.P. 12(b)(1), arguing that the district court lacked subject matter jurisdiction because Heartland's claim could lie in tort and, therefore, the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2019, granted the CDPHE immunity from suit.

¶ 2 The district court denied the CDPHE's motion. Noting that "the inquiry [ultimately] turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises," the district court concluded that Heartland's regulatory takings claim was based on article II, section 15 of the Colorado Constitution. Emphazing that "the CGIA does not act as a bar to constitutional claims, even when the remedy for those claims is compensation," the court ruled that "a takings claim 'could not lie in tort'" and "is not barred by the CGIA."

¶ 3 We acknowledge that tension exists between, on the one hand, case law stating that takings claims under the Colorado Constitution are exempt from the CGIA, and, on the other hand, the CGIA's grant of immunity to public entities for all claims "for injury which lies in tort or could lie in tort." § 24-10-108, C.R.S. 2019. In our view, however, a close examination of the pleadings and the undisputed evidence shows that Heartland's regulatory takings claim is not one that could lie in tort because it is grounded in article II, section 15 of the Colorado Constitution and the Solid Wastes Disposal Sites and Facilities Act (SWA), §§ 30-20-101 to -123, C.R.S. 2019. As a result, we affirm the district court's denial of the CDPHE's motion to dismiss for lack of subject matter jurisdiction.

I. Background

¶ 4 Heartland owns a natural gas facility in Weld County, Colorado. Before it ceased operations in early 2017, Heartland's facility "used an anaerobic digester system to convert cow manure, food waste, and other organic waste from local sources into renewable natural gas." The facility also produced "digestate

liquor," which Heartland sold to local farms and businesses as a fertilizer substitute called a "liquid soil amendment."

¶ 5 Heartland acquired the facility in 2013 from Heartland Renewable Energy (HRE).[1] Three years before the acquisition, the Weld County Board of County Commissioners (BOCC) had approved HRE's application for a permit, including a certificate of designation, to operate a solid waste facility. *See* § 30-20-102(1), C.R.S. 2019; Dep't of Pub. Health & Env't Reg. 1.6.1, 6 Colo. Code Regs. 1007-2 (requiring "[a]ny person proposing to operate a facility for solid wastes disposal" to apply to the county's board of commissioners for a certificate of designation).

¶ 6 Both HRE (before the transfer in ownership) and Heartland (after the transfer) discussed with the CDPHE and the Colorado Department of Agriculture (CDA) which agency would regulate the liquid soil amendment. According to Heartland, the agencies agreed that the CDA would treat the liquid soil amendment as a finished product, allowing Heartland to sell it freely to third parties as long as Heartland complied with the CDA's testing and labeling rules,

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[1] According to the record, Heartland and HRE are not related to each other.

and the CDA issued Heartland a certificate of registration approving the liquid soil amendment for sale. Heartland claims that this was "the only viable option for Heartland's business" and that if, instead, the CDPHE were to regulate the liquid soil amendment as solid waste, then "Heartland would not go forward with building its Facility because it would be impossible to comply with the regulatory restrictions."

¶ 7 Following Heartland's acquisition of the facility, the BOCC and the CDPHE gave Heartland approval for, among other things, (1) the transfer of the facility's ownership from HRE to Heartland; (2) construction of the facility; and (3) an amendment to the facility's development plan. Based on these approvals, Heartland believed that it had inherited HRE's certificate of designation and, therefore, that it did not need to apply for its own.

¶ 8 Believing that it had a valid certificate of designation and that it could sell the digestate liquor as a liquid soil amendment under the CDA's rules, Heartland claims that it spent over $102 million altering and constructing the facility and, in 2014, began operating it.

¶ 9 Then, in the spring of 2016, a Weld County inspector discovered an odor violation at the facility. Heartland claims that it "took immediate and proactive steps to mitigate odors at the Facility" and that no further violations occurred, but from this point on, Heartland's relationships with its regulators seem to have soured.

¶ 10 First, based on the odor violation, the BOCC held a probable cause hearing and determined that it had enough evidence for a show cause hearing, where it would consider whether to revoke the facility's permit. Before the show cause hearing, First Assistant Attorney General David Kreutzer, on behalf of the CDPHE, wrote a letter to an Assistant Weld County Attorney. In the letter, Kreutzer opined that Heartland did not have a valid certificate of designation and was "technically operating in violation of [section] 30-20-102(1) and related regulatory requirements." At the conclusion of the show cause hearing, the BOCC determined that Heartland was operating the facility without a valid certificate of designation, in violation of section 30-20-102(1), and decided to suspend the facility's permit indefinitely.

¶ 11 Second, the CDPHE notified Heartland that it considered the liquid soil amendment to be solid waste, for which Heartland needed a discharge permit or a beneficial use determination. Then, the Weld County Department of Public Health and Environment sent a letter to Heartland insisting that it stop distributing the liquid soil amendment, which Heartland did. The liquid soil amendment began accumulating in the facility's storage lagoons, which eventually reached capacity. Heartland stopped producing liquid soil amendment in January 2017 and began to shut down the facility. According to Heartland, the shutdown is permanent.

¶ 12 In July 2017, Heartland sued the CDPHE and the CDA. Heartland brought two claims of promissory estoppel, one against the CDPHE related to the facility's permit and certificate of designation and one against the CDPHE and the CDA related to the agencies' regulatory treatment of the liquid soil amendment, and one regulatory takings claim against the CDPHE. The CDPHE and the CDA moved to dismiss Heartland's complaint under C.R.C.P. 12(b)(1), for lack of subject matter jurisdiction, and under C.R.C.P. 12(b)(5), for failure to state a claim on which relief can be granted. As pertinent here, the agencies argued that (1) the CGIA barred

Heartland's promissory estoppel claims because those claims could lie in tort, *see* § 24-10-108; and (2) Heartland failed to allege facts that plausibly supported a regulatory takings claim.

¶ 13 The district court granted the agencies' motion in part and denied it in part. The court concluded that Heartland's promissory estoppel claims "*could* lie in tort as negligent misrepresentation claims, and thus the CGIA present[ed] a jurisdictional bar" to those claims. But recognizing the "possibility that an injustice ha[d] occurred," the court dismissed the promissory estoppel claims without prejudice and allowed Heartland to amend its complaint. Turning to the agencies' C.R.C.P. 12(b)(5) argument, the court concluded that Heartland had adequately pleaded the elements of a regulatory takings claim.

¶ 14 Heartland then filed an amended complaint, again alleging a promissory estoppel claim against the CDPHE related to the facility's permit and certificate of designation, a promissory estoppel claim against the CDPHE and the CDA related to the agencies' regulatory treatment of the liquid soil amendment, and a regulatory takings claim against the CDPHE. The agencies moved to dismiss the two promissory estoppel claims under C.R.C.P. 12(b)(1), for lack

of subject matter jurisdiction, and under C.R.C.P. 12(b)(5), for failure to state a claim on which relief can be granted.

¶ 15 The district court granted the motion. "The essence" of Heartland's promissory estoppel claims, according to the court, was either negligent misrepresentation or tortious interference with prospective business advantage, both of which are tort claims that the CGIA bars. The court thus ruled that it lacked subject matter jurisdiction over the promissory estoppel claims and dismissed those claims with prejudice.

¶ 16 Heartland then amended its complaint again, adding a regulatory takings claim against the BOCC and maintaining the regulatory takings claim against the CDPHE from its earlier pleadings. As relief, the complaint requests "[c]ompensatory and consequential damages in an amount to be determined at trial," plus pre- and post-judgment interest, reasonable attorney fees, expert witness fees, and court fees.

¶ 17 The BOCC moved to dismiss the complaint under C.R.C.P. 12(b)(5), arguing that Heartland had failed to state a plausible regulatory takings claim against it. Separately, the CDPHE moved to dismiss the complaint under C.R.C.P. 12(b)(1) and 12(b)(5). The

CDPHE argued, specifically, that Heartland's regulatory takings claim against the agency was "nothing more than a tort in disguise" and was barred by the CGIA.

¶ 18 The court issued a written order resolving both motions to dismiss. At the outset, the court concluded that Heartland had pleaded sufficient facts to state a plausible claim that it held a property interest in the facility's permit and certificate of designation, of which it could be deprived by a regulatory taking. Next, the court concluded that the CGIA did not present a jurisdictional bar to Heartland's regulatory takings claims. As a result, the court denied both the BOCC's and the CDPHE's motions to dismiss.

¶ 19 The CDPHE appeals the district court's order denying its motion to dismiss for lack of subject matter jurisdiction. *See* § 24-10-108.

II. Analysis

¶ 20 The CDPHE raises two arguments on appeal. First, it argues that the CGIA bars Heartland's regulatory takings claim against the agency. Second, it argues that Heartland's regulatory takings claim is not viable or ripe. Meanwhile, Heartland argues that the

CDPHE's arguments are substantially frivolous and requests appellate attorney fees under section 13-17-102(4), C.R.S. 2019, and C.A.R. 39.1. We address each of the parties' arguments in turn.

A. Does the CGIA Bar Heartland's Regulatory Takings Claim?

¶ 21 The CDPHE contends that Heartland's regulatory takings claim "could lie in tort" under section 24-10-108 and, therefore, that the district court erred in concluding that the CGIA does not bar the claim. We disagree.

1. Standard of Review

¶ 22 Whether a public entity is immune from suit under the CGIA is a question of subject matter jurisdiction for the district court to determine in accordance with C.R.C.P. 12(b)(1). *Foster v. Bd. of Governors*, 2014 COA 18, ¶ 10. The issue under the CGIA is not whether the claim "was properly pled, but whether the claim could have been brought as a tort." *Casey v. Colo. Higher Educ. Ins. Benefits All. Tr.*, 2012 COA 134, ¶ 19. Courts make that determination "on a case-by-case basis through a close examination of the pleadings and undisputed evidence." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1004 (Colo. 2008). When, as here, the

alleged jurisdictional facts are not in dispute, the question is one of law that the court can resolve without a hearing. *Foster*, ¶ 10. And in such a case, our review of the district court's ruling is de novo.[2] *Id.*

2. The CGIA

¶ 23 Section 24-10-108 of the CGIA states that, with certain exceptions not pertinent here, "sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant."

¶ 24 The form of the complaint does not determine whether a claim lies or could lie in tort for purposes of the CGIA. *Bd. of Cty. Comm'rs v. Colo. Dep't of Pub. Health & Env't*, 2020 COA 50, ¶ 16. Instead, a court must consider the nature of the injury and the relief sought. *Id.* As the Colorado Supreme Court put it,

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[2] The CDPHE contends that the district court erroneously applied a C.R.C.P. 12(b)(5) standard and assessed "the *plausibility* of Heartland's takings claim" rather than "requiring Heartland to prove jurisdiction" under C.R.C.P. 12(b)(1). But even if the district court applied the plausibility standard, the jurisdictional facts are not in dispute, and both parties agree that this court can decide this appeal as a matter of law.

> When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA.

Robinson, 179 P.3d at 1003. The nature of the relief sought is not itself dispositive of whether a claim lies or could lie in tort. *Bd. of Cty. Comm'rs*, ¶ 16. Rather, the relief requested merely "informs our understanding of the nature of the injury and the duty allegedly breached." *Robinson*, 179 P.3d at 1003.

¶ 25 Ultimately, the question of whether the CGIA bars a claim "turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Colo. Dep't of Transp. v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 690 (Colo. 2008). The CGIA's immunity "encompasses all claims against a public entity arising from the breach of a general duty of care, as distinguished from contractual relations or a distinctly non-tortious statutorily-imposed duty." *Bd. of Cty. Comm'rs*, ¶¶ 17, 36 (quoting *Brown Grp. Retail, Inc.*, 182 P.3d at 691).

3. Application to Heartland's Regulatory Takings Claim

¶ 26 Heartland's regulatory takings claim against the CDPHE alleges that (1) Heartland had protected property interests in its facility, in the facility's certificate of designation, and in the certificate of registration under which the CDA allowed it to distribute the liquid soil amendment; and (2) the CDPHE's determinations that Heartland lacked a valid certificate of designation and that it could not distribute the liquid soil amendment "deprived Heartland of the value of its property by placing such burdens on its ownership of its private property that Heartland's ownership of the property has been taken for public use without just compensation."

a. Source and Nature of the CDPHE's Liability and Duty for Heartland's Regulatory Takings Claim

¶ 27 Although the CGIA generally precludes any claim against a governmental entity that "lies in tort or could lie in tort," the state has authorized some suits against governmental entities that do not fall within the CGIA. *Conners v. City of Colo. Springs*, 962 P.2d 294, 295-96 (Colo. App. 1997). "The most notable . . . instance in which the state has authorized a suit for damages is that in which private

property is taken or damaged by the state or a political subdivision and compensation is required to be paid under" article II, section 15 of the Colorado Constitution. *Conners*, 962 P.2d at 296; *see* Colo. Const. art. II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation.").

¶ 28 Colorado courts have consistently stated that claims based on article II, section 15 are not subject to the CGIA. *See City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 768 (Colo. 1992) ("[S]overeign immunity does not preclude claims under the just compensation clause . . . ."); *Casey*, ¶ 43 ("Because an inverse condemnation claim could not lie in tort, it is not barred by the CGIA."); *Jorgenson v. City of Aurora*, 767 P.2d 756, 758 (Colo. App. 1988) (concluding that an inverse condemnation claim is not subject to the CGIA); *Srb v. Bd. of Cty. Comm'rs*, 43 Colo. App. 14, 19, 601 P.2d 1082, 1085 (1979) (concluding that the just compensation clause of the Colorado Constitution is an exception to governmental immunity). As the *Jorgensen* division explained, "[g]iven the constitutional genesis of a claim for inverse condemnation, and considering the nature of the right upon which

this action is founded, we hold that this claim is not subject to the limitations of the [CGIA]." 767 P.2d at 758.

¶ 29 We acknowledge that, in determining whether the CGIA bars Heartland's claim, our precedent requires us to look beyond the label on Heartland's complaint, to the nature and source of the CDPHE's liability and duty. *Bd. of Cty. Comm'rs*, ¶ 16. In our view, the source of the CDPHE's liability, if Heartland's claim is proved, is article II, section 15 of the Colorado Constitution,[3] and the source of duty for purposes of Heartland's regulatory takings claim is the SWA and related regulations.

¶ 30 Colorado law recognizes two types of regulatory takings under article II, section 15. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 64 (Colo. 2001). First, "a per se taking occurs when a regulation 'denies an owner economically viable use of [its] land.'" *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992)). Second, a taking occurs under a "fact-specific inquiry . . . in which the property in question retains more than a de minimis value but, when its diminished economic value is

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[3] Heartland does not cite the Takings Clause of the United States Constitution, U.S. Const. amend. V.

considered in connection with other factors, the property effectively has been taken from its owner." *Id.* at 66.

¶ 31 Heartland's theory of liability is that the CDPHE's regulatory actions deprived Heartland of an economically viable use of its facility — namely, the production and sale of the liquid soil amendment. First, Heartland claims that Kreutzer, on behalf of the CDPHE, wrote a letter to the BOCC opining that Heartland did not have a valid certificate of designation and was "technically operating in violation of [section] 30-20-102(1) and related regulatory requirements." According to Heartland, as a result of Kreutzer's letter, the BOCC determined that Heartland was operating the facility without a valid certificate of designation and suspended the facility's permit indefinitely. Second, Heartland alleged that the CDPHE "exercised its regulatory authority [under the SWA] to order Heartland to treat [the liquid soil amendment] as a solid waste" and not to distribute the liquid soil amendment without a discharge permit or a beneficial use determination. As a result of these actions, Heartland claims that its facility was no longer economically viable and that it was forced to shut down.

¶ 32 In our view, Heartland's claim is not one that lies or could lie in tort because it is grounded in either the per se test or the fact-specific inquiry for a regulatory takings claim. Put simply, Heartland maintains that, because of the CDPHE's regulatory actions under the SWA, it can no longer produce and sell the liquid soil amendment and that, as a result, the facility has effectively been taken from it without just compensation.

b. The CDPHE's Other Arguments

¶ 33 We are not persuaded otherwise by the CDPHE's argument that Heartland's claim is tainted with allegations that the CDPHE failed to provide notice, was negligent in its legal analysis, made false promises, and "dropped the ball." All those allegations arise from the CDPHE's breach of its statutory or regulatory authority to interpret the SWA and related regulations. *See Bd. of Cty. Comm'rs*, ¶¶ 36-37.

¶ 34 The Kreutzer letter was based in part on section 30-20-103(1), C.R.S. 2019, which requires the CDPHE to conduct a review and recommend whether to grant a certificate of designation. Section 30-20-105(1), C.R.S. 2019, in turn, states that "[s]uch governing body [the BOCC] shall not issue a certificate of designation if [the

CDPHE] has recommended disapproval pursuant to section 30-20-103." And the CDPHE admits that, pursuant to its statutory authority to regulate wastewater, Heartland was "required to obtain the necessary regulatory approvals from" the CDPHE to sell the liquid soil amendment to third parties. Accordingly, as alleged, the CDPHE's actions were based on its statutory or regulatory authority, not on any general duties of care. *Bd. of Cty. Comm'rs*, ¶ 36 (explaining that "[n]ontortious statutory duties are distinct from general duties of care because the former seek to implement broad policy while the latter primarily seek to compensate individuals for personal injuries").

¶ 35 Nor are we persuaded by the CDPHE's argument that the nature of the relief Heartland seeks renders its regulatory takings claim one that lies or could lie in tort. As a threshold matter, the form of relief requested is not determinative of whether a claim lies, or could lie, in tort. *Id.* at ¶ 16. More importantly, though, the fact that Heartland seeks compensatory and consequential damages does not transform its regulatory takings claim into a tort claim.

¶ 36 "When the government takes private property for a public purpose, it must pay just compensation." *Fowler Irrevocable Tr.*

1992-1 v. City of Boulder, 17 P.3d 797, 802 (Colo. 2001). In determining "just compensation," "the question is what the owner lost, not what the taker gained," and, "[a]s its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (quoting *Boston Chambers of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910)). Thus, to conclude that, by seeking compensatory and consequential damages, a regulatory takings claim becomes a tort claim would vitiate the rule that takings claims are not subject to the CGIA. *See, e.g.*, *Desert Truck Sales, Inc.*, 837 P.2d at 768.

¶ 37 Furthermore, the CDPHE's reliance on *Desert Truck Sales*, 837 P.2d at 765-77 & n.5, and *City of Northglenn v. Grynberg*, 846 P.2d 175, 184 (Colo. 1993), is misplaced.

¶ 38 *Desert Truck Sales*, 837 P.2d at 763, presented the Colorado Supreme Court with two questions: (1) whether Desert Truck's replevin claim lay, or could lie, in tort for purposes of the CGIA and (2) whether, in barring the replevin claim, the CGIA would violate the Just Compensation or Due Process Clauses of the Colorado Constitution, article II, sections 16 and 25. Answering the first

question, the court concluded that Desert Truck's replevin claim sounded in tort and, therefore, the CGIA barred it. *Desert Truck Sales*, 837 P.2d at 765. Turning to the second question, the court reasoned that, because the government's seizure of Desert Truck's vehicle was not a taking of private property for public purposes, "barring Desert Truck's claim on the basis of sovereign immunity d[id] not implicate the just compensation clause of the Colorado Constitution." *Id.* at 766-67. Here, by contrast, Heartland alleged a regulatory takings claim, which we conclude is based on the Colorado Constitution and the SWA and related regulations, not a replevin claim. And the court in *Desert Truck Sales*, *id.* at 768, specifically acknowledged "that sovereign immunity does not preclude claims under the just compensation clause."

¶ 39 *Grynberg*, in turn, is inapposite because it concerns the supreme court's review of the *merits* of a takings claim. *See* 846 P.2d at 177 (describing the court's review of the trial court's determination that a taking or damaging had occurred for purposes of the Colorado Constitution's Just Compensation Clause). By contrast, as discussed below, our appellate jurisdiction in this case is limited to the question of whether the CGIA bars Heartland's

regulatory takings claim, *see* § 24-10-108, and we express no opinion on the merits of Heartland's claim.

¶ 40 Finally, even if Heartland's regulatory takings claim could arguably lie in tort, for three reasons, the Takings Clause still controls. First, "[b]ecause governmental immunity under the CGIA is in derogation of Colorado's common law, we narrowly construe the CGIA's immunity provisions . . . ." *Daniel v. City of Colorado Springs*, 2014 CO 34, ¶ 13. Second, to the extent the CGIA conflicts with the Takings Clause, we have a duty to interpret the CGIA "in a constitutional manner where the statute is susceptible to a constitutional construction." *People v. Montour*, 157 P.3d 489, 503-04 (Colo. 2007). And third, when a statute cannot be reconciled with the constitution, the constitution controls.[4] *Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987). Applying these principles here, Heartland's regulatory takings claim could not lie in tort and cannot be barred by the CGIA.

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[4] In *City of Northglenn v. Grynberg*, 846 P.2d 175, 184 n.20 (Colo. 1993), the supreme court left "for another day resolution of any apparent conflict between the Governmental Immunity Act and Article II, Section 15 of the state constitution" when a takings claim under article II, section 15 could also lie in tort.

¶ 41 For all these reasons, we conclude that the district court correctly ruled that the CGIA does not bar Heartland's regulatory takings claim.

B. Is Heartland's Regulatory Takings Claim Viable or Ripe?

¶ 42 Next, the CDPHE argues that Heartland's regulatory takings claim is neither viable nor ripe because (1) Heartland did not allege any protected property interest; (2) Heartland's takings claim should be against the BOCC, not the CDPHE; (3) the CDPHE's actions constituted reasonable exercises of its regulatory authority or police power; and (4) the CDPHE never issued any final agency decision. We decline to address these contentions.

¶ 43 The CGIA specifically limits our appellate jurisdiction to the question of whether the CDPHE is immune from Heartland's claim. Section 24-10-108 of the CGIA provides that the district court's decision on whether a public entity is immune under the CGIA "shall be a final judgment and shall be subject to interlocutory appeal." *See People v. Gallego*s, 946 P.2d 946, 952 (Colo. 1997). That section does not, however, give this court jurisdiction to resolve any other grounds for dismissal, because determining merit-based issues would expand the nature of appellate review

beyond that mandated by statute. *Adams ex rel. Adams v. City of Westminster*, 140 P.3d 8, 12 (Colo. App. 2005); *see also Casey*, ¶ 44 (declining to address grounds other than the CGIA for reversing the probate court's C.R.C.P. 12(b)(1) order "because we do not have jurisdiction to resolve them within the context of this interlocutory appeal").

¶ 44 Accordingly, we conclude that, at this stage in the proceedings, we lack jurisdiction to consider whether Heartland's claim is viable or ripe. We therefore express no opinion on whether Heartland's claim is meritorious.

C. Is Heartland Entitled to Appellate Attorney Fees?

¶ 45 Heartland argues that it is entitled to appellate attorney fees under section 13-17-102(4) and C.A.R. 39.1 because the CDPHE's appeal is substantially frivolous. We disagree.

¶ 46 Section 13-17-102(4) states that a court "shall assess attorney fees if . . . it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification." An action lacks substantial justification, in turn, if it is "substantially frivolous, substantially groundless, or substantially vexatious." *Id.*

¶ 47 An appeal may be frivolous for either of two reasons:

> First, where an appeal is taken in a case in which "the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there is really no appealable issue," the appeal is held to be "*frivolous as filed*." Second, even in cases in which genuinely appealable issues may exist, so that the taking of an appeal is not frivolous, the appellant's misconduct in arguing the appeal may be such as to justify holding the appeal to be "*frivolous as argued*."

Castillo v. Koppes-Conway, 148 P.3d 289, 292 (Colo. App. 2006) (quoting *Dungaree Realty, Inc. v. United States*, 30 F.3d 122, 124 (Fed. Cir. 1994)).

¶ 48 The CDPHE's appeal is neither frivolous as filed nor frivolous as argued. In our view, the CDPHE presented arguably meritorious reasons why the district court's C.R.C.P. 12(b)(1) ruling was incorrect. That we ultimately disagree with the CDPHE's arguments does not mean the appeal was frivolous as filed or argued. *See City of Aurora ex. rel. Util. Enter. v. Colo. State Eng'r*, 105 P.3d 595, 620 (Colo. 2005) ("Meritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not frivolous."). As a result, we deny Heartland's request for appellate attorney fees.

III. Conclusion

¶ 49 For the foregoing reasons, we affirm the district court's order that the CGIA does not bar Heartland's regulatory takings claim and deny Heartland's request for appellate attorney fees.

JUDGE DUNN concurs.

JUDGE RICHMAN dissents.

JUDGE RICHMAN, dissenting.

¶ 50 I cannot agree with the majority that, based on the facts alleged in the third amended complaint and the circumstances of this case, the Colorado Department of Public Health and Environment (CDPHE) is not immune from Heartland's suit as provided by the Colorado Governmental Immunity Act (CGIA). Therefore, I dissent from the opinion affirming the district court's order.

¶ 51 Section 24-10-108, C.R.S. 2019, provides as follows:

> Except as provided in sections 24-10-104 to 24-10-106 and 24-10-106.3, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by claimant.

Heartland does not assert that any of the statutory exceptions to the immunity doctrine apply here.

¶ 52 Rather, all parties agree that sovereign immunity exists for the CDPHE if the claims alleged against it "lie in tort or could lie in tort." My disagreement with the majority arises primarily from its application of the scope of our review of an immunity determination based on whether or not a claim could lie in tort.

¶ 53 In *Robinson v. Colorado State Lottery Division*, the supreme court applied section 24-10-108 to a purported contractual claim (not a tort) against a state agency, and it concluded that "the form of the complaint is not determinative of the claim's basis in tort or contract." 179 P.3d 998, 1003 (Colo. 2008). I agree with the majority that under *Robinson*, the court must consider the nature of the injury and the relief sought, and the nature of the relief sought is not dispositive of whether a claim lies in tort or could lie in tort. Rather, the nature of the relief reveals "the nature of the injury and the duty allegedly breached." *Id.*

¶ 54 But how does the court assess the "nature of the injury?" *Robinson* advises: "We assess the nature of the injury and the relief requested on a case-by-case basis through a close examination of the pleadings and undisputed evidence." *Id.* at 1004. And, it concludes that "the CGIA is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff could argue." *Id.* at 1005; *see also Berg v. State Bd. of Agric.*, 919 P.2d 254, 259 (Colo. 1996) ("By barring not only the tort claim but also claims which could lie in tort, the CGIA requires the court to examine the pleadings and undisputed evidence closely."); *Foster v. Bd. of*

Governors, 2014 COA 18, ¶ 3 ("It is only where the claim *cannot* lie in tort that there is no immunity.").

¶ 55 Following the dictate of *Robinson*, a close examination of the pleadings is required in deciding whether a claim is a tort or could sound in tort. Upon my close examination of the pleadings, I disagree with the majority's assessment that Heartland's claims do not sound in tort or could not sound in tort.

¶ 56 Heartland has argued, and perhaps the majority agrees, that the general principle of *Robinson*, 179 P.3d at 1004, requiring a "close examination of the pleadings" does not apply when the plaintiff's claim is framed as a taking, and the source of the governmental agency's duty arises from the Takings Clause of the state constitution.[1] Colo. Const. art II, § 15. I disagree with that premise.

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[1] The majority relies, in part, on a statement from *Jorgenson v. City of Aurora*, 767 P.2d 756, 758 (Colo. App. 1988). But in a later opinion, *City of Northglenn v. Grynberg*, the supreme court noted that "an inverse condemnation claim arising from, for example, a physical occupation and ouster of the owner of real property, may lie in trespass as well, and would appear to come under the Governmental Immunity Act," and called into question whether the reasoning of *Jorgenson* would apply to a conflict between CGIA and article II, section 15 of the Colorado Constitution. 846 P.2d 175, 184 n.20 (Colo. 1993).

¶ 57 In *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759 (Colo. 1992), the supreme court applied the type of analysis described in *Robinson*, undertaking a close examination of the plaintiff's claim, although it was argued as a "takings" claim. Desert Truck asserted that the city had improperly impounded its vehicle and argued on appeal that its claims arose under article II, section 15 (the Takings Clause) and section 25 (the Due Process Clause) of the Colorado Constitution, and were not barred by the CGIA. *Id.* at 766.

¶ 58 The supreme court disagreed, stating, "how the plaintiff characterizes its claim is not the question. The dispositive question is whether the claim is a tort claim or could be a tort claim" under the CGIA. *Id.* at 764. The supreme court reviewed the claim as pleaded as well as the statutory source of the claim, and determined that "no fair reading of [the] complaint supports a claim for inverse condemnation . . . ." *Id.* at 766. In reaching its result, the court concluded that the seizure of the vehicle was not a taking of private property for public purposes, a requirement under article II, section 15. *Id.* at 767. The court noted that the seizure of the

vehicle was a lawful exercise of the city's police power, and quoted from a Tenth Circuit case:

> Police power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed.

Id. at 766-67 (quoting *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971)).

¶ 59 A close review of Heartland's third amended complaint leads me to conclude that its claim against CDPHE is, at most, an assertion that CDPHE improperly exercised its police power, and therefore the claim, like Desert Truck's, does not implicate the Just Compensation Clause of the Colorado Constitution. Rather, what Heartland has alleged is a tort, or could be pleaded in tort, for the following reasons.

¶ 60 The third amended complaint alleges a claim against the CDPHE, in part, because an assistant attorney general assigned to the department wrote a letter to the Board of County Commissioners (BOCC) for Weld County advising it that Heartland's

site "does not have a [certificate of designation] and is technically operating in violation of [section 30-20-102(1), C.R.S. 2019,] and related regulatory requirements." Contrary to the suggestion in the majority opinion, the letter does not recommend to the BOCC whether to grant a certificate of designation (CD), nor does it recommend disapproval of a CD under section 30-20-103, C.R.S. 2019. There had been no application for a CD from Heartland as provided in section 30-20-103, and, thus, there was no occasion calling for an approval or recommendation. The lawyer who wrote the letter did not purport to be giving a formal opinion by the CDPHE. The letter left open the suggestion that Heartland submit a revision to the engineering design and operation plan (EDOP) and apply for a CD. As in *Desert Truck*, the letter cannot be fairly characterized as a taking of private property for public purposes.

¶ 61 Moreover, although the letter was addressed to the Weld County Attorney, the subsequent actions taken by the BOCC to suspend Heartland's permit in December 2016 did not emanate solely from, or even substantially from, the letter. A close review of the BOCC resolution of December 2016 reflects that the investigation into Heartland's operations and noncompliance with

permitting regulations predated the letter by several months. The investigation revealed numerous acts by Heartland that had nothing to do with the absence of a CD. When the BOCC suspended Heartland's permit by resolution in December 2016, it listed numerous reasons for doing so that were unconnected to the absence of a CD. Although Heartland alleges that CDPHE's exercise of "regulatory authority" deprived it of valuable property, that is not what the documents and undisputed evidence reveals. Again, a fair reading of these facts does not indicate a taking by the CDPHE emanating from the letter.

¶ 62 The third amended complaint also alleges a claim against CDPHE based on an email from a staff person at the CDPHE sent in September 2016, and a follow up letter from CDPHE staff dated November 4, 2016.

¶ 63 The email advised that Heartland "has approached third parties regarding use of the liquid waste generated at the facility as a soil amendment" and advised that, if so, a "beneficial use determination is required." The email stated that without a beneficial use approval, discharges at Heartland's facility would be a violation of the facility's EDOP and Colorado's solid waste laws.

And the email advised Heartland how to submit a beneficial use application.

¶ 64 Heartland thereafter made a beneficial use application as suggested in the staffer's email. By letter dated November 4, 2016, personnel at CDPHE responded to the application stating that "the Division cannot determine whether the proposal meets the Division's criteria for Beneficial Use as defined" in the regulations. The letter asked for more information.

¶ 65 Heartland alleges, in its third amended complaint, that Weld County thereafter "injected itself" into Heartland's "dispute with the CDPHE" regarding distribution of the liquid soil amendment, eventually leading the county to issue a cease distribution letter. It further alleges that the requirement of an approval constituted a change in position by the county, causing it to suffer injury to the value of its property. But other than the email and letter described above, Heartland does not point to any specific enforcement actions taken by CDPHE under the SWA that limit Heartland's ability to distribute the liquid soil amendment.

¶ 66 Heartland, and the majority, correctly point out that under Colorado law, a taking can occur under a "fact specific inquiry"

which shows the property, although retaining value, has been effectively taken. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 64-65 (Colo. 2001). But that case also emphasizes that a regulatory taking occurs when the actions of the regulator "go too far." *Id.* at 74. I cannot conclude on the factual allegations in the third amended complaint that the actions of the CDPHE staff constitute a regulatory taking that has gone "too far." Again, as stated in *Desert Truck*, I cannot "fairly characterize" these few alleged acts by CDPHE as a taking of private property for public purposes.[2]

¶ 67 Rather, I conclude that Heartland's allegations against the CDPHE arising from the lawyer's letter regarding the CD, and the actions of the CDPHE staffers regarding the liquid soil amendment, could give rise to other claims. If, as Heartland alleges, the actions

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[2] The majority appears to rely on *Board of County Commissioners v. Colorado Department of Public Health & Environment*, 2020 COA 50, for the proposition that a compliance order issued by the CDPHE under Solid Wastes Disposal Sites and Facilities Act (SWA), §§ 30-20-101 to -123, C.R.S. 2019, involves a nontortious statutory duty and that a statutory enforcement action to abate hazardous waste is not a tort. Even if so, the acts alleged to have been taken by CDPHE personnel in this case did not result in a compliance order or an enforcement action under the SWA.

of the CDPHE staff are erroneous interpretations of law, they could amount to tortious interference with Heartland's contractual relations, prospective business relations, or negligent misrepresentations, as the district court has already found. Or, to the extent that they constitute a change in position by the CDPHE on which Heartland relied in making its investment, they could be pleaded as promissory estoppel. But those claims sound in tort, or could sound in tort, and would be barred under the CGIA, as the district court already concluded in its order dismissing portions of Heartland's first amended complaint.[3]

¶ 68 My conclusion that Heartland's claim sounds in tort, or could sound in tort, is fortified by Heartland's own conduct in this litigation. In its first amended complaint, Heartland pleaded virtually identical facts as set forth in its current complaint. But it characterized the counts as claims for promissory estoppel, as well as for a taking. Thus, Heartland itself apparently believed, in good faith, that its claims could sound in promissory estoppel. When those claims were dismissed by the district court under the CGIA

[3] I do not address Heartland's claim in the third amended complaint alleging a taking against the BOCC, as that claim is not before us.

because they were torts, or could sound in tort, Heartland filed its amended complaint, now alleging only a takings claim against CDPHE, and adding a takings claim against BOCC.

¶ 69 I conclude that restating the claims and describing them as "takings" does not save them under the CGIA, or the rule of *Robinson* requiring that we determine CGIA immunity through a "close examination of the pleadings and undisputed evidence." 179 P.3d at 1004.

¶ 70 The majority concludes that we should not be examining the "viability" of Heartland's claims because, at this stage of the case, the only question is whether CDPHE is immune under the CGIA. But as demonstrated, the cases under CGIA require the court to take a close look at the pleadings to determine if the claims sound in tort or could sound in tort. That requirement cannot simply be dismissed by asserting that it amounts to an evaluation of the "viability" of Heartland's claims.

¶ 71 In addition, the immunity vested under the CGIA is immunity from "any action" — that includes litigation, not just immunity from an eventual judgment. As the supreme court noted in *City of Lakewood v. Brace*, CGIA immunity is "an *immunity from suit* rather

than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 919 P.2d 231, 238 (Colo. 1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)), *rev'd*, 919 P.2d 231 (Colo. 1996). Thus, at the early stages of the case, it is incumbent on the court to decide if immunity attaches. Otherwise, immunity from litigation is defeated.

¶ 72 For these reasons, I dissent from the majority opinion affirming the district court's order denying CDPHE's motion seeking sovereign immunity under the CGIA.

Court of Appeals

STATE OF COLORADO
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Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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