ADVANCE SHEET HEADNOTE
January 29, 2024

2024 CO 5

No. 22SC250, *City & Cnty. of Denver v. Bd. of Cnty. Comm'rs of Adams Cnty.*—Breach-of-Contract Claim—Statue of Limitations—Accrual Date—§ 13-80-108(6), C.R.S. (2023)—*Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver*, 907 P.2d 648, 654 (Colo. App. 1995), *aff'd in part and rev'd in part*, 928 P.2d 1254 (Colo. 1996).

The supreme court today clarifies when a breach-of-contract claim accrues for purposes of the applicable three-year statute of limitations. The court holds that a breach-of-contract claim accrues at the time the breach is, or in the exercise of reasonable diligence should have been, discovered. Because a division of the court of appeals applied an accrual rule based on when a plaintiff becomes aware of damages and possesses certainty of harm and incentive to sue, it erred. The division's holding is inconsistent with the plain and ordinary meaning of the language of Colorado's accrual statute, *see* § 13-80-108(6), C.R.S. (2023), the relevant case law, and the public policy considerations that underpin statutes of limitations.

Here, Adams County learned no later than 1995 that the City and County of Denver breached the parties' contract by using a noise-modeling system instead of a noise-monitoring system at Denver International Airport. It follows that the breach-of-contract claim Adams brought in this case in 2018 accrued no later than 1995 and is barred by the statute of limitations. It is immaterial when Adams became aware of the full extent of its damages and acquired certainty of harm and incentive to sue. Accordingly, the supreme court reverses the division's judgment and dismisses Adams' complaint.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 5

Supreme Court Case No. 22SC250
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1778

Petitioner:

City and County of Denver,

v.

Respondents:

Board of County Commissioners of Adams County, City of Aurora, City of Brighton, and City of Thornton.

Judgment Reversed
en banc
January 29, 2024

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, and **JUSTICE HART** joined.
JUSTICE BERKENKOTTER did not participate.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 "Once more unto the breach, dear friends, once more." William Shakespeare, *King Henry the Fifth*, Act 3, Sc. 1, l.1 (1600). For a Shakespearean hero, these words were a rallying cry as he propelled his troops into yet another foray with an old rival. For us, these words are a summons to settle a decades-long dispute between two Colorado jurisdictions that find themselves in merry-go-round litigation. Rather than a breach in the fortifications, however, we confront a breach of contract. We must decide whether, under Colorado law, Adams County ("Adams") could bring a breach-of-contract claim against the City and County of Denver ("Denver") in 2018, even though Adams learned, more than twenty years earlier, of Denver's breach. And so, unto the breach we plunge.

¶2 There is little factual disagreement between the parties. Both agree that they entered into the 1988 Intergovernmental Agreement ("IGA"), which required Denver to install a noise-*monitoring* system and to use it to calculate noise levels surrounding the soon-to-open Denver International Airport ("DIA"). Both agree that, in contravention of its contractual mandate, Denver instead installed a noise-*modeling* system, which it has used to report noise data ever since DIA opened. And, importantly, both agree that Adams knew, no later than 1995, that Denver was using a modeling system (and not a monitoring system). Where Adams and Denver part ways is on the legal question at the heart of this breach-of-contract

case: Under the applicable three-year statute of limitations, when should Adams have brought this action? More pointedly: Did Adams push off from the gate too late, missing the takeoff window within which to bring its claim?

¶3 Of course, plaintiffs must bring a claim within the governing limitations period or else relinquish it. But a claim cannot reach its expiration date if the statute-of-limitations clock never starts ticking in the first place. That clock begins to tick on the date a claim accrues. Thus, the dispositive question here is a narrow one: When did Adams' breach-of-contract claim accrue?

¶4 Not surprisingly, the parties advance opposing accrual theories. Denver contends that the claim accrued no later than 1995, as Adams was aware by that time that Denver had installed a modeling system (instead of a monitoring system) and was using it to calculate and report noise data. Adams, by contrast, asks us to embrace the court of appeals' determination that the claim accrued in 2014, when Adams learned that Denver's modeling system was underreporting noise data.[1] *Bd. of Cnty. Comm'rs v. City & Cnty. of Denver*, 2022 COA 30, ¶ 23, 511 P.3d 692, 701 ("*Bd. of Cnty. Comm'rs II*"). It was only then, the court of appeals reasoned, that Adams "became aware it suffered damages" and had "'certainty of harm and

[1] In 2017, the parties agreed to temporarily put on hold the three-year limitations period. Neither party disputes the validity of such an agreement, and we accordingly pass no judgment on it. The parties stipulate that Adams' claim was timely brought in 2018 if it accrued in 2014.

incentive to sue.'" *Id.* at ¶¶ 21, 23, 511 P.3d at 700–01 (quoting *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver*, 907 P.2d 648, 654 (Colo. App. 1995), *aff'd in part and rev'd in part*, 928 P.2d 1254 (Colo. 1996)).

¶5 We conclude that the court of appeals erred by minting and applying a damages-based accrual rule. The court of appeals' holding is inconsistent with the plain and ordinary meaning of the language of Colorado's accrual statute, *see* § 13-80-108(6), C.R.S. (2023), the relevant case law, and the public policy considerations that underpin statutes of limitations. To the extent the court of appeals leaned on the "certainty of harm and incentive to sue" language from *Bennett Bear Creek*, today we clarify that this part of *Bennett Bear Creek* was mere dictum. In any event, that opinion is not binding on us.

¶6 Because Colorado law dictates that a breach-of-contract claim accrues at the time the breach "is discovered or should have been discovered by the exercise of reasonable diligence," § 13-80-108(6), and because Adams learned no later than 1995 that Denver breached the IGA by using a modeling system rather than a monitoring system, Adams' claim against Denver is barred by the applicable three-year statute of limitations. Therefore, we reverse the judgment of the court of appeals and dismiss Adams' complaint.

I. Facts and Procedural History

¶7 After several years of intense negotiations in the 1980s, Denver and Adams agreed that Denver could annex fifty-five square miles of land located in Adams County to build DIA. The parties eventually executed the IGA, which, as relevant here, conditioned the annexation on strict airport noise restrictions.

¶8 Article V of the IGA governs "Noise Control and Mitigation." This provision sets Noise Exposure Performance Standards ("NEPS") at several locations surrounding the airport, known as "NEPS points." One of the noise level benchmarks is the "Leq(24)," which represents twenty-four-hour noise averages at given NEPS points.

¶9 To track NEPS compliance, the IGA imposes two pertinent duties on Denver. The first, under Section 5.4, is a one-time obligation to "install and operate a noise monitoring system capable of recording noise levels sufficient to calculate . . . Leq(24) values for the purpose of monitoring and enforcing the NEPS." The second, under Section 5.4.3, is a recurring obligation to "calculate on an annual basis . . . the actual Leq(24) values . . . in order to determine compliance . . . with the NEPS."

¶10 The IGA specifies maximum noise exposure levels. If the Leq(24) value exceeds the limit at any of the NEPS points by more than two decibels, the IGA considers the exceedance a "Class II" violation. The IGA allows Denver to "cure"

such violations within a given period. If Denver fails to do so, Adams can sue for liquidated damages of $500,000 per violation.

¶11 At the time of the IGA's signing in 1988, there was no noise-monitoring system in existence capable of satisfying the requirements of the IGA. Therefore, Denver hired an environmental and transportation consulting firm to develop a compliant system. However, in 1991, Denver rejected that firm's initial proposal and informed Adams that it would not install the microphone-based noise-*monitoring* system required by the IGA. Denver subsequently developed a noise-*modeling* system instead. The modeling system, referred to as "ARTSMAP," uses flight paths and other real-world data to forecast noise levels from flights into and out of DIA. However, ARTSMAP lacks the ability to directly record and measure actual noise levels at NEPS points.

¶12 In 1992, Adams filed a lawsuit objecting to Denver's use of ARTSMAP and seeking to compel installation of a noise-monitoring system. Soon thereafter, Denver learned of a company that could develop a noise-monitoring system capable of distinguishing between aircraft and non-aircraft noise. Since it could install and operate such a system, Denver argued the lawsuit was moot. The district court agreed and dismissed Adams' complaint in 1993 without prejudice. Then, in 1995, the year DIA opened, Denver installed the IGA-compliant noise-monitoring system referred to as "ANOMS."

¶13 From the beginning, though, Denver exclusively used ARTSMAP to calculate and report NEPS values. While it also published data from ANOMS, Denver never used the monitoring system to calculate and enforce NEPS.

¶14 In 1996, after the first year of the airport's operations, Denver submitted the first annual report required by the IGA. The report included NEPS-compliance calculations for 1995–1996 using only the ARTSMAP system. In a separate table, the report compared raw data from ARTSMAP and ANOMS. The report, however, did not use ANOMS data to document NEPS exceedances; nor did it show ANOMS readings from the NEPS points. Denver provided similar tables in its two subsequent annual reports, which continued to reflect discrepancies—albeit minor ones—between the raw data churned out by ARTSMAP and ANOMS. According to the first three annual reports, the systems seemed to be moving toward consistency.

¶15 In 1998, Adams brought a second lawsuit against Denver. This time, Adams sought liquidated damages for uncured Class II NEPS violations and an order requiring Denver to achieve NEPS compliance. (Recall that the first lawsuit, which was brought in 1992, was over Denver's failure to use a noise-monitoring system.) Adams relied exclusively on ARTSMAP values from the annual reports to identify violations and calculate damages. And Adams did not challenge Denver's installation and use of ARTSMAP in that action, even though that conduct violated

the IGA's provision requiring that a monitoring system be used for NEPS enforcement.

¶16 Adams' 1998 lawsuit proceeded to trial in 1999. Notably, during the trial, Adams' attorney stated that Adams "acquiesced" to Denver's use of a modeling system instead of a monitoring system.

¶17 The district court ultimately awarded Adams $4 million in liquidated damages based on NEPS values calculated using ARTSMAP. Both parties appealed, and a division of the court of appeals affirmed. *See Bd. of Cnty. Comm'rs v. City & Cnty. of Denver*, 40 P.3d 25, 36 (Colo. App. 2001) ("*Bd. of Cnty. Comm'rs I*").

¶18 Thereafter, Denver continued to use ARTSMAP for NEPS enforcement. And Adams, in turn, continued to collect liquidated damages for uncured Class II NEPS violations. Those damages eventually totaled $26 million.

¶19 In 2014, Denver diverged from its disclosure practice over the previous sixteen years: It submitted its annual report as usual, but it additionally provided a "Noise Climate Report." Denver's Noise Climate Report included *both* ARTSMAP and ANOMS data. Adams' noise expert reviewed this report and determined that the discrepancies between ARTSMAP and ANOMS data had widened considerably since 1998. Based on this expert's assessment, Adams sent Denver a notice of default. The parties then engaged in negotiations, and in

conjunction therewith, entered into a tolling agreement that temporarily froze the three-year-limitations clock.

¶20 In 2018, after the parties' efforts to reach a settlement failed and the tolling agreement expired, Adams sued Denver a third time by filing the complaint at issue in the present matter. In pertinent part, Adams sought "a declaration . . . that the . . . IGA requires Denver to install and operate an airport noise 'monitoring' system," and that the "IGA does not contemplate, provide for, or allow for the use of a noise 'modeling' system as the basis to measure the compliance of the NEPS." Adams also asked the district court to issue an order compelling Denver to install, and to submit data derived from, a compliant noise-monitoring system.

¶21 Denver raised several affirmative defenses. As relevant here, it argued that Adams' suit was barred by the three-year statute of limitations in section 13-80-101(1)(a), C.R.S. (2023). Denver emphasized that, under section 13-80-108(6), breach-of-contract claims accrue on the date the breach is, or in the exercise of reasonable diligence, should have been discovered. And because Adams knew about the breach (i.e., Denver's use of a modeling system) no later than 1995, Denver urged the court to rule that the statute of limitations had lapsed on Adams' claim.

¶22 The court disagreed and entered judgment in favor of Adams. It found that the IGA imposed a "recurring" obligation on Denver to calculate and report NEPS

compliance on an annual basis. Under this rationale, Denver's use of ARTSMAP constituted successive breaches of IGA Section 5.4.3 with a new cause of action accruing each year. Thus, the court held that Adams' breach-of-contract claim was timely filed, and it accordingly awarded Adams liquidated damages totaling $33.5 million for 67 uncured Class II NEPS violations.

¶23 Denver appealed, and a division of the court of appeals affirmed on different grounds in a published opinion. *Bd. of Cnty. Comm'rs II*, ¶ 1, 511 P.3d at 697. While the division "agree[d] with the trial court's ultimate finding," it rejected the recurring-breach theory. *Id.* at ¶ 18, 511 P.3d at 700. Focusing on Section 5.4 of the IGA, the division determined that the operative breach was "Denver's use of a noise modeling system rather than a noise monitoring system." *Id.* It observed that "no recurring duties are associated with this claim." *Id.* Still, relying on *Bennett Bear Creek*, the division concluded that "[i]t was not until 2014, when Adams received the Noise Climate Report, that Adams first knew of any damages flowing from Denver's use of ARTSMAP, thereby providing it with the '*certainty of harm and incentive to sue*' that triggered the running of the statute of limitations." *Id.* at ¶ 23, 511 P.3d at 701 (emphasis added) (quoting *Bennett Bear Creek*, 907 P.2d at 654).

¶24 Denver then petitioned our court for certiorari review. We granted its petition.[2]

II. Analysis

¶25 Our takeoff point is the governing standard of review. Piloted by the General Assembly's intent, we then construe section 13-80-108(6) to determine when a breach-of-contract claim accrues. Next, we follow the prevailing common-law winds and boost our statutory analysis with our case law and federal decisions applying Colorado law. We proceed by explaining that prudent public policy considerations justify our course. Finally, after considering and rejecting Adams' contentions, we apply sections 13-80-101(1)(a) and 13-80-108(6) to the present case and land at the conclusion that Adams' breach-of-contract claim is time-barred.

A. Standard of Review

¶26 Ordinarily, the accrual date of a claim and the corresponding issue of whether the statute of limitations has expired are questions of fact for a jury to resolve. *Jackson v. Am. Fam. Mut. Ins. Co.*, 258 P.3d 328, 332 (Colo. App. 2011). But when the material facts are undisputed, these questions may be decided as a

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[2] We agreed to review the following question:

> Whether the court of appeals erred when it determined that a cause of action for breach of contract does not accrue until the extent of damages is fully ascertainable and there is an "incentive to sue."

matter of law. *Id.* Furthermore, the interpretation of a statutory provision addressing when a claim accrues is an issue of law that we review de novo. *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 899 (Colo. App. 2003). Accordingly, we review de novo whether Adams' breach-of-contract claim is barred by the statute of limitations.

B. Construction of Section 13-80-108(6)

¶27 "Integral to any statute of limitations is the time of accrual: the time when the proverbial clock starts ticking and the statute of limitations begins to run." *Rooftop Restoration, Inc. v. Am. Fam. Mut. Ins. Co.*, 2018 CO 44, ¶ 13, 418 P.3d 1173, 1176. A statute of limitations without an accrual date is like an analog clock without gears—it never begins to run. Consequently, in establishing statutes of limitations, the General Assembly has laid out dates of accrual that apply to different types of claims. *See* § 13-80-108; *Rooftop Restoration*, ¶ 13, 418 P.3d at 1176–77.

¶28 It is our job to effectuate the General Assembly's intent when interpreting a statute. *Goodman v. Heritage Builders, Inc.*, 2017 CO 13, ¶ 7, 390 P.3d 398, 401. To determine legislative intent, we begin with the statutory language itself, giving "the words and phrases their ordinary and commonly accepted meaning." *Id.* If the statutory language is unambiguous, then we must apply it as written and need not turn to other rules of statutory construction. *Bd. of Cnty. Comm'rs v. Colo. Dep't*

of Pub. Health & Env't, 2021 CO 43, ¶ 17, 488 P.3d 1065, 1069. Thus, the language of the accrual statute is our control tower; it directs our inquiry into when Adams' claim accrued.

¶29 Adams' claim is for breach of contract. The accrual date for breach-of-contract claims is set by subsection (6) of the accrual statute. § 13-80-108(6). Subsection (6) states that "[a] cause of action for breach of any express or implied contract . . . accrue[s] *on the date the breach is discovered or should have been discovered* by the exercise of reasonable diligence." *Id.* (emphasis added).

¶30 The division, however, created and applied a different standard for the accrual of breach-of-contract claims—one that requires the plaintiff to become "aware it suffered damages" and have "'certainty of harm and incentive to sue.'" *Bd. of Cnty. Comm'rs II*, ¶¶ 21, 23, 511 P.3d at 700–01 (quoting *Bennett Bear Creek*, 907 P.2d at 654). This reading is not supported by section 13-80-108(6).

¶31 Beginning with the plain and ordinary meaning of the statutory language, we note that respected dictionaries define "discover" as "to learn," "find out," or "obtain . . . knowledge of for the first time." *Discover*, The Brittannica Dictionary, https://www.britannica.com/dictionary/discover [https://perma.cc/YA2R-ZMEQ]; *Discover*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/discover [https://perma.cc/SR3T-DUXQ]; *see also Cowen v. People*, 2018 CO 96, ¶ 14, 431 P.3d 215, 218 ("When determining the plain

and ordinary meaning of words, we may consider a definition in a recognized dictionary."). Further, Black's Law Dictionary defines "breach of contract" as the "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." *Breach of Contract*, Black's Law Dictionary (11th ed. 2019); *see also* CJI-Civ. 30:11 (2023) (same). Thus, section 13-80-108(6) dictates that accrual occurs when one party to a contract learns, or in the exercise of reasonable diligence should have learned, that another party has violated a term of that contract.

¶32 In applying section 13-80-108(6), we may "not add words" to it or "subtract words from it." *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). And we must presume that the General Assembly knew "the legal import of the words it use[d]" and that its choice of words "was a deliberate one calculated to obtain the result dictated by the plain meaning of the words." *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987); *see also Granite State Ins. Co. v. Ken Caryl Ranch Master Ass'n*, 183 P.3d 563, 567 (Colo. 2008).

¶33 Yet, the division engaged in wordsmithing and reached an outcome inconsistent with the plain and ordinary meaning of the statutory language. The division swapped the term "breach" for "damages." *Bd. of Cnty. Comm'rs II*, ¶ 21, 511 P.3d at 700. Then, going still further, it added the "certainty of harm and incentive to sue" language, rendering the accrual rule unrecognizable. *Id.* at ¶ 23,

511 P.3d at 701 (quoting *Bennett Bear Creek*, 907 P.2d at 654). By doing so, the division improperly based accrual on awareness of damages rather than discovery of breach. Hence, under the division's construction, Adams' claim did not get its wings until 2014, nearly twenty years after Adams admittedly knew Denver had breached the IGA.

¶34 Had the General Assembly intended to tie accrual to "damages," it could have used that term rather than the term "breach." Indeed, elsewhere, the General Assembly settled on knowledge of damages as the event that triggers a statute of limitations. Motor vehicle injury claims, for example, accrue on the date the existence and cause of the "injury or damage are known." § 13-80-108(12).

¶35 Because we presume that the General Assembly made "intentional distinctions in the language it chose" when drafting the accrual statute, *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L. ex rel. Loveland*, 2014 CO 33, ¶ 24, 325 P.3d 1014, 1022, we conclude that it did not intend to use the terms "breach" and "damages" interchangeably or to have the former encompass the latter. When interpreting a statute, "we give each word independent effect so that no word is rendered superfluous." *Id.* at ¶ 23, 325 P.3d at 1022.

¶36 Moreover, we agree with Denver's assertion that the terms "breach" and "damages" are not synonymous. Breach and damages constitute separate elements of a breach-of-contract claim. *See W. Distrib. Co. v. Diodosio*, 841 P.2d 1053,

1058 (Colo. 1992) (describing the four elements of a breach-of-contract claim). This distinction is also recognized by the Colorado Pattern Civil Jury Instructions, which explain that a breach is "the failure to perform a contractual promise," CJI-Civ. 30:11 (2023), while damages are awarded only if there has been a breach, CJI-Civ. 30:37 (2023).

¶37 In short, the statute means what it says and says what it means. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The General Assembly clearly intended a breach-of-contract claim to accrue at the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the violation of a contractual obligation. Nowhere does the statute tie accrual of a claim to the "damages" flowing from a breach. We are duty-bound to adhere to the statutory language.

C. Common Law

¶38 Our reading of the accrual statute is bolstered by our longstanding case law and federal cases applying Colorado law. This line of authority cuts against the division's reading of *Bennett Bear Creek* and is also in step with the majority rule.

¶39 As early as 1909, this court pointed to "a general rule" providing that "a cause of action for . . . the breach of a contract or duty, accrues immediately upon the happening of . . . the breach, even though the actual damages resulting

therefrom may not accrue until some time afterwards." *Middelkamp v. Bessemer Irrigating Ditch Co.*, 103 P. 280, 282 (1909) (citing 19 Am. & Eng. Encyclopedia of Law 200 (2d Ed.) and collecting cases). Elaborating, we said that "the statute [of limitations] . . . begins to run upon the occurrence of . . . the breach complained of, and not from the time of the damage resulting therefrom."[3] *Id.* Our modern case law reaffirms this pronouncement.

¶40 In *Jones v. Cox*, 828 P.2d 218, 223 (Colo. 1992), we expressly refused to peg accrual under section 13-80-108(1) to a threshold damages requirement in the personal injury context. Doing so, we reasoned, "would destroy the effectiveness of the statute of limitations by allowing claims to be brought three years after some indefinite period of time in which it might take to reach the threshold [damages] amount." *Id.* at 224. Going further, we observed that a plaintiff's present "uncertainty as to the extent of her damages" does not "prevent[] the filing of her complaint within the . . . limitations period where the fact of injury was known

[3] Although this general rule has kept a steady hand on the joystick of Colorado law for over a century, we acknowledge that we did not implement it in *Middelkamp*. *See* 103 P. at 282. Rather, "in cases of waters escaping by percolation and seepage from irrigation ditches" — a narrow class of cases, indeed — we haven't deemed the general rule to be "practical, equitable, or fair." *Id.* However, because the instant matter is a classic breach-of-contract case and does not implicate the "uncertain" elements of water escape, *see id.*, our airstrip is illuminated by the general rule.

since the date of her accident." *Id.* at 224 n.4 (quoting *Dove v. Delgado*, 808 P.2d 1270, 1273–74 (Colo. 1991)).

¶41 Over a dozen years later, in *Brodeur v. American Home Assurance Co.*, 169 P.3d 139, 147 n.8 (Colo. 2007), we underscored the dichotomy we recognized in *Jones*: "[A]n injury is different from the damages that flow from the injury." Accordingly, we reiterated that "damages do not need to be known before accrual of a claim." *Id.* (citing *Dove*, 808 P.2d at 1274).

¶42 Federal cases applying Colorado law are in lockstep with *Middelkamp*, *Jones*, and *Brodeur*. In *Grant v. Pharmacia & Upjohn Co.*, 314 F.3d 488 (10th Cir. 2002), for instance, the plaintiffs filed their breach-of-contract claims in 1999. *Id.* at 491. But because they "were aware of [the defendant's] alleged *breach*" in 1986, the Tenth Circuit held that their claims were time-barred under sections 13-80-101(1)(a) and 13-80-108(6). *Id.* at 493 (emphasis added). The court rejected the argument that "the cause of action did not accrue until 1996 because damages did not occur until 1996." *Id.* It explained that "[u]ncertainty as to the precise extent of damage neither precludes the filing of a suit nor delays the accrual of a claim for purposes of the statute of limitations." *Id.* (alteration in original) (quoting *Broker House Int'l., Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998)).

¶43 Subsequently, a Colorado federal district court recognized that a conceptual gulf lies between "breach"—which is the contract-law analogue of "injury," as

discussed in *Jones* and *Brodeur*—and "damages." *See D.R. Horton, Inc.-Denver v. Travelers Indem. Co. of Am.*, 860 F. Supp. 2d 1246, 1254 (D. Colo. 2012). In *D.R. Horton*, certain insurers brought subrogation claims against third-party defendants and asserted that a "breach of contract claim does not accrue until the time that one learns of a breach *and* sustains damages as a result." *Id.* The court ruled that, "although creative," the insurers' argument lacked merit. *Id.* Looking to the plain language of section 13-80-108(6), the court spotlighted the difference between "breach" and "damages," noting the conspicuous absence of the latter from the pertinent statutory language. *Id.* "Although of course an essential element of a breach of contract claim is . . . damages," the court stated, "this governing statutory provision regarding the timing of accrual . . . *say[s] nothing about a damages requirement*." *Id.* (emphasis added).

¶44 It appears axiomatic, then, that damages need not be known before a breach-of-contract claim accrues under Colorado law. Mindful of this well-established framework, we now turn our attention to *Bennett Bear Creek*, the decision on which the division below largely rooted its holding.

¶45 As a preliminary matter, Adams asserts that Denver "compel[led]" the division to apply the *Bennett Bear Creek* standard and now makes an abrupt U-turn to "argue[] *against* the very same standard." This contention, however, falters upon closer scrutiny. The principle that Denver extrapolated from *Bennett Bear*

Creek stands in stark contrast to the one on which the division's analysis rests. The division's first mention of the case is revealing: "Relying on *Bennett Bear Creek* . . . , Denver contends that section 13-80-101(1)(a) . . . bars the breach of contract claims because claims challenging *the method of contractual performance accrue when the method is implemented*." *Bd. of Cnty. Comm'rs II*, ¶ 16, 511 P.3d at 699 (emphasis added).[4] This excerpt accurately conveys what we perceive to be the salient portion of *Bennett Bear Creek*. And yet, this is not the tarmac on which the division below landed.

¶46 Instead, the division alights during its second mention of *Bennett Bear Creek*, giving its take on the holding in that case in a parenthetical: "[T]he statute of limitations commences when the certainty of harm and incentive to sue are known to the plaintiff." *Id.* at ¶ 20, 511 P.3d at 700 (citing *Bennett Bear Creek*, 907 P.2d at 654). The division explained that, "during the 1999 trial, Denver's noise expert testified that ARTSMAP and ANOMS reported comparable numbers of NEPS violations and that the differences between their data appeared to be declining." *Id.* at ¶ 22, 511 P.3d at 700. Consequently, continued the division, "[n]ot only was Adams unable to prove that any damages flowed from Denver's use of ARTSMAP

[4] Speaking of the method of contractual performance, remember that Adams was aware, no later than 1995, that Denver had implemented a noise-modeling system instead of a noise-monitoring system.

rather than ANOMS [between 1995 to 1998], a necessary element of a breach of contract claim, but it also had no incentive to sue." *Id.* In this way, the division used *Bennett Bear Creek* to shift the focus of the accrual analysis from knowledge of breach to knowledge of damages.

¶47 But does *Bennett Bear Creek*, if properly construed, lend itself to such ends? The answer is no. By cutting through the clouds of dictum, we discern that the *Bennett Bear Creek* opinion charted a similar flight path to the one we take in the instant matter. Indeed, the division in *Bennett Bear Creek* faithfully tied accrual to knowledge of breach.

¶48 *Bennett Bear Creek* involved long-term leases between suppliers and distributors of water. 907 P.2d at 651. The rates charged by the suppliers under those water leases were based in part on a "plant value" metric. *Id.* The plant value was determined through a "current use" methodology for twenty-one years. *Id.* But in 1980, the suppliers changed to a "historic investment" method, which substantially increased the rates. *Id.* at 651–52. They then changed to a "split allocation" method ten years later, in 1990. *Id.* at 652.

¶49 The distributors filed a breach-of-contract action based on the initial 1980 method change, but they didn't do so until 1990 (after the second method change). *Id.* The district court dismissed the claims, finding that the statute of limitations for breach of contract had lapsed. *Id.* On appeal, the distributors contended that

their claims were not time-barred because each bill the suppliers submitted based on rates that breached the lease agreements—that is, "stemming from the 1980 rate change"—constituted a "continuing breach of contract." *Id.* at 654.

¶50 The *Bennett Bear Creek* division was unpersuaded. It noted that the distributors did not dispute that they were aware of the initial 1980 method change "when it was implemented." *Id.* According to the division, it did not "necessarily follow that each billing by the [suppliers] create[d] a new and separate cause of action." *Id.* Rather, determined the division, "the completed part of the [suppliers'] conduct causing the alleged harm to the distributors was the change in the method of allocating plant value." *Id.* Applying section 13-80-108(6), the division concluded that "[a]ny cause of action for breach of contract would therefore have accrued no later than the effective date of the 1980 change" and thus was barred by the statute of limitations. *Id.* In our view, *this* is the core holding in *Bennett Bear Creek*.

¶51 True, the division in *Bennett Bear Creek* did not stop there. It went on to comment that, "[b]ecause *the certainty of harm and the incentive to sue* were . . . known [at the time of the 1980 method change], the statutory period of limitations commenced immediately, without regard to future conduct." *Id.* (emphasis added) (citing *Developments in the Law Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1205 (1950)). While this statement seems enmeshed in the analysis, we

do not detect any intention on the part of the division to pronounce a new accrual test or standard. The division simply recognized that knowledge of the breach in 1980 provided the distributors certainty of harm and incentive to sue. The fulcrum of the division's accrual determination, though, was the fact that the distributors knew about the 1980 method change at the time of its implementation. *See id.* Accordingly, we place little stock in the division's passing reference to "certainty of harm" and "incentive to sue"—it was mere dictum.

¶52 In any case, we are not bound by the division's holding in *Bennett Bear Creek*. To be sure, the relevant case law supports the conclusion yielded by our statutory interpretation analysis; that is, a cause of action for breach of contract under section 13-80-108(6) accrues when the breach is, or in the exercise of reasonable diligence should have been, discovered. And by so holding, we park in the same hangar as most other jurisdictions: "The vast majority of courts weighing in on this fundamental question of law have held that a breach of contract claim accrues at the moment of breach rather than when the plaintiff is damaged by the breach." *Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 749 n.6 (Okla. 2021) (collecting cases).

D. Public Policy

¶53 The purposes behind statutes of limitations are to "promote justice, discourage unnecessary delay, and preclude the prosecution of stale claims."

Gunderson v. Weidner Holdings, LLC, 2019 COA 186, ¶ 9, 463 P.3d 315, 317; *see also Morrison v. Goff*, 91 P.3d 1050, 1056 (Colo. 2004). The breach-based accrual rule established by our General Assembly, which we fully enforce today, comports with these well-established public policy considerations.

¶54 For one, requiring plaintiffs to exercise "reasonable diligence" in discovering a breach sets objective criteria for accrual. § 13-80-108(6); *Sulca*, 77 P.3d at 900. By contrast, the division's certainty-incentives standard makes plaintiffs the arbiters of accrual based on their own subjective perception of what constitutes damages or an incentive to sue. Such a standard essentially puts plaintiffs in the pilot's seat and lets them land their claims at their whim. But the setting of accrual dates is the domain of the General Assembly, and transferring this role to plaintiffs—something we cannot do—risks both indefinitely extending the time period for bringing claims and rewarding "self-induced ignorance." *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489, 492 (Colo. App. 2008); *see also Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 854 (Colo. App. 2007).

¶55 Moreover, this court has recognized that the clear time limits set by a breach-based accrual rule adhere to the public policy goal of "penalizing unreasonable delay," thereby "compel[ling] litigants to pursue their claims in a timely manner" and "creat[ing] desirable security and stability." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996). On the flip side, a damages-based

accrual rule "destroy[s] the effectiveness of the statute of limitations" because it allows claims to be brought after "some indefinite period of time." *Jones*, 828 P.2d at 224. Under a damages-based approach, plaintiffs might choose to delay the filing of their suit to allow damages to increase or until litigation is more advantageous. This case is a prime example. At the time of the 1999 trial (during the second lawsuit), Adams knew of Denver's breach, but it also knew that any resulting damages were likely minimal. Adams' breach-of-contract claim stagnated for two decades, and when it was finally filed in 2018, damages had increased exponentially.

¶56 Finally, limiting the period within which a cause of action can be brought prevents "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 29, 444 P.3d 847, 854 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.*

¶57 Resolving this appeal in Adams' favor would run headlong into the aforementioned concerns. By the time of the 2018 trial, more than twenty years

after the breach occurred, Adams' expert could only "vaguely" recall the reports he had prepared, and a chief IGA negotiator had died.

¶58 Adams reminds us that a breach-based accrual rule may force a party to bring a breach-of-contract claim prematurely when that party is aware of noncompliance but not of any loss or damage. Colorado case law, however, does not condition the filing of a breach-of-contract claim on awareness of loss or damage. Nominal damages are recoverable even if no actual damages resulted or can be proven. *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 481 (Colo. App. 2003).

¶59 More importantly, we defer to the General Assembly to weigh the cost of premature claims against the cost of stale ones. The General Assembly chose to set the accrual date at the time breach is discovered or reasonably should have been discovered. Our job is simply to implement this public policy—nothing more; nothing less.

¶60 In short, the accrual statute's plain language, the relevant case law, and the policies undergirding statutes of limitations all compel the conclusion that a breach-of-contract claim accrues when the breach is, or in the exercise of reasonable diligence should have been, discovered.

¶61 Adams nevertheless urges us to rule in its favor. We turn our focus to Adams' arguments next.

E. Adams' Contentions

¶62 Adams maintains that we have several distinct paths to affirmance in this case. First and foremost, it invites us to reinstate the district court's determination that the suit is not time-barred based on Denver's recurring contractual obligation to calculate and report NEPS violations. Second, Adams invites us to adopt the division's reading of *Bennett Bear Creek* and conclude that this cause of action did not accrue until 2014, when Adams claims it first learned that it had been damaged and had an incentive to sue. Lastly, Adams invites us to anchor our analysis either to its allegation that Denver hid the ball regarding ARTSMAP underreporting noise levels or to its allegation that the parties contracted through the IGA to extend the applicable limitations period or delay accrual of a breach-of-contract claim under the circumstances of this case. We decline all these invitations in turn, but before doing so, we address a threshold issue.

1. Certiorari Was Not Improvidently Granted

¶63 At the outset, Adams argues that certiorari was improvidently granted. Quoting part of the question on which we granted certiorari, Adams informs us that in this litigation no party has postulated, and no court has ruled, that a breach-of-contract claim accrues when "the extent of damages is *fully* ascertainable." (Emphasis added.) This, in essence, is a semantic attack on the framing of the issue before us.

¶64 Try as it might, Adams cannot meaningfully distinguish between the "fully ascertainable [damages]" language embedded in the issue we agreed to review and the putative "certainty of harm" standard the division derived from *Bennett Bear Creek*. *See Bd. of Cnty. Comm'rs II*, ¶ 23, 511 P.3d at 701 (quoting *Bennett Bear Creek*, 907 P.2d at 654). Any discrepancy is immaterial. What matters is that the issue confronted by the division is substantively the same as the one we address. The operative inquiry is whether a breach-of-contract claim accrues at the time a plaintiff has knowledge of breach or knowledge of damages. Accordingly, everything we consider today was resolved below. *Cf. Colby v. Progressive Cas. Ins. Co.*, 928 P.2d 1298, 1301 (Colo. 1996) (holding that certiorari was improvidently granted when the issue before this court was not addressed by the lower court).

2. This Is Not a Recurring Breach Case and, Regardless, the Theory of Recurring Breach Is Not Properly Before Us

¶65 As noted above, Article V of the IGA imposes two relevant obligations on Denver: (1) *a one-time obligation to install* a noise-monitoring system for the purpose of enforcing NEPS pursuant to Section 5.4; and (2) *a recurring obligation to calculate and report* NEPS values on an annual basis pursuant to Section 5.4.3. Adams claims that it timely filed this cause of action because the latter obligation is a yearly, recurring one. But this is not a recurring obligation case. In this litigation, Adams challenges Denver's installation and use of a modeling system, not Denver's compliance with NEPS values reported by that system.

¶66 Adams, however, insists that there was no breach of the one-time installation obligation. It reiterates that Denver *did* install ANOMS; thus, by Adams' telling, the breach at issue here is Denver's continued reporting of *modeled* data. Not so. While it is true that Denver installed ANOMS, it is undisputed that ANOMS effectively lay fallow—Denver exclusively used ARTSMAP for NEPS enforcement. And that's the basis of this cause of action.

¶67 Adams' 2018 complaint lends credence to our characterization of the breach. In part, Adams sought a declaration that the IGA "requires Denver to install and *operate* an airport noise 'monitoring' system." (Emphasis added.) Importantly, Adams also requested a declaration that the "IGA does not contemplate, provide for, or allow for the use of a noise 'modeling' system as the basis to measure the compliance of the NEPS." This *use* of a modeling system is the essence of the breach alleged by Adams. It is of no moment that Denver also installed ANOMS.

¶68 At any rate, the procedural posture of this case forecloses Adams' efforts to pivot from Denver's one-time obligation to Denver's recurring obligation. Recall that, at Adams' urging, the district court found that this case was timely filed because Denver's conduct constituted successive breaches of Section 5.4.3. *See Bd. of Cnty. Comm'rs II*, ¶ 18, 511 P.3d at 700. The division, however, expressly rejected that rationale. *Id.* Although it upheld the district court's ultimate disposition, it arrived there via a different route. *Id.* The division correctly observed that Adams'

breach-of-contract claim was based on "Denver's use of a noise modeling system rather than a noise monitoring system and that *no recurring duties are associated with this claim*." *Id.* (emphasis added). Thus, the division disagreed with Adams' position at the district court.

¶69 Having prevailed on appeal, albeit on other grounds, Adams chose not to seek our review of the division's determination that this is not a recurring breach case. And, absent a cross-petition, Section 5.4.3 of the IGA and the concomitant theory of recurring breach are not properly teed up for our consideration. The sole issue as to which we granted certiorari was raised by Denver, and it was narrowly framed: "Whether the court of appeals erred when it determined that a cause of action for breach of contract does not accrue until the extent of damages is fully ascertainable and there is an 'incentive to sue.'" We limit our review accordingly.[5]

3. Neither the Hide-the-Ball Allegation nor the Toll-or-Delay Contention Can Rescue Adams

¶70 Adams accuses Denver of actively hiding information that purportedly showed that ARTSMAP underreported noise levels. But Adams fails to explain how this disputed factual assertion is relevant to the instant matter. We are

[5] Nothing we say today should be understood as affecting any right Adams may have to timely bring suit against Denver for alleged violations of the recurring obligation to calculate and report NEPS values on an annual basis pursuant to Section 5.4.3. We simply do not address that provision of the IGA.

familiar, of course, with equitable tolling, which permits courts to toll a statute of limitations in limited circumstances based on a defendant's intentionally wrongful conduct. *Dean Witter*, 911 P.2d at 1099. In this litigation, though, Adams has never before taken the position that the limitations period should be equitably tolled. And it is too late to raise the argument for the first time at the thirteenth hour in our court.[6] *See Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 18, 287 P.3d 842, 847 ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

¶71 Besides, far from being a case in which the defendant hid the ball from the plaintiff, this is a case in which the defendant handed the ball to the plaintiff and the plaintiff examined it and returned it.[7] Adams "decided to acquiesce" to Denver's modeling system in open court and, consistent with such acquiescence, took no action for more than two decades on Denver's failure to use a monitoring

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[6] By the same token, any contention related to technological obsolescence and a contracting party's obligation, under the good faith and fair dealing doctrine, to timely notify the other party as to material issues is not presently before us. This lawsuit is not based on Denver's alleged failure to update ARTSMAP.

[7] We speak here of breach, not damages. We acknowledge that, as Adams notes, Denver did withhold data that reflected that ARTSMAP and ANOMS values had become more disparate with time. Denver showed Adams the full picture only when it sent the 2014 Noise Climate Report, which was different from that report's previous iterations. We do not condone Denver's conduct. To be sure, if accrual hinged on awareness of damages, rather than awareness of breach, this might well qualify as a hide-the-ball situation.

system. Under the circumstances, there was no reason for Denver to stop using ARTSMAP, and there is no basis now for Adams to cry foul pursuant to the equitable tolling doctrine. *See Dean Witter*, 911 P.2d at 1099 (noting that equitable tolling requires proof that the defendant "wrongfully impeded" the plaintiff from bringing suit or that "truly extraordinary circumstances prevented the plaintiff from filing" the claim "despite diligent efforts").

¶72 Equally unavailing is Adams' toll-or-delay proposition. According to Adams, the parties contracted through the IGA to either toll the limitations period or delay accrual of a breach-of-contract claim under the circumstances present here. In support of its position, Adams relies on two provisions of the IGA: (1) the waiver provision, which states that the "waiver . . . of any breach of any term, covenant or condition . . . shall not be deemed a waiver of such term, covenant or condition or any subsequent breach of the same"; and (2) the notice-of-default provision, which states that a party is not in default "unless and until notice shall have been given in writing, specifying such default." The waiver provision, maintains Adams, means "that a party's act of not demanding performance" of a term "in any given year" doesn't affect the ability to enforce that term in a later year. And the notice-of-default provision, continues Adams, allowed it "to accept the performance of the yearly noise level reporting requirement through

ARTSMAP without prejudice to its right to enforce the IGA requirement of a noise measurement system in future years."

¶73 But neither the district court nor the division relied on these provisions. More concerning, in front of the division, Adams did not mention, never mind demonstrate, that these provisions had any bearing on the accrual of the breach-of-contract claim advanced. In essence, then, Adams nudges us to be the first court in this litigation to pass judgment on the effect, if any, of the waiver and notice-of-default provisions. Again, however, the general rule is that we don't address an issue that has not been considered by the lower courts. *See Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 26, 498 P.3d 1106, 1114.

¶74 Having disposed of Adams' contentions, we now apply the law we discussed earlier regarding accrual to the facts of this case.

F. Application

¶75 Section 5.4 of the IGA specifies that "Denver shall install and operate a noise *monitoring* system capable of recording noise levels sufficient to calculate . . . Leq(24) values *for the purpose of monitoring and enforcing the NEPS*." (Emphases added.) Despite this mandate, Denver installed ARTSMAP, a *modeling* system, and used it to calculate and report NEPS compliance. This constituted a breach of the IGA.

¶76 Significantly, Adams knew about this breach more than two decades before it filed its 2018 complaint. Indeed, Denver's first annual report included NEPS values for 1995–1996 using only the ARTSMAP system. And when Adams sued Denver in 1998 seeking liquidated damages for NEPS violations (the second lawsuit), it relied solely on the reports derived from the ARTSMAP system. Adams did not challenge the installation or use of ARTSMAP during that case's trial in 1999. On the contrary, Adams' attorney admitted in open court that Adams "acquiesced" to Denver's conduct.

¶77 The motivation for Adams' acquiescence appears to have been twofold: (1) the ARTSMAP and ANOMS systems yielded similar results in the first three annual reports; and (2) the systems appeared to be moving toward consistency. Put simply, Adams took a chance. Although it knew about the breach, it was not convinced that it would garner any appreciable benefit by seeking relief (declaratory or otherwise). But by acquiescing to Denver's use of the ARTSMAP system for nearly two decades, Adams played the percentages, and in the end, its gamble didn't pay off.

¶78 In sum, the proverbial clock started ticking no later than 1995, as Adams undisputedly knew then that Denver was using a modeling system instead of a monitoring system, in contravention of the IGA. *See* § 13-80-108(6). Adams had three years in which to bring a suit for this breach of contract. § 13-80-101(1)(a).

But it sat on its rights until 2018. By then, it was too late. Pursuant to section 13-80-108(6), discovery of breach—not knowledge of damages, nor any derivative notion of certainty of harm and incentive to sue—determines the accrual of a cause of action for breach of contract. Therefore, Adams' cause of action is time-barred and its complaint is dismissed.

III. Conclusion

¶79 For the foregoing reasons, we reverse the division's judgment and dismiss Adams' complaint as barred by the statute of limitations.