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ADVANCE SHEET HEADNOTE
June 17, 2024

2024 CO 46

No. 22SC293, *City of Aspen v. Burlingame Ranch*—Colorado Governmental Immunity Act (“CGIA”), §§ 24-10-101 to -120, C.R.S. (2023)—Economic Loss Rule—*Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008)—*Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000)—Scope of Immunity Under the CGIA—*Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993)—Subject Matter Jurisdiction.

The supreme court clarifies that its jurisprudence lays out a freestanding, self-sufficient framework for determining whether an action brought against a public entity is barred by the Colorado Governmental Immunity Act (“CGIA”), §§ 24-10-101 to -120, C.R.S. (2023), thereby depriving the trial court of subject matter jurisdiction. Therefore, it holds that the economic loss rule, a fundamentally different and unrelated doctrine, has no part to play in this inquiry.

Where, as here, the sole question is whether the CGIA precludes a plaintiff's claims, the court must consider the nature of the injury underlying the claims and the relief sought. If the injury arises out of tortious conduct or the breach of a duty arising in tort, and the relief seeks to compensate the plaintiff for that injury, it is barred by the CGIA. Even if such claims could arise in both tort *and* contract,

they're still barred because they "*could* lie in tort" for purposes of the CGIA. § 24-10-106(1), C.R.S. (2023) (emphasis added). It is of no moment that an analysis under the economic loss rule could prohibit any tort claim. The economic loss rule does not involve a jurisdictional question and cannot come to the rescue of an otherwise CGIA-barred claim. Accordingly, the division's judgment is reversed, and the case is remanded to be returned to the district court for further proceedings.

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

2024 CO 46

Supreme Court Case No. 22SC293
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA2088

Petitioner/Cross-Respondent:

City of Aspen, a municipal corporation,

v.

Respondent/Cross-Petitioner:

Burlingame Ranch II Condominium Owners Association, Inc., a nonprofit
corporation.

Judgment Reversed

en banc

June 17, 2024

Attorneys for Petitioner/Cross-Respondent:

Overturf McGath & Hull, P.C.

Robert I. Lapidow

Jeremy B. Goldblatt

Denver, Colorado

Anne Whalen Gill, LLC

Anne Whalen Gill

Castle Rock, Colorado

Attorneys for Respondent/Cross-Petitioner:

Griffiths Law PC
Christopher J. Griffiths
Duncan Griffiths
Kimberly Newton
Lone Tree, Colorado

Attorney for Amicus Curiae Colorado Defense Lawyers Association:

Andrew M. LaFontaine
Westminster, Colorado

Attorneys for Amicus Curiae Colorado Municipal League:

Robert D. Sheesley
Rachel Bender
Denver, Colorado

Attorneys for Amicus Curiae Colorado Trial Lawyers Association:

Burg Simpson Eldredge Hersh Jardine P.C.
Ronald M. Sandgrund
Craig S. Nuss

Englewood, Colorado

The Paul Wilkinson Law Firm LLC
Nelson Boyle
Denver, Colorado

Attorneys for Amicus Curiae Community Associations Institute:

Kerrane Storz, P.C.
Jeffrey P. Kerrane
Andrew T. Mossman
Broomfield, Colorado

JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 “Oh, East is East, and West is West, and never the twain shall meet” Rudyard Kipling, *The Ballad of East and West* (1889). This aphorism should describe the fate of the two unrelated legal doctrines before us today: the Colorado Governmental Immunity Act (“CGIA”), §§ 24-10-101 to -120, C.R.S. (2023), and Colorado’s economic loss rule. Alas, much like the eastern and western heroes of Kipling’s poem, the doctrines have been foisted together — this time by a division of the court of appeals in a residential construction defect case brought against the City of Aspen (“Aspen”). But the unexpected union threatens to contravene our CGIA jurisprudence and subvert the General Assembly’s intent in codifying governmental immunity. Therefore, we disentangle the doctrines today and hold that the economic loss rule has no bearing on whether the CGIA bars a plaintiff’s claims.

¶2 Despite the merger forced by the division below, the CGIA and the economic loss rule are fundamentally different — they mix like oil and water. Their disparate origins, purposes, and operations explain the inauspicious implications of their convergence.

¶3 On the one hand, the CGIA immunizes public entities from all claims for injury which “lie in tort or could lie in tort.” § 24-10-106(1), C.R.S. (2023). That is to say, the CGIA deprives courts of subject matter jurisdiction over those claims.

Without the CGIA's grant of immunity, exposure to unlimited liability would frustrate the state and its political subdivisions in their efforts to provide essential public services. Take, for instance, the enterprise underlying the present case – the development of affordable housing. But for the legislature's intervention via the CGIA, unlimited tort liability would perch perilously like the sword of Damocles¹ above the proverbial head of any municipality engaged in this necessary venture. Recognizing this, as well as the excessive fiscal burdens that would inevitably be borne by taxpayers, the General Assembly saw fit to derogate from standard tort liability by enacting the CGIA. Thus, with some exceptions, public entities have enjoyed sanctuary from tort liability since the CGIA went into effect in 1972.

¶4 On the other hand, this court adopted the economic loss rule nearly three decades after the legislature enacted the CGIA. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). Neither the kith nor kin of the CGIA, this judicially

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Then he chanced to raise his eyes toward the ceiling. What was it that was dangling above him, with its point almost touching his head? It was a sharp sword, and it was hung by only a single horse-hair. What if the hair should break? There was danger every moment that it would do so.

State v. Parson, 844 A.2d 178, 180 n.2 (R.I. 2004) (quoting *The Sword of Damocles*, in *Favorite Tales of Long Ago*, 97, 98–99 (Aladdin Books 1955) (retold by James Baldwin)); see also *Barese v. Clark*, 773 A.2d 946, 948 n.4 (Conn. App. Ct. 2001) (“The ‘sword of Damocles’ [of classical Greek fame] refers generally to impending disaster.”).

crafted doctrine exists for entirely different policy reasons. It is concerned with ensuring predictability in commercial transactions and (perhaps more importantly) with maintaining the distinction between tort and contract law. *Id.* at 1262. In furtherance of these goals, the economic loss rule prohibits tort claims that are based solely on the breach of a contractual duty that results in purely economic losses (i.e., damages other than physical harm to persons or property, such as the loss of a bargain). *Id.* at 1264.

¶5 The doctrines, therefore, are separated by dint of their respective geneses and aims. But that's not all. They also demand incongruous analyses. Under the CGIA, courts must ask a fundamentally expansive question, i.e., whether the nature of the injury and the relief sought lies in tort or *could* lie in tort. *See Berg v. State Bd. of Agric.*, 919 P.2d 254, 258–59 (Colo. 1996); *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1175–76 (Colo. 2000). In contrast, the economic loss rule is a narrowing doctrine, which extinguishes tort claims when the source of the allegedly breached duty is a contract. *See Town of Alma*, 10 P.3d at 1262. Surely then, these doctrines are different horses for different courses.

¶6 Yet, they have been thrust together by a perceived legal quandary. To wit, what's a court to do when a plaintiff sues a public entity and both tort and contract are implicated by the nature of the injury and the relief requested? We spotlighted this challenging question some sixteen years ago. *See Robinson v. Colo. State Lottery*

Div., 179 P.3d 998, 1004 (Colo. 2008) (remarking, in the CGIA context, that “where the nature of the injury and the relief requested implicate both tort and contract, the analysis becomes more complicated”).

¶7 Divisions of the court of appeals have wrestled with overlapping tort and contract claims. Some divisions have used the economic loss rule to determine whether the CGIA applies to bar such an overlapping claim—that is, to resolve whether an action lies *solely* in contract and thus cannot lie in tort, thereby taking the action outside the CGIA’s grant of immunity. *See, e.g., Casey v. Colo. Higher Educ. Ins. Benefits All. Trust*, 2012 COA 134, ¶¶ 17, 22–30, 310 P.3d 196, 201–04, *as modified on denial of reh’g* (Sept. 13, 2012).

¶8 Indeed, the division below endorsed that amalgam in this construction defect case. *City of Aspen v. Burlingame Ranch II Condo. Owners Ass’n*, No. 20CA2088, ¶¶ 19–26 (Mar. 17, 2022). The division observed that the plaintiff framed its claims in terms of contractual duties by arguing that Aspen breached express and implied warranties. *Id.* at ¶ 25. And so, reasoned the division, after additional factual findings on remand, if the record reveals that the plaintiff suffered only economic harm, the economic loss rule would extinguish any attendant tort claims, thereby displacing Aspen from the CGIA’s refuge. *Id.* at ¶¶ 25–26. In effect, the division concluded that, to the extent the economic loss rule prevents the plaintiff in this case from bringing a tort claim, the doctrine

serves to strip Aspen of the immunity to which it would otherwise be entitled under the CGIA.

¶9 This potential outcome demonstrates why these unrelated doctrines are such uncomfortable bedfellows. The division's analysis curtailed governmental immunity for claims that "lie in tort or could lie in tort," as we have construed this statutory language, by incorporating the economic loss rule into the jurisdictional question presented by the CGIA. Differently stated, by consulting the economic loss rule to determine whether Aspen was entitled to immunity, the division improperly narrowed the scope of the protection provided by the CGIA. We cannot countenance such a clear contravention of our jurisprudence and the legislative purposes of the CGIA.

¶10 Today, we clarify that our jurisprudence lays out a freestanding, self-sufficient framework for determining whether an action brought against a public entity is barred by the CGIA, thereby depriving the trial court of subject matter jurisdiction. Therefore, we hold that the economic loss rule has no part to play in this inquiry.

¶11 Where, as here, the sole question is whether the CGIA precludes a plaintiff's claims, the court must consider the nature of the injury underlying the claims and the relief sought. If the injury arises out of tortious conduct or the breach of a duty arising in tort, and the relief seeks to compensate the plaintiff for that injury, it is

barred by the CGIA. Even if such claims could arise in both tort *and* contract, they're still barred because they *could* lie in tort for purposes of the CGIA. It is of no moment that an analysis under the economic loss rule could prohibit any tort claim. The economic loss rule does not involve a jurisdictional question and cannot come to the rescue of an otherwise CGIA-barred claim. Accordingly, we reverse the division's judgment and remand the case to be returned to the district court for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶12 Aspen oversaw the development of an affordable housing project known as Burlingame Ranch II Condominiums (the "Project"). Through a declaration (the "Declaration"), Aspen established the Burlingame Ranch II Condominium Owners Association, Inc. (the "Association") to manage the Project. The Declaration required Aspen to maintain control of the Association until the Project was complete. Using a lottery system, Aspen sold individual units in the Project to qualifying residents at well below market value. Aspen conveyed the units using standard-form purchase and sale agreements ("Form Contracts").

¶13 In August 2017, Aspen transferred full control over the Project to the Association. Around the time of the transfer, the Association complained that there were several construction defects on the property. In pertinent part, it alleged that some of the Project's structural elements—beams, columns, and

stringers (collectively “glulams”)—had been deficiently installed. In December 2017, the Association sent Aspen an Amended Re-Notice of Claim, asserting that “[t]he Association ha[d] suffered damages, and [would] suffer further damages . . . as a result of [Aspen’s] breaches of warranty, breaches of contract, and *negligence*, related to the defective construction of [the Project].” (Emphasis added.) Aspen’s own expert later confirmed that “[w]eather exposed glulams on the project were required to be preservative treated” but “likely . . . [were] not.”

¶14 After the parties unsuccessfully pursued mediation, the Association filed a demand for arbitration. The arbitration demand contained two claims stemming from the alleged construction defects: (1) breach of contract and express warranty for “deficient conditions” and (2) breach of implied warranties for the same conditions. In advancing these claims, the Association took the position that the Declaration and Form Contracts were the operative instruments from which Aspen’s duties arose.

¶15 Aspen responded by seeking a declaratory judgment in district court, asserting that the CGIA barred the Association’s claims as a matter of law. Specifically, Aspen contended that the Association’s claims sounded in tort, or

could sound in tort, and therefore, were barred by the CGIA's grant of governmental immunity. The district court set a *Trinity* hearing.²

¶16 A week before the hearing, the Association opposed Aspen's immunity claim in a brief that was forty-two pages long and accompanied by 2,000 pages of exhibits. Concerned that the Association's brief would impermissibly expand the scope of the upcoming *Trinity* hearing, Aspen asked the court to limit the hearing to the threshold jurisdictional issue—namely, whether the CGIA barred the Association's claims. The court held a conference with counsel to resolve this preliminary dispute.

¶17 Following the conference, the court vacated the *Trinity* hearing. It subsequently ordered further briefing and decided the governmental immunity issue based on its review of the pleadings.

¶18 In a written order, the court agreed with Aspen that the Association's claims sounded in tort, or could sound in tort, and were thus barred by the CGIA. Relying on *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042 (Colo. 1983), the court reasoned that Colorado law recognizes a “common law tort duty to build without

² A *Trinity* hearing is an evidentiary hearing in accordance with *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 927 (Colo. 1993), as modified on denial of reh'g (Apr. 12, 1993). The purpose of a *Trinity* hearing is to allow courts to determine the facts necessary to definitively resolve before trial all disputed issues relating to a public entity's potential immunity under the CGIA. See *Finnie v. Jefferson Cnty. Sch. Dist. R-1*, 79 P.3d 1253, 1258–59 (Colo. 2003).

negligence on residential construction” projects. So, considering the nature of the injury underlying the Association’s construction defect claims, the court determined that, regardless of how the Association characterized its claims, they necessarily implicated a tort duty and were thus subject to the CGIA. Consequently, the court (1) issued a declaratory judgment stating that the CGIA prevented the Association’s claims from proceeding to arbitration, and (2) dismissed the case without holding a *Trinity* hearing.

¶19 The Association appealed, and a division of the court of appeals reversed. *Burlingame Ranch*, ¶ 29. In doing so, the division relied heavily on *Casey*, ¶ 30, 310 P.3d at 203–04, where a previous division leaned on the economic loss rule to conclude that claims pled as breaches of contract but premised on the violation of a tort duty are not necessarily barred by the CGIA. *Burlingame Ranch*, ¶¶ 19–26.

¶20 Using the *Casey* template, the division perceived that the Association’s claims for breach of express and implied warranties “*could*, depending on the specifics, only sound in contract.” *Id.* at ¶ 25. “Such specifics,” the division continued, may reveal that the Association’s claims are subject to the economic loss rule, which would mean that any tort claim would be effectively extinguished and Aspen would lose any entitlement to immunity under the CGIA. *Id.* at ¶¶ 25–26. But “without a more developed record,” the division reasoned, it “could not conclude that *all* of the Association’s claims involving construction

defects are barred by the CGIA, since the underlying facts are essential to those legal determinations.” *Id.* at ¶ 26.

¶21 The division ultimately remanded the case for a *Trinity* hearing. *Id.* at ¶ 29. In effect, its instructions would permit the district court on remand to consider the economic loss rule in determining whether Aspen is entitled to immunity under the CGIA. *Id.* at ¶¶ 26, 29.

¶22 Aspen petitioned this court for certiorari review. We agreed to consider the following issue:

[REFRAMED] Whether the court of appeals erred by applying the Economic Loss Rule . . . in its determination of whether a claim “could lie in tort” under the [CGIA], § 24-10-106, C.R.S. (2022).

II. Standard of Review

¶23 Governmental immunity under the CGIA is a question of subject matter jurisdiction that is determined in accordance with C.R.C.P. 12(b)(1). *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 85 (Colo. 2003) (citing *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993), *as modified on denial of reh’g* (Apr. 12, 1993)). The plaintiff bears the burden of demonstrating jurisdiction—that is, that the CGIA does not bar the suit. *Id.* When the alleged jurisdictional facts are disputed, the district court should conduct a hearing before ruling on the jurisdictional issue. *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001). A district court’s factual findings will not be disturbed on

appeal unless they are clearly erroneous. *Walton v. State*, 968 P.2d 636, 643 (Colo. 1998). If, however, the underlying facts are undisputed, the issue is one of law, which is reviewed de novo. *Swieckowski ex rel. Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997).

III. Analysis

¶24 The parties advance diametric contentions on the sole issue for our review. On one side of the divide, the Association asserts that courts *must* consider the economic loss rule when determining whether an action brought against a public entity is barred by the CGIA. According to the Association, this much is necessary to maintain the boundary between tort and contract law. What's more, avers the Association, the analyses under the economic loss rule and the CGIA are similar – if not identical at times. So, the argument goes, applying the economic loss rule's source-of-the-duty test to the CGIA's immunity inquiry is both natural and necessary, and the division did not err.

¶25 On the opposite side of the divide, Aspen contends that the economic loss rule is simply irrelevant in the CGIA context and that any convergence between the doctrines undermines the purposes of the CGIA by exposing public entities to unlimited tort liability. Thus, Aspen urges us to proclaim that the division erred by applying the economic loss rule to determine whether the Association's construction defect claims lie or could lie in tort for purposes of the CGIA.

¶26 We side with Aspen and hold that the economic loss rule has no bearing on whether an action brought against a public entity is barred by the CGIA. Because that determination resolves the narrow issue on which we granted certiorari, we need not, and therefore do not, address the merits of Aspen’s immunity argument.³ However, because it’s germane to the issue we agreed to review, we endeavor to illuminate the topography of governmental immunity under the CGIA.

¶27 After considering the origin and purposes of the CGIA, we retrace the freestanding, self-sufficient framework established by our jurisprudence for applying the CGIA’s grant of governmental immunity. Next, we review the economic loss rule’s unrelated development and functions, which render the doctrine inapplicable when determining jurisdiction under our CGIA framework. Finally, we consider the ill-fated convergence of the two doctrines in our court of appeals’ case law and strive to disentwine them.

A. Governmental Immunity Under the CGIA

¶28 In 1971, the General Assembly enacted the CGIA in response to a trilogy of cases that abrogated Colorado’s common law of governmental immunity. *Padilla*, 25 P.3d at 1179–80 (citing ch. 323, sec. 1, §§ 130-11-1 to -17, 1971 Colo. Sess. Laws

³ Similarly, we decline to reach any of the alternative arguments raised in the parties’ briefs. Our holding is sufficient to resolve the issue before us.

1204, 1204–11); *see also Evans v. Bd. of Cnty. Comm’rs*, 482 P.2d 968 (Colo. 1971); *Flournoy v. Sch. Dist. No. One*, 482 P.2d 966 (Colo. 1971); *Proffitt v. State*, 482 P.2d 965 (Colo. 1971). The CGIA became effective a year later.

¶29 A central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory damages in tort. *See Connors*, 993 P.2d at 1172 (citing § 24-10-102, C.R.S. (2023)). The General Assembly recognized that broad exposure to such liability could have a chilling effect on public operations and could otherwise thwart intrepid governmental actors. *See* § 24-10-102 (“[U]nlimited liability could disrupt or make prohibitively expensive the provision of . . . essential public services and functions.”). And, in the final tally, “the taxpayers would ultimately bear the fiscal burdens of unlimited liability.” *Id.*; *see also Bd. of Cnty. Comm’rs v. Sundheim*, 926 P.2d 545, 550 (Colo. 1996) (stating that the “CGIA clearly sought to . . . maintain[] an efficient and fiscally responsible government”).⁴ Under section 24-10-106(1) of the CGIA, then, “[a] public entity

⁴ The General Assembly identified other purposes underlying the CGIA. It cited “the desirability of including within one article *all* the circumstances” under which public entities *may be sued* for injuries which lie or could lie in tort. § 24-10-102 (emphasis added). Relatedly, it noted the “often overlooked” goal of permitting “a person to seek redress for personal injuries caused by a public entity.” *State v. Moldovan*, 842 P.2d 220, 222 (Colo. 1992); *see also Sundheim*, 926 P.2d at 550 (acknowledging that the CGIA allows “citizens [to] seek[] relief from governmental abuse of power”). On the flipside, it recognized the need to limit the potential liability of public employees to allow them to perform their duties without being deterred by the fear of potential liability. § 24-10-102.

shall be immune from liability in all claims for injury which *lie in tort or could lie in tort* regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section.”⁵ (Emphasis added.)

¶30 Significantly, the immunity blanket provided by the CGIA does not cover “actions grounded in contract.” *Robinson*, 179 P.3d at 1003 (citing *Berg*, 919 P.2d at 258). The form of the complaint is not determinative of whether a claim is grounded in contract or whether it lies in tort or could lie in tort. *Id.* That’s why we said in *Robinson* that “the CGIA is less concerned with what the plaintiff *is arguing* and more concerned with what the plaintiff *could argue*.” *Id.* at 1005 (emphases added). Whether a particular claim lies in tort or could lie in tort within the meaning of the CGIA depends on the factual basis underlying the claim. *Id.* at 1007–08.

¶31 Accordingly, we have held that “court[s] must consider the nature of the injury and the relief sought.” *Id.* at 1003 (citing *Connors*, 993 P.2d at 1175–76). Although the relief requested isn’t dispositive, it informs our understanding of the nature of the injury and the duty allegedly breached. *Id.* 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 aim of the requested relief is to compensate

⁵ The CGIA lays out certain immunity waivers, none of which are relevant here. See §§ 24-10-106, -106.1, -106.3, C.R.S. (2023).

the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA. *Id.*

¶32 So far, so good. But as we previously remarked, “where the nature of the injury and the relief requested implicate both tort and contract,” things can get a bit dicey. *Id.* at 1004. This overlap is seen most clearly in the case of common law tort claims that are expressly intended to remedy economic loss. Such claims can exist independently or in conjunction with a contractual claim. *See id.* (citing *Town of Alma*, 10 P.3d at 1263, which listed “professional negligence, fraud, and breach of fiduciary duty” as examples of torts designed to address purely economic loss). For purposes of the CGIA, “these economic-loss claims sound in tort” *even if a contract is implicated*. *Id.* Indeed, where there is such overlap, claims that could arise in both tort and contract are barred by the CGIA. *Id.* Only claims that arise “*solely in contract*” are not subject to the immunity provision of the CGIA. *Id.* (emphasis added).

¶33 To determine whether overlapping claims arise solely in contract—i.e., whether they are truly “grounded in contract,” *Id.* at 1003—our recent CGIA cases have hearkened back to their predecessors. *See Bd. of Cnty. Comm’rs v. DeLozier*, 917 P.2d 714, 716–17 (Colo. 1996) (addressing whether a *contract* claim for promissory estoppel was actually based on the *tort* theory of equitable estoppel, and holding that because the “essence” of the claim was breach of a promise that

was detrimentally relied on, not alleged misrepresentations of fact, the claim did not and could not lie in tort for purposes of the CGIA); *Berg*, 919 P.2d at 259 (same). In *Robinson*, we ultimately discerned that “these cases apply our general rule that courts must assess the nature of the injury underlying the claim to determine whether the injury arose out of tortious conduct or the breach of a duty arising in tort and thus whether the claim could lie in tort.” 179 P.3d at 1005. This, therefore, is our freestanding, self-sufficient framework for determining whether the CGIA bars a claim against a public entity and divests the trial court of subject matter jurisdiction.

¶34 But even as we outlined the contours of CGIA immunity in *Robinson*, we weren’t oblivious of the economic loss rule. See *Casey*, ¶ 64, 310 P.3d at 209 (Hawthorne, J., concurring in part and dissenting in part) (“In *Robinson* . . . , the court expressly acknowledged its seminal economic loss rule case, *Town of Alma* . . . , and nonetheless held that in areas where there is overlap, ‘claims that could arise in both tort and contract are barred by the CGIA.’” (quoting *Robinson*, 179 P.3d at 1004)). Yet, we made no bones about casting that doctrine aside in the CGIA context.

¶35 Under *Robinson* and its forebears, then, the economic loss rule and the CGIA remain in their respective lanes. Sure enough, we have never applied the economic loss rule in determining whether a claim lies in tort or could lie in tort

under the CGIA. And for good reason. A closer look at the economic loss rule demonstrates that it pairs with our CGIA framework like peanuts go together with chewing gum.

B. The Economic Loss Rule and Its Inapplicability When Determining Jurisdiction Under Our CGIA Framework

¶36 We adopted the economic loss rule in 2000, nearly three decades after the CGIA went into effect. *See Town of Alma*, 10 P.3d at 1264. Unlike the CGIA, the economic loss rule does not implicate a jurisdictional question. *See id.*

¶37 This judge-made doctrine initially emerged as a response to the growing application of tort law to products liability cases in mid-century American jurisprudence. *Id.* at 1260. To prevent tort law from “swallowing” the law of contracts in that context, the California Supreme Court fashioned the economic loss rule and articulated it thusly: “Even in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.” *Id.* (quoting *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)).

¶38 Although its genesis lies in products liability, the economic loss rule is much broader nowadays, as demonstrated by its current aims: (1) maintaining the boundary between tort and contract; (2) protecting parties’ expectations in bargaining; (3) encouraging parties to build cost considerations into their contracts; and (4) simplifying litigation. *Bermel v. BlueRadios, Inc.*, 2019 CO 31,

¶ 36, 440 P.3d 1150, 1157 (citing *Town of Alma*, 10 P.3d at 1262–63). In furtherance of these policy goals, Colorado’s economic loss rule provides that “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.” *Town of Alma*, 10 P.3d at 1264. “Economic loss is defined generally as damages other than physical harm to persons or property.” *Id.*

¶39 The polestar in any analysis conducted under the economic loss rule is “the source of the duties alleged to have been breached.” *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000); *see also Town of Alma*, 10 P.3d at 1262. While contractual duties arise from the promises that contracting parties make to each other, tort duties are generally created by law and are designed to protect all citizens from the risk of physical harm to their persons or property. *Town of Alma*, 10 P.3d at 1262.

¶40 Unlike our CGIA jurisprudence, our economic loss rule cases “require courts to focus first on the contractual context among and between the parties to see whether there was a contractual relationship that established the duty of care alleged to have been breached.” *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004). In other words, at the outset, courts must determine whether the breached duty derives from the parties’ contract or, more generally, from the common law of tort. We have recognized three factors (“BRW factors”) that aid

courts in administering this source-of-the-duty test: (1) whether the relief sought in tort is the same relief sought for breach of contract; (2) whether there is an established common law duty of care in tort; and (3) whether the duty of care in tort differs in any way from the contractual duty. *Id.* (citing *Grynberg*, 10 P.3d at 1269–70).

¶41 It follows that “[a] breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract”; in such a scenario, “a tort action will not lie.” *Town of Alma*, 10 P.3d at 1262 (quoting *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 463 S.E.2d 85, 88 (S.C. 1995)). But the “breach of a duty arising independently of any contract duties between the parties . . . may support a tort action.” *Id.* (quoting *Tommy L. Griffin*, 463 S.E.2d at 88). Thus, “the economic loss rule has no application where a plaintiff’s tort claim is based on an independent duty of care.” *A.C. Excavating v. Yacht Club II Homeowners Ass’n*, 114 P.3d 862, 867 (Colo. 2005).

¶42 To be sure, on several occasions we have permitted tort actions to proceed despite the existence of a contractual relationship between the parties. *See, e.g., Lembke Plumbing & Heating v. Hayutin*, 366 P.2d 673, 675 (Colo. 1961); *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 318 (Colo. 1980); *Cosmopolitan Homes*, 663 P.2d at 1042; *see also Town of Alma*, 10 P.3d at 1265–66 (discussing *Lembke*, *Metropolitan Gas*, and *Cosmopolitan Homes* at length). We determined that those

cases fell outside the scope of the economic loss rule because the duties of care underlying the tort claims in question arose *independently of the contracts*. See *Town of Alma*, 10 P.3d at 1263, 1265–66.

¶43 Notably, though, if the answers to the three *BRW* factors outlined above establish that a duty of care is “memorialized” in the parties’ contract—i.e., the duty is contained within, or imposed under, the contract—it necessarily follows that the plaintiff has failed to show any duty *independent of the contract*. *BRW*, 99 P.3d at 74. In other words, if a tort claim is based on duties that are contained within the relevant contract, the economic loss rule will douse the tort claim and hold the parties to the terms of their contract. *Id.*

¶44 And herein lies the chief difference between the economic loss rule’s source-of-the-duty test and the CGIA’s “could lie in tort” inquiry. The economic loss rule eschews the very overlap that the CGIA embraces and accommodates. Whereas the economic loss rule serves to enforce the boundary between tort and contract law, the CGIA confers immunity to public entities even “where there is such overlap.” *Robinson*, 179 P.3d at 1004. Thus, incorporating the economic loss rule into the jurisdictional analysis under the CGIA improperly curbs the scope of the immunity afforded by the statute.

¶45 Make no mistake, “claims that could arise in both tort and contract are barred by the CGIA.” *Id.* And the economic loss rule has no say in the matter; it

cannot act as a lifeline to a CGIA-barred claim. Indeed, to consider the economic loss rule in determining jurisdiction under the CGIA is to place the cart before the horse. The question of jurisdiction under the CGIA must be resolved before the economic loss rule may enter the picture. If there is no subject matter jurisdiction under the CGIA because the defendant is entitled to governmental immunity, the economic loss rule is irrelevant and the claim must be dismissed – without the horse, the cart goes nowhere.

C. Application

¶46 In applying the foregoing principles to the instant matter, it becomes clear that permitting the doctrinal mismatch endorsed by the division to play out would lead to results that contravene our jurisprudence and the very purposes of the CGIA itself. But before parsing the division’s opinion below, we first examine its jurisprudential forerunner – the majority opinion in *Casey*. After all, the division tethered its holding to *Casey*. We end by disavowing that case and its progeny, thereby disentangling the economic loss rule from our CGIA jurisprudence.

1. The Majority Opinion in *Casey*

¶47 The majority opinion in *Casey* constitutes the first time our court of appeals explicitly applied the economic loss rule to save an otherwise CGIA-barred tort claim. See *Casey*, ¶¶ 22–30, 310 P.3d at 202–04. But cf. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 289 (Colo. App. 2009) (applying the economic

loss rule in the CGIA context *without* analyzing whether it is an appropriate doctrine to consider in determining the issue of immunity).

¶48 In *Casey*, the parties negotiated trust agreements whereby employees of several public colleges contributed to a trust that was designed to provide long-term disability benefits. ¶ 2, 310 P.3d at 199. One of the participating colleges withdrew from the trust agreements and requested the return of the funds its employees had paid into a trust reserve fund. *Id.* at ¶ 5, 310 P.3d at 200. After the request was denied, the employees of the withdrawing college filed a class action suit against certain colleges and trustees. *Id.* at ¶¶ 5-7, 310 P.3d at 200. The employees alleged that the colleges and trustees had breached “contractually imposed fiduciary duties.” *Id.* at ¶ 8, 310 P.3d at 200.

¶49 The colleges and trustees moved to dismiss the case, arguing, in part, that the probate court didn’t have subject matter jurisdiction because the CGIA barred the employees’ claim. *Id.* at ¶ 11, 310 P.3d at 200. More specifically, the colleges and trustees contended that the breach-of-contract claim—which contained an allegation that tort-based fiduciary duties had been breached—lay, or could have lain, in tort. *Id.* at ¶ 18, 310 P.3d at 201. The probate court denied the motion to dismiss without holding a *Trinity* hearing, and the colleges and trustees appealed. *Id.*

¶50 Faced with this tort/contract overlapping claim, a majority of a division of the court of appeals applied the economic loss rule to determine which side of the tort-/contract-law boundary the claim belonged on. *Id.* at ¶ 23, 310 P.3d at 202. It reached different conclusions for the respective defendants.

¶51 As it pertained to the colleges, the majority agreed that the claim lay in tort and was thus barred by the CGIA. *Id.* at ¶ 39, 310 P.3d at 205. It reasoned that “the language of the trust agreements only places fiduciary duties on the trustees, not on the colleges. Thus, . . . the only source of a fiduciary duty that the colleges may owe the employees would be the common law.” *Id.*

¶52 The *Casey* majority, however, decided that the economic loss rule demanded the opposite result for the trustees. *Id.* at ¶¶ 22, 30, 310 P.3d at 202, 203. After applying the three *BRW* factors, the majority determined that “the trustees’ duty of care [was] ‘memorialized’ in the trust agreements.” *Id.* at ¶ 30, 310 P.3d at 203. While the majority acknowledged that “[a]n established common law tort duty of care attaches to fiduciary relationships between trustees and beneficiaries,” it made two countervailing observations: (1) the employees’ complaint referenced “the specific contractual duties found in the trust agreements”; and (2) the trustees’ “tort duty [was] not appreciably different from the contractual duty”—that is, the duty imposed by tort law was “nearly identical” to the fiduciary duty that the language of the trust agreements imposed. *Id.*

¶53 Based on these considerations, the majority concluded that there was “no common law tort duty *independent* of [the contract] upon which a tort action for breach of fiduciary duty could be based.” *Id.* (emphasis added). In the majority’s view, then, the employees’ claim was “grounded in contract.” *Id.* at ¶ 30, 310 P.3d at 204. Thus, it held that the economic loss rule extinguished any potential *tort* claim for breach of fiduciary duty, which, in its view, meant there was no governmental immunity for the trustees under the CGIA and the *contract* claim brought against them for breach of fiduciary duty imposed by the trust agreements could proceed. *Id.* at ¶ 30, 310 P.3d at 204.

¶54 Mindful of the matrix laid out by the *Casey* majority, we now delve into the division’s opinion below.

2. The Division’s Opinion Perpetuates *Casey*’s Misstep

¶55 The division began its CGIA analysis on the right foot. It acknowledged that the “form of the complaint is not controlling” and that the proper focus is instead on “the nature of the injury and the relief sought.” *Burlingame Ranch*, ¶ 18 (quoting *Robinson*, 179 P.3d at 1003). But things started to go awry when the division confronted the ostensible tort/contract overlap in the Association’s construction defect claims against Aspen. *See id.* at ¶ 19 (citing *Robinson* 179 P.3d at 1004). Here’s where the division strayed down the wrong path: “Despite this difficulty,” the division declared, “our courts have developed various doctrines to

delineate when such overlapping claims can only sound in tort or contract. . . . *The economic loss rule is one such doctrine.*” *Id.* at ¶¶ 19–20 (emphasis added). The division then hitched its wagon to *Casey* and the economic loss rule principles on which that majority opinion rests. *See generally id.* at ¶¶ 20–22. This was error.

¶56 Taking its cue from the *Casey* majority, the division’s analysis was informed by how the Association pled its claims, rather than by how it could have pled them. *See Burlingame Ranch*, ¶ 25; *see also Casey*, ¶ 30, 310 P.3d at 203 (“[T]he reference in the complaint to the specific contractual duties found in the trust agreements establishes that the claim lies in contract” (emphasis added)); *cf. Robinson*, 179 P.3d at 1005 (“However, the CGIA is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff could argue.”); *see id.* at 1006 (“[R]egardless of whether [the plaintiff] has presented valid contract claims, the pleaded allegations underlying the contract claims could be alternatively pleaded in tort—in other words, the claims could lie in tort.”); *see also* § 24-10-106(1) (public entities are immune from claims which “could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant” (emphasis added)). In this way, the division impermissibly used an economic-loss-rule blueprint to analyze a CGIA question.

¶57 The division copycatted *Casey* by “focus[ing] first on the contractual context among and between the parties to see whether there was a contractual relationship

that established the duty of care alleged to have been breached.” *BRW*, 99 P.3d at 74 (emphasis added) (citing *Grynberg*, 10 P.3d at 1269). Mirroring the *Casey* majority again, the division then suggested that the inquiry turned on whether the tort “duty of care is memorialized in the contract” or whether it arose independently of the parties’ contract. *Burlingame Ranch*, ¶ 21. Thus, notwithstanding the recognized tort duty under Colorado law to “act without negligence in the construction of a home,” *id.* at ¶ 24 (quoting *Cosmopolitan Homes*, 663 P.2d at 1042), the division deduced, in lockstep with *Casey*, that the economic loss rule could apply to determine whether the CGIA immunized Aspen from the Association’s claims:

Here, the Association argues its injuries are contractual in nature – or, more precisely, based on the breach of express and implied warranties. These claims *could*, depending on the specifics, only sound in contract. The economic loss rule, for instance, generally provides that a contracting party who suffers only economic harm may only recover in contract, and that an attendant tort claim is effectively extinguished. *See, e.g., Casey*, ¶ 30[, 310 P.3d at 203–04].

This example highlights why additional factfinding is necessary. Such specifics may reveal, for example, that the Association’s claims are subject to the economic loss rule. The upshot is that the court, without a more developed record, could not conclude that *all* of the Association’s claims involving construction defects are barred by the CGIA, since the underlying facts are essential to those legal determinations.

Id. at ¶¶ 25–26.

¶58 The division concluded that “the alleged duty, injury, and relief sought all arise *from contract*.” *Id.* at ¶ 27 (emphasis added). Yet, the division observed that “there remain unresolved factual disputes — such as whether [Aspen] *owes implied warranties or provided express warranties to the homeowners* — that are critical to the threshold jurisdictional determination” under the CGIA. *Id.* at ¶ 28 (emphasis added). And although the division posited that “the Association’s arbitration demand was clearly premised on contract claims,” it also tellingly conceded that the record was unclear as to “the precise evidentiary basis for those contract claims.” *Id.* at ¶ 28 n.3. Therefore, the division remanded to the district court for “a *Trinity* hearing to determine what facts the Association’s claims are based on before reaching the CGIA immunity question.” *Id.* at ¶ 29.

3. Disentangling the Doctrines: Disavowing *Casey* and Its Progeny

¶59 The *Casey* majority and the division below stumbled at the same hurdle in their CGIA immunity analyses: the complication that arises “where the nature of the injury and the relief requested implicate both tort and contract.” *Robinson*, 179 P.3d at 1004. And, for both divisions, the economic loss rule, with its fixation on maintaining the boundary between tort and contract law, proved an all-too-enticing nostrum. We, however, see at least two reasons for extricating the economic loss rule from the CGIA inquiry: its application contravenes our jurisprudence and subverts the legislative purposes underlying the CGIA.

¶60 First, we have demonstrated that our CGIA jurisprudence lays out a freestanding, self-sufficient framework for applying the grant of governmental immunity. Courts, therefore, need not call upon the economic loss rule to determine whether the CGIA bars a plaintiff's claims. Quite simply, the economic loss rule is irrelevant in the CGIA context.

¶61 Judge Hawthorne's well-reasoned partial dissent in *Casey* highlights this point. See *Casey*, ¶¶ 58–66, 310 P.3d at 208–10 (Hawthorne, J., concurring in part and dissenting in part). Unlike the majority, Judge Hawthorne believed that the economic loss rule had no bearing on whether the CGIA barred the employees' claims. *Id.* at ¶ 64, 310 P.3d at 209. He underscored that this court acknowledged and rejected the economic loss rule when we laid out our framework for determining whether the CGIA bars claims that could arise in both tort and contract. *Id.* (citing *Robinson*, 179 P.3d at 1004). Thus, Judge Hawthorne continued, "the relevant consideration is whether the claims are or could be tort claims, not whether the economic loss rule prevents a plaintiff from successfully asserting potential tort claims." *Id.* at ¶ 64, 310 P.3d at 210.

¶62 Turning to the core focus of the CGIA inquiry, Judge Hawthorne observed that "[t]he fact that the economic loss rule prevent[ed] the employees from successfully asserting a tort claim" did not alter "the claim's *fundamental nature*." *Id.* at ¶ 65, 310 P.3d at 210 (emphasis added). Because a "[b]reach of a fiduciary

duty is an action that can lie in tort,” *id.* at ¶ 62, 310 P.3d at 209 (citing Restatement (Second) of Torts § 874 cmt. b (Am. L. Inst. 1979)), Judge Hawthorne would have concluded “that the employees’ breach of fiduciary duty claim [was] barred by the CGIA,” *id.* at ¶ 65, 310 P.3d at 210. After all, “[a]ny claim that could lie in tort is barred by the CGIA, notwithstanding the economic loss rule’s effect.” *Id.*

¶63 We wholeheartedly agree with this part of Judge Hawthorne’s opinion. The economic loss rule is not an arrow in the quiver of courts engaged in determining whether the CGIA bars a plaintiff’s claim. Rather, it has nothing to do with the CGIA’s jurisdictional inquiry. The all-important consideration in the economic loss rule’s source-of-the-duty test — whether the relevant duty exists *independently* of any contractual obligations, *see Town of Alma*, 10 P.3d at 1264 — is completely extraneous to our CGIA framework. And the issue of overlapping claims under that framework shouldn’t place courts in any real quandary. Our directive on this point is straightforward and unequivocal: “[W]here there is . . . overlap” and claims “could arise in both tort and contract,” they “are barred by the CGIA.” *Robinson*, 179 P.3d at 1004.

¶64 Second, applying the economic loss rule to determine whether the CGIA bars a plaintiff’s claim undermines the General Assembly’s intent in codifying governmental immunity. Indeed, the doctrinal differences we discern today manifest primarily in an end run around the protections the CGIA was designed

to confer on public entities. These protections exist not merely to eliminate prima facie tort claims brought against public entities, but also to eliminate almost *any* liability for compensatory damages based on claims that *could be* pled in tort. *Colo. Dep't of Transp. v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 690–91 (Colo. 2008) (characterizing “lies in tort or could lie in tort” as an “expansive statutory phrase”); *see also* § 24-10-102 (stating that the General Assembly recognizes that “the doctrine of sovereign immunity . . . is, in some instances, an inequitable doctrine”).

¶65 In sum, we disavow *Casey* and its progeny to the extent those opinions stand for the proposition that courts may apply the economic loss rule to determine whether a claim lies in tort or could lie in tort for purposes of the CGIA.⁶ Likewise,

⁶ The improper convergence of the economic loss rule and the CGIA inquiry has also occurred in our court of appeals’ case law in more subtle ways. *See, e.g., Foster v. Bd. of Governors of the Colo. State Univ. Sys. ex rel. Colo. State Univ.*, 2014 COA 18, ¶ 28, 342 P.3d 497, 505. In *Foster*, the division held that the CGIA barred claims brought by a bailor against a bailee because, although bailment claims *could* sound in contract, the same allegations would also support a tort claim. ¶¶ 22–25, 342 P.3d at 503–04. The division “conclude[d] that the economic loss rule has no bearing on this case.” *Id.* at ¶ 28, 342 P.3d at 505. At first blush, the division appears to have properly applied our CGIA framework without turning to the economic loss rule to determine the immunity issue. Upon closer scrutiny, though, it may not have stayed the course. Indeed, in the penultimate paragraph of the *Foster* opinion, after citing *Town of Alma* and laying out the economic loss rule, the division supported its conclusion by stating, “[W]here, as here, the duty allegedly breached exists *independently of the contract*, a tort action may be maintained.” *Id.* (emphasis added) (first citing *Metro. Gas*, 621 P.2d at 317–18; and then citing *Lembke*, 366 P.2d at 677). But, as today’s opinion makes clear, whether there’s an *independent* duty of care under tort law is exclusively part of the economic loss rule analysis; it has nothing to do with the CGIA inquiry. So,

we reject the Association’s contention that the respective analyses under the economic loss rule and the CGIA are essentially identical; our jurisprudence demonstrates otherwise. To be sure, the disparate origins, purposes, and operations of the doctrines establish that the economic loss rule has no relevance in determining jurisdiction under our CGIA framework.

IV. Conclusion

¶66 For the foregoing reasons, we clarify that our jurisprudence lays out a freestanding, self-sufficient framework for determining whether an action brought against a public entity is barred by the CGIA and deprives the trial court of subject matter jurisdiction. Therefore, we hold that the economic loss rule has no part to play in this inquiry.

¶67 Where, as here, the sole question is whether the CGIA precludes a plaintiff’s claims, the court must consider the nature of the injury underlying the claims and the relief sought. If the injury arises out of tortious conduct or the breach of a duty arising in tort, and the relief seeks to compensate the plaintiff for that injury, it is barred by the CGIA. Even if such claims could arise in both tort *and* contract, they’re still barred because they *could* lie in tort for purposes of the CGIA. It is of no moment that an analysis under the economic loss rule could prohibit any tort

to the extent *Foster* considered the economic loss rule as part of the CGIA inquiry, it is overruled.

claim. The economic loss rule does not involve a jurisdictional question and cannot come to the rescue of an otherwise CGIA-barred claim.

¶68 Accordingly, we reverse the division's judgment and remand the case to be returned to the district court for further proceedings consistent with this opinion. On remand, the district court should hold a *Trinity* hearing. After determining what contracts, if any, are implicated in this case, it must decide, consistent with the principles discussed in this opinion, whether the Association's construction defect claims against Aspen could nonetheless lie in tort such that they are barred by the CGIA. We reiterate that the economic loss rule is not an appropriate consideration in this inquiry.