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Appeal from:
Court of Appeals No. 2022CA204, J. Lipinsky (JJ. Fox and Freyre concurring) 2022COA143

District Court, Archuleta County, Colorado
Case No. 2021CV30003
Honorable Jeffrey R. Wilson,
District Judge

▲COURT USE ONLY▲

PLAINTIFF-APPELLEE-RESPONDENT: MATT ROANE

v.

DEFENDANT-APPELLANT-PETITIONER:
KRISTY ARCHULETA, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER OF ARCHULETA COUNTY

Case Number: 2023SC70

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 4,487 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b)

☒For each issue raised by the appellant/petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐In response to each issue raised, the appellee/respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee/respondent agrees with appellant's/petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Archuleta County Attorney's Office

s/ *Todd A. Weaver*
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I. ISSUE CERTIFIED FOR REVIEW

Whether the lower courts committed reversible error by allowing a party, who is litigating a civil action against a public entity, to use an open records request to obtain documents relevant to the pending litigation, instead of complying with the rules of discovery as set forth in the Colorado Rules of Civil Procedure.

II. STATEMENT OF THE CASE

In the words of the Court of Appeals, this case presents “the novel issue” of whether a party who is litigating an action against a public entity is entitled to use an open records request under the Colorado Open Records Act (“CORA”) to obtain documents relevant to the pending litigation, instead of complying with the rules of discovery contained in the Colorado Rules of Civil Procedure.

The Court of Appeals determined that any party litigating an action against a public entity may use an open records request to obtain documents, which are relevant to the pending litigation, from the public entity instead of complying with the discovery requirements of the Rules of Civil Procedure. It sets an unfortunate course of essentially eliminating the discovery limits implemented by this Court in the Rules of Civil Procedure when one party is a public entity subject to the requirements of CORA, and appears to decide a question of substance not in

accord with this Court's holdings in *Martinelli v. Dist. Court in & for City of Denver*, 612 P.2d 1083 (Colo. 1983) and *City of Colorado Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998).

A. Factual and Procedural Background

On October 20, 2020, Plaintiff Matt Roane initiated a declaratory judgment action in Archuleta County District Court against the Archuleta County Board of County Commissioners (the "Board") alleging violations of Colorado's Open Meetings Law (CF, p 51). In that case, Roane filed a motion for summary judgment on November 30, 2020, without engaging in any discovery. Realizing his mistake, Roane, on December 28, 2020, submitted a CORA open records request to Ms. Kristy Archuleta, the Archuleta County Clerk and Recorder (CF, p 4).

Roane's CORA request sought information directly related to the subject matter of litigation between Roane and the Board. His CORA request sought a copy of the recording of the Board's October 6, 2020 regular meeting and a copy of an email that provided the agenda for the Board's September 22, 2020 Work Session (CF, p 4). Roane specifically referenced both of these meetings in his Complaint against the Board (CF, p 51).

Roane admitted in an email to undersigned counsel (CF, p 8) and in his Motion for an Extension of Time (CF, p 56) to the trial court that he needed the

information in his CORA request for his "reply to the pending motion for summary judgment," (CF, p 8) and "to incorporate into his reply" (CF, p 57).

On January 4, 2021, Ms. Archuleta denied Roane's CORA request and provided the legal reasons for the denial (CF, p 139). Roane then emailed undersigned counsel a Notice of Litigation (CF, p 61). Subsequently, Roane filed legal action against Ms. Archuleta based on her denial of Roane's CORA request.

The parties agreed to forego a hearing on the matter and instead to submit written briefs to the trial court. Ms. Archuleta submitted her Opening Brief with Exhibits on April 15, 2021 (CF, p 40). Roane filed his Response Brief with Exhibits on April 28, 2021 (CF, p 77). Ms. Archuleta submitted her Reply Brief with Exhibits on May 5, 2021 (CF, p 93). The District Court then issued its order granting the relief sought by Roane on January 16, 2022 (CF, p 117). In its order, the District Court allowed Roane to use an open records request to supplant discovery practice in civil litigation, in contradiction to the Colorado Supreme Court's rulings in *Martinelli v. Dist. Court in & for City of Denver*, 612 P.2d 1083 (Colo. 1983) and *City of Colorado Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998). The Court of Appeals affirmed the District Court's decision in *Matt Roane v. Kristy Archuleta, in her official capacity as the Clerk and Recorder for Archuleta County*, 526 P.3d 220 (Colo. App. 2023) holding that Roane was entitled

to use CORA as a discovery mechanism as a distinct procedure from the production of documents as part of discovery. *Id.* At 231.

III. SUMMARY OF THE ARGUMENT

CORA allows any person to inspect and copy governmental records, but the General Assembly limited key provisions of CORA, making those provisions applicable except as “prohibited by rules promulgated by the supreme court or by the order of any court.” This Court interpreted this specific language as referring to the Colorado Rules of Civil Procedure and that this limiting language indicated that the General Assembly did not intend that CORA would supplant discovery in civil litigation but instead was meant for an entirely different situation – for citizens to explore public records during normal business hours.

The Rules of Civil Procedure govern the procedure and proceedings of civil actions before trial and appellate courts and were implemented to secure the just, speedy and inexpensive determination of every action. For this purpose, this Court adopted limits on discovery to eliminate the abuse of disproportionate and inappropriate discovery requests.

Specifically, Rules 16, 16.1 and 26 limit requests for production of documents to twenty (20) under Rules 16 and 26, and to five (5) under Rule 16.1. The Court of Appeals’ Opinion created a loophole in the discovery limits of Rules

16, 16.1 and 26, allowing any party pursuing civil litigation against a public entity subject to CORA to serve an unlimited number of requests for open records, all in circumvention of the limits on requests for production of documents in the Rules of Civil Procedure; whereas, a public entity would have to comply with the discovery limits on requests for production of documents. This disparity directly conflicts with the purposes of Rule 16, which was implemented to establish a "uniform, court-supervised procedure" for case management.

The Court of Appeals' Opinion also implicates other civil actions that do not allow for discovery or allow very limited discovery. Actions under Rule 106 that seek judicial review of a governmental body's judicial or quasi-judicial decisions do not allow for discovery by any party. Yet, under the Opinion, a party pursuing a Rule 106 action against a public entity could simply file an open records request to avoid the Rule's ban on discovery. Only limited discovery is allowed in cases involving public entities and employees to resolve sovereign immunity issues. Discovery is limited to only what is needed to decide the issue of sovereign immunity, and the trial court must suspend any other discovery. The Opinion now allows a litigant to use an open records request to bypass the trial court's order and obtain documents from a public entity related to the underlying litigation but unrelated to sovereign immunity. Similarly, a party may seek a protective order

from discovery under Rule 26. The Opinion appears to allow a party to file an open records request with a public entity that had obtained a protective order preventing the party from discovering the same material, again in circumvention of the Rules of Civil Procedure.

The General Assembly modeled CORA after the federal Freedom of Information Act. Federal courts, including the U.S. Supreme Court, have ruled that discovery for litigation is not the purpose of FOIA as it is meant to inform the public about federal agency action and not benefit private litigants – similar to CORA. This Court should parallel such federal decisions and place the same restrictions on CORA, in that it cannot be used as a substitute for or a supplement to discovery in civil litigation.

For these reasons, Defendant Kristy Archuleta respectfully requests that the Court answer the certified question in the negative, holding that a party, who is litigating a civil action against a public entity, cannot use an open records request to obtain documents relevant to the pending litigation, and must instead comply with the Colorado Rules of Civil Procedure and its rules of discovery.

IV. ARGUMENT

B. The Lower Courts Committed Reversible Error When They Allowed Plaintiff Roane To Use An Open Records Request To Supplant Discovery Practice In Civil Litigation Against A Public Entity.

1. Standard Of Review And Preservation.

Because the certified question presents a matter of statutory interpretation, the standard of review is de novo. "We review de novo issues of statutory interpretation." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574. When construing a statute, the court's primary purpose is to ascertain and give effect to the legislature's intent. *McCoy v. People*, 2019 CO 44, ¶ 37. The words and phrases in a statute are given their plain and ordinary meanings. *Id*. The statutory scheme is reviewed as a whole, giving consistent, harmonious, and sensible effect to all its parts such that none is rendered meaningless. *Id.*

Ms. Archuleta preserved the issues before this Court in her Opening Brief in Opposition to Order for Show Cause (CF, p 40), in her Reply Brief in Opposition to Order for Show Cause (CF, p 93), and in the District Court's January 16, 2022 Order Upon Motion to Show Cause (CF, p 117).

2. Once A Party Initiates Legal Action, The Colorado Rules Of Civil Procedure Control All Aspects Of Litigation.

CORA, as a general matter, allows for the inspection and copying of governmental records by "any person," without limitation as to the reason or

reasons for which the inspection is undertaken. *See* C.R.S. §§ 24-72-201 & 203. However, the legislature was careful to limit key provisions of CORA, making those provisions applicable except as "prohibited by rules promulgated by the supreme court or by the order of any court." C.R.S. § 24-72-204(1)(c).

The Court analyzed the General Assembly's intent in enacting CORA and interpreted the specific language of C.R.S. § 24-72-204(1)(c) in *Martinelli v. Dist. Court in & for City of Denver*, 199 Colo. 163 (1980). In this case, the Court interpreted the language "prohibited by rules promulgated by the supreme court or by the order of any court" as referring to the Colorado Rules of Civil Procedure. *Id.* at 177. The Court determined that the limiting language of those provisions "indicates that *the legislature did not intend that the open records laws would supplant discovery practice in civil litigation*." *Id*. (emphasis added). The Court then stated that open records laws are "directed toward regulation of the entirely different situation of the general exploration of public records by any citizen during general business hours." *Id*. (quoting *Tighe v. City & County of Honolulu*, 520 P.2d 1345, 1348 (Haw. 1974)).

Eight years later, the Court revisited this issue and reemphasized that "[i]n enacting the open records laws, the General Assembly 'did not intend that the open records laws would supplant discovery practice in civil litigation.'" *City of*

Colorado Springs v. White, 967 P.2d 1042, 1055 (Colo. 1998). As interpreted by this Court, the intent of the legislature in adding the provision of C.R.S. § 24-72-204(1)(c) to the list of exceptions to inspection was clearly to prevent CORA from being used to supplement or expand discovery in ongoing litigation outside of the Colorado Rules of Civil Procedure.

The Rules of Civil Procedure govern the procedure in the supreme court, court of appeals, and district courts in all actions, suits and proceedings of a civil nature, whether brought as cases at law or in equity, and "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action..." C.R.C.P. 1. The 2015 commentary to the Rules particularly emphasized this portion of Rule 1, stating in part:

> The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive.

C.R.C.P. 1, 2015 Comm., ¶1.

The Rules governing discovery expressly incorporate the "just, speedy and inexpensive" mandate espoused in Rule 1. Rule 16 limits discovery to only what is allowed under Rule 26(b)(2), unless otherwise ordered by the court. C.R.C.P.

16(b)(11). Rule 26 limits requests for production of documents to twenty (20) and does not allow any party to seek discovery from any source until the court issues the case management order. C.R.C.P. 26(b)(2)(D) & (d). Rule 16.1 is even more restrictive on discovery, allowing for only five (5) requests for production of documents. C.R.C.P. 16.1(k)(4). The purpose of Rule 16 is to establish a uniform, court-supervised procedure for case management. C.R.C.P. 16(a). The purpose of Rule 16.1, in part, is to enhance the just, speedy and inexpensive determination of civil cases and to limit discovery and its attendant expenses. C.R.C.P. 16.1(a).

The Court's purpose in adopting discovery limits was to eliminate abuse "by disproportionate and inappropriate requests that increase the cost of litigation, harass an opponent, or tend to delay a fair and just determination of the legal issues." *In re Attorney D*, 57 P.3d 395, 399 (Colo. 2002). If a party in litigation with a public entity is permitted to perform discovery via open records requests, that would create a loophole in the Rules of Civil Procedure and allow such party to circumvent the discovery limits in Rules 16, 16.1 and 26, specifically the limits on requests for production of documents. It would also seriously impede the ability of trial courts to manage their civil dockets, as a party could engage in discovery, via open records requests, well before a trial court could adopt a case management order addressing discovery limits.

Normally, a party is limited to twenty (20) requests for production under Rule 16 and 26, or five (5) under Rule 16.1, and the opposing party served with the request for production has thirty-five (35) days to respond. C.R.C.P. 16(b)(11), 26(b)(2)(D) & 34(b). In stark contrast, CORA places no limits on how many open records requests a party can serve on a public entity and requires a public entity to provide the requested records to the requesting party within three (3) days, or ten (10) days under extenuating circumstances. C.R.S. § 24-72-203(3)(a). If the Opinion is left to stand, a public entity would be limited to twenty (20) requests for production under Rule 16 and 26 or five (5) under Rule 16.1, and would have to wait thirty-five days to receive a response from the opposing party, whereas an opposing party could file any number of open records requests under CORA and receive the requested documents within three (3) or ten (10) days. This disparity is contrary to the purposes of Rule 16, which is to establish a "uniform, court-supervised procedure" for case management. C.R.C.P. 16(a). CORA, as a discovery mechanism, destroys this uniformity by allowing a private party unlimited requests for production of documents to a public entity and removes the case management of discovery from the trial court's supervision by taking it outside the Rules of Civil Procedure.

3. CORA Abuses Extend To Actions That Allow For Limited Discovery Or No Discovery At All.

The potential abuses of CORA in civil litigation against a public entity extend beyond Rules 16 and 16.1 and encompass other proceedings where discovery is limited or simply not allowed. Rule 106 allows a party to seek judicial review of a governmental body's judicial or quasi-judicial decision for abuse of discretion or exceeding its jurisdiction. C.R.C.P. 106(a)(4). The district court's review is limited to the record before the governmental body, which the plaintiff designates, and the governmental body may supplement. C.R.C.P. 106(a)(4)(III) & (IV). Rule 106 does not allow any party to engage in discovery. *Boles v. Bartruff*, 228 P.3d 183, 188 (Colo. App. 2009). If the Opinion is left to stand, a party pursuing a Rule 106 action against a public entity could simply file an open records request to dodge Rule 106's ban on discovery. Undersigned counsel has personally received open records requests seeking documents directly related to Rule 106 actions from opposing counsel, demonstrating that CORA abuses in civil litigation against public entities are not illusory or ephemeral, but material and persistent.

Further, only limited discovery is allowed in cases involving public entities and employees to resolve sovereign immunity issues under the Colorado Governmental Immunity Act ("CGIA"). Discovery in such actions is limited to

only what is needed to decide the issue of sovereign immunity, and the trial court is required to issue an order suspending any other discovery until such time as the issue of sovereign immunity is decided. C.R.S. §§ 24-10-108 & 118(2.5). The Opinion now allows a litigant to use an open records request to bypass such an order and obtain documents from a public entity related to the underlying litigation but unrelated to sovereign immunity, all in direct contravention to the trial court's order limiting discovery to only sovereign immunity.

Similarly, a party or a non-party subject to discovery requests may seek a protective order under Rule 26 to prevent discovery. The Opinion is devoid of guidance on this issue and appears to allow a party that was denied discovery by a protective order to seek the same discovery by simply submitting an open records request to the public entity that obtained the protective order. This is particularly concerning if the public entity sought and was awarded the protective order because the opposing party had exceeded the Rule 26 limits on requests for production of documents.

It is because of the potential abuses of CORA in civil litigation that the General Assembly specifically included the language in C.R.S. § 24-72-204(1)(c) that prohibits a custodian of public records to allow the inspection of such records when "[s]uch inspection is prohibited by rules promulgated by the supreme court

or by the order of any court." C.R.S. § 24-72-204(1)(c), and why this Court ruled that the legislature did not intend that the open records laws would supplant discovery practice in civil litigation**.**" *Martinelli*, 199 Colo, at 177, 612 P.2d at 1093; *City of Colorado Springs*, 967 P.2d at 1055. This Court should reaffirm those two rulings and hold that a party litigating a civil action against a public entity cannot use a CORA open records request to obtain documents relevant to the pending litigation, but instead must comply with the rules of discovery as set forth in the Rules of Civil Procedure.

4. The Court Should Look To Federal Case Law Interpreting The Freedom Of Information Act For Further Guidance.

It is a fact that the drafters of CORA studied the federal Freedom of Information Act ("FOIA"), and in certain instances, CORA mirrors FOIA. *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 878 (Colo. App. 1987). Since there is a correlation between CORA and FOIA, the Court can and should look to federal case law interpreting FOIA for further guidance on this matter. *See generally*, *Wick Communications Co. v. Montrose County Bd. Of County Comm.*, 81 P.3d 360 (Colo. 2003). The Court did so in *Martinelli* when it compared its view of the scope of CORA – that it is not meant to supplant discovery practice in civil litigation – to the scope of FOIA, and then stated that the scope of CORA

parallels construction of FOIA's scope by the federal courts. *Martinelli*, 199 Colo at 177.

Federal courts have ruled that as a general principle, discovery for litigation purposes is not an expressed, indicated purpose of FOIA. *Renegotiation Bd. v. Bannercraft Clothing Co.*, *Inc*., 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of [FOIA]"); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n. 10 (1975) (FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants"). The U.S. Supreme Court further observed that FOIA "was not intended to supplement or displace the rules of discovery." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

Federal courts do not allow litigants to use a FOIA open records request as a discovery mechanism against federal agencies. The United States Supreme Court unequivocally ruled in multiple cases that the purpose of FOIA was not discovery for litigation, nor to displace or supplement the rules of discovery. This Court considered such federal holdings in *Martinelli* and concluded that the scope of CORA mirrored that of FOIA on this issue. This Court concluded that CORA, just like FOIA, cannot be used as a substitute for or a supplement to discovery in civil litigation nor is it meant to benefit private litigants. Faced with the same issue in

this case, this Court should reaffirm its rulings in *Martinelli* and *City of Colorado Springs* and mirror federal courts by answering the certified question in the negative, which is that a party litigating a civil action against a public entity cannot use a CORA open records request to obtain documents relevant to the pending litigation, but instead must comply with the rules of discovery as set forth in the Rules of Civil Procedure.

V. CONCLUSION

For these reasons, Defendant Kristy Archuleta respectfully requests that the Court answer the certified question in the negative, holding that a party who is litigating a civil action against a public entity cannot use an open records request to obtain documents relevant to the pending litigation, and must instead comply with the Colorado Rules of Civil Procedure and its rules of discovery.

Respectfully submitted on November 27, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 27, 2023, a true and correct copy of this Opening Brief was served via electronic notice through the Colorado Court E-Filing system or by first-class United States Postal Service mail on the following:

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