

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 8, 2026

Christopher M. Wolpert
Clerk of Court

DALE MURPHY; ANNA MURPHY;
ESTATE OF DONNA MURPHY,

Plaintiffs - Appellees,

v.

JACOB MARLOW; KIOWA COUNTY;
KIOWA COUNTY SHERIFF'S OFFICE,

Defendants - Appellants.

No. 25-1228
(D.C. No. 1:24-CV-01504-CNS-TPO)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **FEDERICO**, Circuit Judges.

Kiowa County Sheriff's Deputy Jacob Marlow and the Kiowa County Sheriff's Office filed this interlocutory appeal challenging the denial of their motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).¹ The district court denied the motion, ruling they were not entitled to sovereign immunity. Although we perceive

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Kiowa County is identified in our caption because it was included on the notice of appeal, but it was dismissed below and has not joined this appeal.

no error in the district court's findings, the district court did not make all the findings necessary to deny sovereign immunity. Accordingly, we exercise jurisdiction under 28 U.S.C. § 1291, vacate the district court's decision to the extent it concluded there was a waiver of immunity, and remand for further proceedings.

I

This appeal stems from a high-speed, nighttime collision. At approximately 9:00 PM on May 29, 2022, Marlow was responding to a single-car accident in a black 2019 Ram truck. He was driving approximately 90 miles per hour where the posted speed limit was 50 miles per hour. The road was dry, the weather was clear, and there was minimal to moderate traffic. The Ram was a marked Kiowa County Sheriff's vehicle, but the markings were black and grey, making it difficult to see at night. Although Marlow had engaged the truck's emergency lights just above the Ram's license plate, the parties dispute whether he activated the Ram's siren. An unspecified number of other motorists pulled over to let Marlow pass. But as he approached an intersection, Dale Murphy, who was driving a Dodge Challenger, misjudged Marlow's speed and attempted to turn onto the highway. As Murphy drove through the intersection, Marlow collided with the Challenger at an impact speed of 75.89 miles per hour. Dale and Anna Murphy were seriously injured; Donna Murphy, who was unrestrained in the back seat, was partially ejected through the rear window and died on scene.

The Murphys and Donna Murphy's estate (Murphys) brought this diversity action, asserting claims for negligence, negligence per se, and wrongful death against

Marlow.² They also asserted *respondeat superior* theories against Kiowa County and the Kiowa County Sheriff's Office, as well as claims for negligent hiring and supervision.

Defendants moved to dismiss under Rule 12(b)(1), arguing that Kiowa County was an improper party and the rest of the claims were barred by sovereign immunity under the Colorado Government Immunity Act (CGIA), Colo. Rev. Stat. §§ 24-10-101 to -120. The district court agreed Kiowa County was an improper party and dismissed it accordingly. That ruling is not before us.

At issue here is the district court's refusal to dismiss Marlow and the Sheriff's Office. In short, the district court determined Marlow and the Sheriff's Office were not entitled to sovereign immunity under the CGIA because the lights on the Ram were not "mounted as high as practicable" as required by Colo. Rev. Stat. § 42-4-213(2). Based on photos of the Ram taken after the collision, the district court found the Ram did not have any lights on the top of the truck or embedded in the mirrors or windshield. Although Marlow argued that other drivers had pulled over to let him pass, the district court rejected that argument absent any legal authority excusing a violation of § 42-4-213 because other drivers yield the right of way. Marlow and the Kiowa County Sheriff's Office immediately appealed.

² This diversity action requires that we apply the substantive law of the forum state, Colorado. *See N.H. Ins. Co. v. TSG Ski & Golf, LLC*, 128 F.4th 1337, 1344 (10th Cir. 2025).

II

A. Appellate Jurisdiction

We first consider our jurisdiction. Under the “collateral order doctrine, we have subject matter jurisdiction to hear appeals of orders denying motions to dismiss where the motions are based on state-law immunity from suit.” *Sawyers v. Norton*, 962 F.3d 1270, 1287 (10th Cir. 2020) (brackets and internal quotation marks omitted). The CGIA provides state-law immunity from suit, so we have jurisdiction to consider this appeal. *See id.*; *see also Aspen Ortho. & Sports Med., LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 837 (10th Cir. 2003) (“Because the CGIA grants the [government entity] immunity from suit, we have subject matter jurisdiction to hear this appeal pursuant to the federal collateral order doctrine.”); Colo. Rev. Stat. § 24-10-118(2.5) (“The court’s decision on [a motion raising sovereign immunity] shall be a final judgment and shall be subject to interlocutory appeal.”).

B. Standard of Review

We review de novo the district court’s Rule 12(b)(1) ruling. *See Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1108 (10th Cir. 2019). Rule 12(b)(1) motions may take two forms: a facial attack or a factual attack. *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020). “A facial attack assumes the allegations in the complaint are true and argues they fail to establish jurisdiction.” *Id.* “A factual attack goes beyond the allegations in the complaint and adduces evidence to contest jurisdiction.” *Id.* When considering a factual attack, the “district court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to

resolve disputed jurisdictional facts.” *Id.* (internal quotation marks omitted). We review the district court’s findings of jurisdictional fact for clear error. *Id.* at 871.

C. *The CGIA*

This appeal presents a factual attack on the district court’s jurisdiction based on the CGIA. “We review questions of CGIA immunity de novo.” *Sawyers*, 962 F.3d at 1288 (internal quotation marks omitted). “‘Under the CGIA, a public entity [is] immune from liability in all claims for injury [that] lie in tort or could lie in tort’ unless sovereign immunity is waived.” *Id.* at 1287 (brackets omitted) (quoting Colo. Rev. Stat. § 24-10-106(1)). “Sovereign immunity is waived . . . in an action for injuries resulting from . . . [t]he operation of a motor vehicle, owned or leased by [a] public entity, by a public employee while in the course of employment, except emergency vehicles operating within the provisions of section 42-4-108(2) and (3).” Colo. Rev. Stat. § 24-10-106(1)(a).

Section 42-4-108 authorizes emergency responders to exceed the lawful speed limit so long as they do not endanger life or property and they use audible or visual signals that meet the requirements of § 42-4-213:

The driver of an authorized emergency vehicle, when responding to an emergency call . . . may . . . [e]xceed the lawful speeds set forth [by statute] so long as said driver does not endanger life or property[.]

. . . .

[This] exemption[] . . . shall continue to apply . . . only when such vehicle is making use of *audible or visual signals meeting the requirements of section 42-4-213 . . .*”

Colo. Rev. Stat. § 42-4-108(2), (3) (emphasis added). Section 42-4-213, states that “every authorized emergency vehicle shall . . . be equipped as a minimum

with a siren and a horn.” Colo. Rev. Stat. § 42-4-213(1). It also states that “[e]very authorized emergency vehicle . . . shall . . . be equipped with at least one signal lamp mounted as high as practicable.” Colo. Rev. Stat. § 42-4-213(2).

D. Analysis

The district court’s decision turned on this last provision of § 42-4-213, which requires an emergency vehicle to “be equipped with at least one signal lamp mounted as high as practicable.” The district court concluded § 42-4-213(2) was not satisfied because the post-collision photos of the Ram showed it did not have lights mounted on the roof. Marlow and the Sheriff’s Office dispute this conclusion, arguing the district court: 1) misinterpreted the CGIA, 2) incorrectly applied the Rule 12(b)(1) standards, and 3) committed clear error in concluding the Ram’s lights were not installed as high as practicable as required by § 42-4-213(2). We consider these arguments in turn.

1. The District Court Misinterpreted the CGIA.

Marlow and the Sheriff’s Office initially contend the district court misinterpreted the CGIA. Specifically, they point out that § 24-10-106(1)(a) and § 42-4-108(3) restore immunity “when [an emergency] vehicle is making use of audible **or** visual signals meeting the requirements of § 42-4-213.” Aplt. Br. at 15 (internal quotation marks omitted). They say the district court considered Marlow’s use of lights, but it did not consider or make necessary findings as to whether he also used his siren. And without any such findings,

they argue the district court could not properly conclude they were not entitled to sovereign immunity because it was disputed whether Marlow activated his siren. We agree.

We review questions of statutory interpretation *de novo*, giving words their plain and ordinary meaning. *See Hice v. Giron*, 543 P.3d 385, 390 (Colo. 2024). Section 42-4-108(3) operates to restore sovereign immunity “only when [an emergency] vehicle is making use of audible *or* visual signals meeting the requirements of section 42-4-213.” Colo. Rev. Stat. § 42-4-108(3) (emphasis added). In *Hice*, the Colorado Supreme Court examined § 42-4-108(3) to discern whether an emergency responder waives immunity by exceeding the speed limit at any time before activating his emergency lights *or* sirens. 543 P.3d at 389-90 n.3. Although *Hice* did not explicitly hold that a responder must activate one or the other—lights or siren—or both, it repeatedly referred to § 42-4-108(3) as the “lights-or-siren requirement.” *Id.* at 391-92 & n.6. Given *Hice*’s repeated references to the plain disjunctive language of § 42-4-108(3), we agree the Colorado Supreme Court construes the statute to permit a responder to use either lights or siren. Because the district court made no findings as to whether Marlow activated his siren, we remand for it to do so. *See Baker*, 979 F.3d at 872 (recognizing that in the context of a factual attack on jurisdiction under Rule 12(b)(1), “a district court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts” (internal quotation

marks omitted)); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (recognizing a plaintiff must “present affidavits or any other evidence necessary to satisfy [his] burden of establishing that the court, in fact, possesses subject matter jurisdiction” (internal quotation marks omitted)).

We acknowledge the Murphys’ argument that the Colorado Supreme Court previously held § 42-4-108(3) required an emergency “vehicle [to] be operating with emergency lights *and* siren activated, unless the vehicle is in pursuit of a suspected violator to obtain evidence of guilt.” *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 81 (Colo. 2003). Indeed, *Tidwell* recognized the statute’s use of the word “or,” *e.g.*, *id.* at 81, but nonetheless repeatedly referred to § 42-4-108(3) as the “lights *and* siren requirement.” *Id.* at 81-83 (emphasis added). But in a diversity action such as this, “we simply apply the most recent statement of Colorado law by the Colorado Supreme Court.” *N.H. Ins. Co. v. TSG Ski & Golf, LLC*, 128 F.4th 1337, 1345 (10th Cir. 2025) (internal quotation marks omitted). *Hice* is the most recent statement of Colorado law, so it controls. We therefore vacate the district court’s denial of immunity and remand with instructions for the district court to make the necessary findings as to whether Marlow was operating his siren. If he was not, the district court’s analysis of the Ram’s lights will be dispositive, so we consider the remaining arguments offered by Marlow and the Sheriff’s Office concerning the Ram’s lights.

2. The District Court Correctly Applied Rule 12(b)(1) Standards.

Marlow and the Sheriff's Office contend the district court incorrectly applied the standards of Rule 12(b)(1) in finding the Ram's lights were not mounted as high as practicable. They argue the post-collision photos of the Ram are unreliable and reveal "nothing with respect to the light placement on Deputy Marlow's vehicle." Aplt. Br. at 19 n.1. They also speculate that, because there is no other evidence to support the district court's finding, the district court must have improperly presumed the truthfulness of the complaint's allegations and the Murphys' arguments. *See Graff v. Aberdeen Enterprizes, II, Inc.*, 65 F.4th 500, 507 (10th Cir. 2023) ("When the moving party attacks the factual basis for subject matter jurisdiction . . . , a court may not presume the truthfulness of the factual allegations in the complaint" (internal quotation marks omitted)).

We perceive no error in the district court's application of Rule 12(b)(1) standards. The district court properly considered the post-collision photos of the Ram because Marlow and the Sheriff's Office asserted a factual attack on the district court's subject matter jurisdiction. *See Baker*, 979 F.3d at 872 (recognizing the district court's wide discretion to consider evidentiary materials to resolve disputed factual questions). Based on those photos, the district court found there were no lights installed on the Ram as high as practicable. *See* Aplt. App. at 46. Because the district court properly considered these photos and relied on them to support its finding that the

Ram's lights were not installed as high as practicable, Marlow and the Sheriff's Office fail to show the district court simply presumed the truthfulness of the complaint's allegations or the Murphys' arguments.

3. The District Court Did Not Commit Clear Error.

Last, Marlow and the Sheriff's Office contend the district court committed clear error in finding the Ram's lights were not mounted as high as practicable. They say the post-collision photos upon which the district court based this finding are "inaccurate," Aplt. Br. at 19 n.1, unreliable, and insufficient to support the district court's finding, *id.* at 21.

But rather than simply assert the photos are inaccurate and unreliable, Marlow and the Sheriff's Office must show clear error. *See Baker*, 979 F.3d at 871. "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ramos v. Bondi*, 155 F.4th 1154, 1165 (10th Cir. 2025) (internal quotation marks omitted).

Marlow and the Sheriff's Office tell us the facts in the record show the Murphys' description of the photos is incorrect, but they do not cite anything in the record to support this assertion. Instead, they take aim at the photos themselves, arguing the lights were not activated in the photos, which they say were taken from a distance. They also cite photos of another police vehicle, purportedly with the same lighting package, to contend the Ram *did*, in fact, have lights at the top of its windshield and in its side mirrors, as well as in its

push bumper and lower bumper. Aplt. Br. at 22 (citing Aplt. App. at 79). But it is not our role to make factual findings or to resolve disputed issues of fact. *See Maestas v. Lujan*, 351 F.3d 1001, 1015-16 (10th Cir. 2003).

Our task is to assess whether the district court committed clear error in finding the lights on the Ram were not installed as high as practicable. Photos from another police vehicle that clearly depict lights in the windshield and mirrors, which do not appear in the photos of the Ram, do not assist with our task. *Compare* Aplt. App. at 79 (depicting another police vehicle with lights embedded in the windshield and side-view mirrors), *with id.* at 46 (post-collision photos of the Ram depicting no similar lights in the windshield or mirrors). The photos of the Ram support the district court’s findings that it “did not have any lights on the top of [the] truck,” and the “emergency lights, installed just above the truck’s license plate, were not installed ‘as high as practicable.’” *Id.* at 298 (quoting § 42-4-213(2)). Marlow and the Sheriff’s Office cite no evidence leaving us with a “definite and firm conviction that a mistake has been committed.” *Ramos*, 155 F.4th at 1165. Accordingly, they fail to demonstrate clear error.

III

For the foregoing reasons, we vacate the district court’s decision to the

extent it concluded there was a waiver of immunity, and remand for further proceedings consistent with this Order and Judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge