COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	
Crowley County District Court Honorable Michael Schiferl, Judge Case No. 08CV25	
JOHN E. SCHWARTZ, on behalf of his minor grandchildren CODY L. SCHWARTZ and JACOB W. SCHWARTZ, Intervenor Plaintiff-Appellee, v. THE COLORADO DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General FRIEDRICK C. HAINES, First Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5151 FAX: (303) 866-5443 E-Mail: fred.haines@state.co.us Registration Number: 13264 *Counsel of Record	Case No. 10CA0204

DEFENDANT-APPELLANT COLORADO DEPARTMENT OF TRANSPORTATION'S OPENING BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES

RULES

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 C.A.R. 28(g).

It contains 5399 words and it does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue: It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and citations to the precise locations in the record where the issue was raised and ruled on.

/s/ *Friedrick C. Haines*
Friedrick C. Haines

Defendant-Appellant Colorado Department of Transportation, by and through First Assistant Attorney General Friedrick C. Haines, submits the following as its Opening Brief:

ISSUES PRESENTED FOR REVIEW

Did the district court err by failing to require Intervenor Plaintiff-Appellee to establish that CDOT's immunity was waived by sufficient proof of each of the elements of the waiver of immunity under §§ 24-10-106(1)(d)(I) and 24-10-103(1), C.R.S., including that plaintiff meet a "but for" test of showing that the dangerous condition of a public highway from which Plaintiff-Intervenor's injuries were alleged to have resulted was "proximately caused" by the negligence of CDOT?

STATEMENT OF THE CASE

Nature of the controversy.

This is a wrongful death action[1] arising from the death of a firefighter in the wildfire that struck Crowley County on April 15, 2008.

[1] The case was originally commenced by a property insurer and a risk pool against Samuel Martson to recover amounts paid under fire insurance policies and a pooling agreement for damage caused by a wildfire alleged to have resulted from Mart-

Intervenor Plaintiff-Appellee, Mr. Schwartz, alleges that CDOT negligently maintained a bridge on Colorado Highway 96, just west of County Lane 16, by failing to clear tumbleweeds from under the bridge, and that accumulated tumbleweeds under the bridge caused it to catch fire and burn down. Mr. Schwartz alleges that John W. Schwartz and another firefighter died when they drove their fire truck into the ditch where the bridge had burned down.

CDOT denies that it negligently maintained the bridge or that the bridge constituted a "dangerous condition of a public highway" such that its immunity is waived under the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, C.R.S. It denies any dangerous condition of the public highway which physically interfered with the movement of traffic on the paved portion thereof was "proximately caused by the negligent act or omission of [CDOT]", § 24-10-103(1), C.R.S., but it contends instead that the bridge, built of creosote-treated wood timbers, could not

---

son's negligence. Neither the insurer, the risk pool, nor Martson are parties to this appeal. Mr. Schwartz intervened in the insurers' action to bring wrongful death claims against Martson, and he later amended his Complaint in Intervention to bring the claim against CDOT which is the subject of this appeal.

have survived the wildfire in any event, whether or not tumbleweeds had accumulated under it. CDOT contends the definition of "dangerous condition" in § 24-10-103(1), C.R.S., which provides that a "dangerous condition" must have been "proximately caused" by its negligence, requires Mr. Schwartz to prove that, "but for" the negligence of CDOT, the bridge would have survived the wildfire in order to establish a waiver of CDOT's immunity. The district court, however, did not require such proof to establish a waiver.

Summary of facts.

On the afternoon of April 15, 2008, a wildfire ignited on the property of Defendant Samuel Martson, rekindled from a "controlled burn" the previous day. Amended Complaint in Intervention[2], ¶7, Rec. p.132. The wildfire spread rapidly and burned approximately 9000 acres in Crowley County. Colorado Bureau of Investigation Report of Investigation by Brett Ellis (Plaintiff's *Trinity* hearing Exhibit 3-2), Rec. at

[2] On May 13, 2010, Mr. Schwartz filed a Second Amended Complaint in Intervention. Supp. Rec. pp.25-29. At the time CDOT's Motion to Dismiss was decided and its Notice of Appeal was filed, the Amended Complaint in Intervention controlled Mr. Schwartz's claims. The Second Amended Complaint in Intervention differs only in ways immaterial to this appeal.

p.1019. The fire damaged or destroyed numerous homes, buildings, and other structures in and around the town of Ordway. *Id.* at p.1019. Among structures destroyed by the fire was a wooden bridge on Colorado Highway 96 over the Numa Ditch, designated bridge #L-21-U. John W. Schwartz, a firefighter with the Olney Springs Volunteer Fire Department, and another Olney Springs firefighter died while responding to the wildfire when they drove their fire truck into the Numa Ditch where the bridge on Colorado Highway 96 had burned down.

April 15, 2008, was a windy day in Crowley County, with winds gusting over 50 miles per hour. Ellis Report (Plaintiff's Trinity hearing exhibit 3-2), Rec. at p.1019; Testimony of C.B.I. Agent Brett Ellis, Rec. at p.834, ll.8-9. Because of the windy conditions and the danger that fires would get out of control, the Crowley County Sheriff's Department was refusing to issue burn permits for that day. Testimony of Undersheriff Steven Becker, Rec. at p.986, ll.7-17. The day before, Samuel Marston had burned refuse on his property southwest of the town of Ordway. Sometime before 1:44 p.m. on April 15, 2008, winds rekindled the trash fire on Marston's property and fanned the flames toward the

northeast. Ellis Report (Plaintiff's *Trinity* hearing Exhibit 3-3), Rec. at p.1020. Shortly after 1:50 p.m., Undersheriff Becker first observed the fire from Highway 96 and Lane 16, when it was still south of Highway 96. Becker testimony, Rec. p.987, ll.10-15. He described the fire at that time as "a long front of flames probably half a mile wide, flame height I would describe as four to five feet . . ." *Id.*, ll.23-24.

Within an hour, flames had burned approximately one and a quarter miles northeast to where Highway 96 crossed Numa Ditch on bridge #L-21-U. Ellis testimony, Rec. at p.834, ll.4-11. At that time, witness Carl Miller was driving on Highway 96 going west from Ordway. Testimony of Carl Miller, Rec. at p.796, ll.3-11. Mr. Miller testified that, at the time the fire reached Highway 96, flames were 10 feet high at the lowest to 25 or 30 feet high and were overtopping Highway 96. Miller testimony, Rec. p.796, l.7 – p.798, l.22. He could feel the heat of the flames inside his truck as he raced to outrun the fire before it crossed the highway. *Id.* at p.797, ll.20-21.

Later, at approximately 2:30 p.m., Undersheriff Becker returned to the bridge after the fire front had passed over Highway 96, and the bridge was then on fire. Becker testimony, Rec. p.988, l.16 – p.989, l.19. Undersheriff Becker "could see ahead of where it had already crossed. There were several tongues flicking out, blowing ashes, embers were creating spot fires ahead of the main body." *Id.*, p.989, ll.2-4. "You get blowing debris, light fuels. It could be, you know, something such as a tumbleweed would be picked up by the winds and then it would become airborne, blow out ahead of the fire and then drop down sometimes as much as 50 yards ahead of the fire." *Id.*, p.989, ll.6-10. Undersheriff Becker was on the bridge and observed flames coming up the north side of the bridge. *Id.*, p.990, ll.19-20. While Undersheriff Becker was on the bridge, "[t]he wind coming out of the southwest was blowing under the bridge. It would blow under and the flames would wrap up on the north tide [*sic*]." *Id.*, p.990, ll.22-24. Undersheriff Becker radioed to dispatch that the bridge was on fire and the road should be closed. *Id.*, p.989, ll.17-19; p.991, ll.5-8.

Carl Miller, who had earlier outrun the fire as it overtopped Highway 96, spent about 45 minutes helping to man a roadblock at Highway 96 and Lane 15, west of the bridge, when he heard over state patrol radio that the bridge was out and not to allow traffic through. Miller testimony, Rec. p.799, l.9 – p.800, l.24. He then returned to Ordway by back roads to help fight the fire as it attacked the elementary school there. *Id.*, p.800, l.24 – p.801, l.6. He was at the school for approximately 20 minutes before leaving, intending to return to the roadblock at Highway 96 and Lane 15. *Id.*, p.801, ll.7-21. At that time, the fire front had passed through Ordway on its way toward Sugar City. *Id.*, p.802, ll.8-16. Structures were burning all over the southwest side of Ordway. *Id.*, p.802, ll.14-23.

Then, although he had heard radio reports that the bridge was out, through ill-luck and miscalculation Mr. Miller was the first to drive his vehicle into Numa Ditch after the bridge had collapsed. Miller testimony, Rec. p.784, l.25 – p.785, l.4. Mr. Miller explained the mishap was due to extremely poor visibility. He testified, "there was so much smoke in front of it you couldn't see. You couldn't even see the gua-

rdrails. I couldn't see—right before I fell in, I slowed way down when I come up into the smoke, and I just forgot the bridge was there. I thought I was already past it." *Id.*, p.788, ll.9-13. "I slowed down to probably close to five miles an hour, or even slower, because I couldn't see my hand in front of my face. Then all I seen was a gap; drop off and hang on. I didn't have time to hit the breaks [*sic*]." *Id.*, p.788, l.25 – p.789, l.3.

Tragically, John W. Schwartz and Terry W. DeVore later drove their fire truck on Highway 96 east from Olney Springs toward Ordway, and they were killed when their truck plunged into the Numa Ditch.

Investigations of the fire and the accident that killed the firefighters were conducted, respectively, by C.B.I. Agent Brett Ellis and C.S.P. Sergeant (now Captain) Brian Lyons. At the Trinity hearing, Agent Ellis was qualified by the court as Mr. Schwartz's expert witness in the field of fire investigation. Rec. p.808, ll.6-17. Agent Ellis observed the scene of the fire on the evening of April 15, 2008. *Id.*, p.829, ll.18-22. The bridge was still burning at that time. *Id.*, p.830, ll.4-5. In addition,

from the location of the bridge, Agent Ellis could see numerous other structures burning, including "many hundred yards of railroad ties continuing to burn" in the railroad bed immediately to the north of Highway 96. *Id.*, p.830, ll.6-15. Agent Ellis testified that "[y]ou could see row after row of railroad tie [*sic*] burning, and then you could see structures, you know, off in the distance that were fully engulfed and trees, phone poles." *Id.*, p.830, ll.20-23.

Utility poles were burning along the north side of Highway 96. "Many utility poles were burning . . . the tops of the poles were burning and the bottoms were burnt away, and they're just sitting there hanging, and the part that was hanging from the wires wasn't burning down below, but it lost the bottom support; they were free hanging burning." Ellis testimony, Rec. p.830, l.25 – p.831, l.6. In addition, Agent Ellis observed "humongous cottonwood trees that had fire 30, 40 feet high, but the trunk itself wasn't burning. So that told me the flame was very high in certain spots and intense heat." *Id.*, p.835, ll.1-4.

Proceedings below.

CDOT was served with Mr. Schwartz's Amended Complaint in Intervention, Rec. pp.140-144, on January 9, 2009. *See* Motion to Amend Complaint in Intervention and Join Party Defendant, Rec. pp.137-139. On March 9, 2009, CDOT filed a motion to dismiss for lack of subject matter jurisdiction under the CGIA, C.R.S. § 24-10-101, *et seq.* (2009). Rec. pp.160-166. Mr. Schwartz sought (Rec. pp.172-175) and was granted (Rec. pp.1099-1103) leave to conduct discovery related to CDOT's immunity defense prior to responding to CDOT's motion. After conducting certain discovery, Mr. Schwartz responded to CDOT's motion to dismiss, Rec. pp.196-209, and submitted with his response the Report of Investigation by Agent Brett Ellis, Rec. pp.210-220, a transcript of the Deposition of Gerald Hoeffler, Rec. pp.221-241, the affidavit of Carl Miller, Rec. pp.283-284, and a copy of a Crowley County Ordinance Implementing a Permit System for Open Burning, Rec. pp.285-288.

CDOT filed its Reply In Support of Its Motion to Dismiss on June 10, 2009, Rec. pp. 472-478, supported by the Affidavit of Danny R.

Johnson with maintenance patrol reports related to bridge #L-21-U, Rec. pp.479-489, and the Affidavit of Sgt. Brian C. Lyons with witness statements of Clayton Stephenson and Larry White, Rec. pp.490-496. In its Reply, CDOT expressly requested an evidentiary hearing under *Trinity Broadcasting Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993), "to resolve disputed issues of fact related to [the district court's] jurisdiction." Rec. p.477.

On June 25, 2009, the district court entered an Order which denied CDOT's motion to dismiss but in doing so applied the standard for deciding motions under C.R.C.P. 12(b)(5) instead of 12(b)(1). Rec. pp.1114-1117; *see Medina v. State*, 35 P.3d 443, 451-52 (Colo. 2001) (contrasting standards for deciding Rule 12(b)(1) and Rule 12(b)(5) motions). Because of the obvious error in the court's initial decision of CDOT's motion to dismiss, the parties stipulated to CDOT filing, on July 8, 2009, an unopposed motion to reconsider the June 25, 2009, Order. Rec. pp. 519-524. Reconsideration was granted on July 10, 2009, Rec. p.1118, and the district court ordered CDOT to set a *Trinity* hearing on its motion to dismiss. Rec. p.1124.

Mr. Schwartz opposed holding a *Trinity* hearing, and on August 6, 2009, he requested a status conference to raise his objections to such a hearing. Rec. pp.550-552. The status conference was held on November 24, 2009, and a transcript of the status conference appears in the Supplemental Record. Supp. Rec. pp.196-223. Counsel for Mr. Schwartz argued against holding an evidentiary hearing on the basis that affidavits and the deposition transcript attached to his response to CDOT's motion to dismiss were sufficient to meet Mr. Schwartz's burden of establishing that CDOT had been negligent in failing to remove tumbleweeds from under the bridge, and that otherwise the only issue of fact concerned which end of the bridge may have been first to collapse. November 24, 2009, Transcript, Supp. Rec. at pp.201-203. CDOT asserted that at a *Trinity* hearing Mr. Schwartz should be required to establish not only that CDOT was negligent in failing to remove tumbleweeds from under the bridge but also that "but for" CDOT's negligent failure to clear tumbleweeds, the bridge would have survived the fire. *Id.*, Supp. Rec. p.205. On December 23, 2009, the district court entered its Order that the *Trinity* hearing proceed. Rec. pp.607-610.

The *Trinity* hearing was held on January 6, 2010. On January 7, 2010, the district court entered its Order, Rec. pp.633-636, in which it noted the disagreement between the parties regarding the burden Mr. Schwartz must meet to establish a waiver of CDOT's immunity under the CGIA. *Id.* at p.635. Without requiring that Mr. Schwartz meet a "but for" test, the district court found that Mr. Schwartz sustained his burden of showing that CDOT's immunity had been waived. *Id*. at p.636.

CDOT filed a timely Notice of Appeal on January 28, 2010, Rec. pp.679-690, and this Court has jurisdiction of this interlocutory appeal pursuant to § 24-10-108, C.R.S.

SUMMARY OF ARGUMENT

Construing the statutory language of waiver of governmental immunity in § 24-10-106(1)(d)(I), C.R.S., while giving effect to every word of the definition of "dangerous condition" contained in § 24-10-103(1), C.R.S., requires the court in a *Trinity* hearing to apply a "but for" test to determine that the dangerous condition which resulted in a plaintiff's

injuries was "proximately caused" by the negligence of the public entity or public employee in the construction or maintenance of a facility. By failing to require proof in this case that, "but for" the negligence of CDOT in failing to clear tumbleweeds from beneath the bridge, it would have survived the wildfire of April 15, 2008, the district court failed to require proof of the elements of the waiver of immunity on which Mr. Schwartz relies to bring claims against CDOT.

ARGUMENT

I. Standard of review and preservation of issues on appeal.

Appellate courts review decisions denying motions to dismiss under the Colorado Governmental Immunity Act, § 24-10-101, *et seq.*, C.R.S., according to a *de novo* standard, *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001), except that the trial court's findings of fact on a motion under C.R.C.P. 12(b)(1) are accorded deference and will not be overturned unless they are clearly erroneous. *Id.*; *Walton v. State*, 968 P2d 636, 641 (Colo. 1998). Where, as here, an issue on review involves a question of statutory interpretation, review is *de novo* as with any ques-

tion of law. *Medina*, 35 P.3d at 452-53. The CGIA's grant of immunity to public entities such as CDOT is strictly construed as a derogation of the common law. *Medina* at 453; *Bertrand v. Bd. of County Comm'rs,* 872 P.2d 223, 225-27 (Colo.1994). As a logical corollary, its waiver provisions are interpreted broadly. *Medina* at 453; *Corsentino v. Cordova,* 4 P.3d 1082, 1086 (Colo. 2000).

Nevertheless, a court's primary task in construing a statute is to determine and give effect to the intent of the legislature. *Bertrand,* 872 P.2d at 228; *State v. Hartsough,* 790 P.2d 836, 838 (Colo.1990). The court must therefore look to the statutory language, giving words and phrases their plain and ordinary meaning, and interpreting the statute in a way that best effectuates the purpose of the legislative scheme. *Medina* at 453; *Springer v. City & County of Denver*, 13 P.3d 794, 799 (Colo. 2000); *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384-85 (Colo. 1997). When construing a statute, the court must give effect to every word and construe each provision in harmony with the overall statutory design and intent of the General Assembly. *Upper Eagle Regional Water Authority v. Wolfe*, 230 P.3d 1203, 1210 (Colo. 2010); *Well*

Augmentation Subdistrict of Central Colorado Water Conservancy District v. City of Aurora, 221 P.3d 399, 410 (Colo. 2009). The court must not adopt a construction of a statute that renders any term superfluous. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005); *People ex rel. N.D.V.*, 224 P.3d 410, 414 (Colo. App. 2009).

CDOT initially raised Mr. Schwartz's burden to establish the district court's jurisdiction and the elements that he must prove to establish a waiver of immunity under C.R.S. § 24-10-106(1)(d)(I) in Defendant Colorado Department of Transportation's Motion To Dismiss Claims Against It For Lack Of Subject Matter Jurisdiction, filed March 9, 2009, pp.3-5 [Rec. pp.162-164]. CDOT again addressed Mr. Schwartz's burden and the requirement to show that CDOT's negligence was the proximate cause of the destruction of the bridge and not merely the proximate cause of an accumulation of tumble weeds in CDOT's Reply in Support of Its Motion to Dismiss, filed June 10, 2009, pp.2-6 [Rec. pp.473-477].

At a pre-*Trinity* hearing Status Conference held on November 24, 2009, CDOT expressly addressed Mr. Schwartz's burden "of proving that, but for the negligence of CDOT in failing to remove tumbleweeds from underneath the bridge, that bridge would have survived this fire." [Supp. Rec. p.205.] In CDOT's Trinity Hearing Brief Regarding: What Plaintiffs Must Prove to Establish Subject Matter Jurisdiction, filed January 2, 2010, [Rec. pp.614-620], CDOT again raised the issue of Mr. Schwartz's burdens and the necessity under Colorado law to meet a "but for" test of establishing that the negligence of CDOT was the proximate cause of the dangerous condition relied upon for a waiver of immunity.

Finally, in opening statements at the *Trinity* hearing itself, on January 6, 2010, the parties sharply contrasted their respective positions on the burden borne by plaintiffs to prove the elements of the waiver of immunity relied on when bringing tort claims against public entities, and in particular the requirement to prove that a dangerous condition of a public highway that interferes with the movement of traffic was "proximately caused by" the negligence of the public entity

maintaining it. [Rec. pp.771-781.] In his Order of January 7, 2010, Rec. pp.633-636, Judge Schiferl acknowledged a dispute between the parties respecting the burden of proof to establish that the dangerous condition was "proximately caused" by CDOT's negligence, *Id.* at p.635, but he refused to hold Mr. Schwartz to a "but for" test to establish a waiver of CDOT's immunity. Order of January 7, 2010, Rec. p.636. A copy of the district court's Order of January 7, 2010, is attached as an Appendix to this Opening Brief.

II. The district court erred by failing to require proof of proximate cause of a dangerous condition of a public highway.

In the Order of January 7, 2010, the district court acknowledged that the parties disputed the burdens Mr. Schwartz must meet to establish a waiver of CDOT's immunity. Rec. p.635. In his decision, Judge Schiferl did not require Mr. Schwartz to meet a "but for" test to establish proximate cause of a dangerous condition under § 24-10-103(1), C.R.S. Regarding the "but for" test, Judge Schiferl said,

> While there are certainly arguments that can be made that there were no weeds or that the fire was so hot that it would have burnt the bridge

> even if there were weeds [*sic*] under the bridge that is not the finding of the Court at this stage of determining if the Court has jurisdiction.

Rec. pp.635-636.

A. Colorado law requires a "but for" test of proximate cause to establish a waiver of immunity for a dangerous condition.

The CGIA bars actions against public entities which lie in tort or could lie in tort, except in a limited set of circumstances. § 24-10-108, C.R.S. The waivers of immunity set out in § 24-10-106(1), C.R.S., define the subject matter jurisdiction of the courts to hear tort claims against public entities, and whether immunity has been waived in a given situation must be determined under C.R.C.P. 12(b)(1). *Trinity Broadcasting*, 848 P.2d at 924; *Medina*, 35 P.3d at 451-52; *Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003). Mr. Schwartz has the burden of pleading and proving jurisdiction. *Tidwell* at 85; *Fogg v. Macaluso*, 892 P.2d 271 (Colo. 1995); *Trinity Broadcasting* at 925. To establish a waiver of immunity for a dangerous condition of a facility, Mr. Schwartz must prove each of the four elements contained in § 24-10-103(1), C.R.S., including that the dangerous condition was *proximately*

caused by the negligence of CDOT in constructing or maintaining the facility. *Walton v. State*, 968 P.2d 636, 644 (Colo. 1998).

Thus, merely pleading that a dangerous condition existed is not enough. Mr. Schwartz must prove "that he suffered 'injuries resulting from' conduct enumerated by subparts (a) through [(g)]" of § 24-10-106(1). *Tidwell* at 86; *see Fogg* at 276. The factual allegations of the Amended Complaint in Intervention are not taken as true on a motion to dismiss for lack of subject matter jurisdiction. *Medina*, 35 P.3d at 452; *Trinity*, 848 P.2d at 924-25. Rather, as the trier of fact, the district court must consider all competent evidence and resolve all disputed facts to determine whether Mr. Schwartz has proven the court's subject matter jurisdiction. *Medina* at 452; *Walton* at 643; *Lafitte v. State Highway Department*, 885 P.2d 338, 341-42 (Colo. App. 1994).

Mr. Schwartz relies on the alleged failure of CDOT to clear tumbleweeds from under the bridge to establish a waiver of CDOT's immunity under § 24-10-106(1)(d), C.R.S., for a dangerous condition of a public highway. A dangerous condition of a public highway for which CDOT's

immunity is waived must be one which "physically interferes with the movement of traffic on the paved portion" of the highway. *Id.* "Dangerous condition" is defined in the CGIA as:

> . . . a physical condition of a facility or the use thereof which constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and *which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility*. . . .

§ 24-10-103(1), C.R.S. (emphasis added).

Mr. Schwartz does not contend that tumbleweeds themselves interfered with the movement of traffic on Highway 96. The dangerous condition of Highway 96 that interfered with the movement of traffic is the destruction of the bridge in the wildfire of April 15, 2008. Mr. Schwartz does not contend that the wildfire occurred due to CDOT's negligence. Mr. Schwartz's contention in this case is that the bridge was destroyed in the wildfire, hence creating the dangerous condition that resulted in the death of John W. Schwartz, because CDOT had negligently failed to clear tumbleweeds from beneath the bridge. Mr.

Schwartz's theory of the case thus requires that tumbleweeds were under the bridge, off the travelled portion of the highway, and that those same tumbleweeds had remained under the bridge for a period of time sufficient to establish CDOT's negligence in failing to remove them.

But if the bridge could not have survived the wildfire of April 15, 2008, whether or not tumbleweeds were collected underneath it, then the element of the waiver of immunity that the dangerous condition must have been "proximately caused" by CDOT's negligence in maintaining the bridge has not been met. To meet the requirement that such dangerous condition be "proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility," Mr. Schwartz must prove that the presence of tumbleweeds under the bridge "proximately caused" the bridge's destruction.

Colorado law requires Mr. Schwartz to satisfy a "but for" test to meet the element of proximate causation for a waiver of immunity for a dangerous condition of a public highway. *Moore v. Standard Paint &*

Glass Co., 145 Colo. 151, 156, 358 P.2d 33, 36 (1960) (Colorado has adopted the "but for" test of proximate causation); *Smith v. State Compensation Insurance Fund*, 749 P.2d 462, 464 (Colo.App. 1987) (test for causation is the "but for" test-whether, but for the alleged negligence, the harm would not have occurred). The reason for the "but for" test of proximate cause is to ensure that casual and unsubstantial causes do not become actionable. *Northern Colorado Medical Center, Inc. v. Committee on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996). To meet the test, Mr. Schwartz must show that "but for the alleged negligence, the harm would not have occurred." *Id.* The test is satisfied if "a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred.'" *Id.* (quoting *Smith* at 464).

In other words, to establish that CDOT's governmental immunity is waived in this case, Mr. Schwartz must prove that tumbleweeds had been allowed to accumulate under the bridge in a manner that presented an unreasonable risk of harm to the public and that, *but for* the

presence of the tumbleweeds under the bridge, it would have survived the wildfire of April 15, 2008.

B. Mr. Schwartz did not present evidence that meets the "but for" test for proximate cause.

Mr. Schwartz presented no evidence that the bridge would have or could have survived the wildfire "but for" the existence of tumbleweeds. On the contrary, the evidence showed that this fire was so powerful that it burned all manner of objects with or without weeds – including another nearby bridge.

The railroad adjacent to the north of Highway 96 crossed the Numa Ditch on a railroad bridge also constructed of wood timbers. Mr. Schwartz called Albert Riemenschneider, who farms the surrounding fields, to testify concerning his observations. Mr. Riemenschneider testified that he had been working the field on the north side a couple of days before the wildfire. Riemenschneider testimony, Rec. p.877, l.25 – p.878, l.1. At that time, he could not see under the highway bridge, *Id.*, p.878, ll.4-5, but he testified there were no weeds under the railroad bridge. *Id.*, p.878, ll.2-4; p.879, l.19 – p.880, l.7. Nevertheless, he saw

the railroad bridge burn down along with the highway bridge. *Id.*, p.882, ll.7-19. When counsel for Mr. Schwartz asked Mr. Riemenschneider about his observation of the bridge burning, he responded, "a bridge is just like a chimney, it would just suck that right through with that wind. And there could have been some weeds under there. I do not know. But as far as I'm concerned, that bridge was doomed, whether it had weeds or not." *Id.*, p.878, ll.11-15.

Although the expert witness called by Mr. Schwartz, Agent Ellis, testified that accumulated dried vegetation was "a contributing factor" to ignition of the bridge once the fire reached it, Ellis testimony, Rec. p.823, ll.6-15, and that "common sense would tell you that the finer common combustible material would burn before solid combustible material," *id.*, p.823, ll.19-21, he also estimated the heat of the fire on April 15, 2008, "at anywhere from 400 to 1200 degrees." *Id.*, p.835, ll.12-13.

Agent Ellis described the characteristics of fires such as the one that burned in Crowley County on April 15, 2008. He testified that "it generates its own wind." *Id.*, p.835, l.16. "So with the wind already

blowing itself, as the wind is moving, it's taking the heat from the fire and lowering the ignition temperature from anything in its path. And so with that heat and wind speed lowering the temperature [*sic*] of all your common combustible materials, they're going to ignite more quickly than if there was no wind." *Id.* p.836, ll.20-25. Heated winds moving ahead of the fire and coming in contact with creosote treated bridge timbers liquefies the creosote in the wood, according to Agent Ellis, and in that state, "[i]t becomes more volatile and it's easier to ignite it because it's a petroleum based product." *Id.*, p.837, ll.1-23. Agent Ellis testified that creosote in the bridge timbers under the conditions created by the wildfire would ignite at "roughly 350 degrees, possibly." *Id.*, p.838, l.1

Agent Ellis's testimony regarding these characteristics of the wildfire tends to explain the devastation that occurred to other structures, apparently without the presence of tumbleweeds to kindle fires. Railroad ties inlaid in a rock bed, utility poles, the tops of enormous cottonwood trees, and multiple structures, all were burned in the wildfire without the presence of tumbleweeds under them. *See* Ellis Testimony,

Rec. p.838, l.6 – p.839, l.20. In the opinion of Agent Ellis, railroad ties and utility poles adjacent to the bridge were ignited because "blowing embers and the superheated air in front of the moving fire cause creosote to become back to a liquid state, which emits more gas, which will ignite more quickly than a piece of wood that doesn't have it." *Id.*, p.838, l.21 – p.839, l.1; see p.839, ll.17-20. Referring to the testimony of Carl Miller, Agent Ellis testified, "[t]hat one gentleman that just testified before me, with him saying that the flames were ten to 25, 30 feet high, judging by a flame that hot—that high, it could light something 50 feet away, depending on the air movement." *Id.*, p.827, ll.22-25.

Mr. Schwartz also called Walter Chapman, the Fire Chief of the Ordway Volunteer Fire Department to testify. Chapman testimony, Rec. p.885, l.19 – p.886, l.15. Mr. Chapman was Assistant Chief at the time of the April 15, 2008, wildfire. *Id.*, Rec. p.887, ll.7-12. Counsel for Mr. Schwartz elicited Mr. Chapman's professional opinion as to whether the bridge would have burned if there were not weeds underneath it. *Id.*, p.889, ll.10-12. Mr. Chapman responded that, "[a]s hot as that fire was that day, it probably would have." *Id.*, Rec. p.889, ll.13-14.

If Mr. Chapman was right – and the evidence agrees with him – then tumbleweeds collected under the bridge cannot be considered a proximate cause of the bridge's condition. Mr. Schwartz therefore failed to meet his statutory burden and the decision below should be reversed.

CONCLUSION

For the reasons and on the authorities set forth above, the Colorado Department of Transportation requests that this Court reverse the decision of the Crowley County District Court in its Order of January 7, 2010.

RESPECTFULLY SUBMITTED this 15th day of September 2010.

JOHN W. SUTHERS
Attorney General

s/ *Friedrick C. Haines* (original signature on file)
FRIEDRICK C. HAINES, 13264*
First Assistant Attorney General
Civil Litigation and
Employment Law Section
Attorneys for Defendant-Appellant
Colorado Department of Transportation
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **DEFENDANT-APPELLANT COLORADO DEPARTMENT OF TRANSPORTATION'S OPENING BRIEF** upon all parties herein by e-filing through the Lexis/Nexis File & Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 15th day of September 2010, addressed as follows:

Lee N. Sternal, Esq.
Lee N. Sternal, P.C.
414 W. Ninth Street
P.O. Box 4718
Pueblo, Colorado 81003-4718

Clerk, Crowley County District Court
Crowley County Judicial Building
110 East 6th Street, Rm 303
Ordway, CO 81603

Paul D. Feld, Esq.
Ritsema & Lyon, P.C.
999 18th Street, Suite 3100
Denver, Colorado 80202

Peter Jones, Esq.
Hall & Evans, LLC
1125 17th Street, Suite 600
Denver, CO 80202

William J. Culver, Esq.
410 North 9th Street
Rocky Ford, CO 81067

Bradley T. Bufkin, Esq.
Peterson & Fonda, P.C.
215 West 2nd Street
Pueblo, CO 81003

s/ Orlando H. Martinez (original signature on file)