APPENDIX

DISTRICT COURT, CROWLEY COUNTY STATE OF COLORADO **110 East 6th, Ordway, CO 81063** **719-267-4468** **COLORADO FARM BUREAU MUTUAL INSURANCE COMPANY, et al.,** **Plaintiffs, and** **JOHN E. SCHWARTZ, in behalf of his minor grandchildren, CODY L. SCHWARTZ and JACOB W. SCHWARTZ, Intervenor Plaintiff,** **v.** **SAMUEL MARTSON and THE COLORADO DEPARTMENT OF TRANSPORTATION,** **Defendants.** **And** **SAMUEL MARTSON,** **Third Party Plaintiff,** **v.** **NUMA DRAINAGE DISTRICT and ORDWAY** **DRAINAGE DISTRICT,** **Third Party Defendants.**	 **▲ FOR COURT USE ONLY ▲** **Case Number: 2008 CV 25** **Div.: B**
ORDER	

This matter is before the Court for a hearing on January 6, 2010, upon the request of the Defendant, Colorado Department of Transportation (CDOT) for dismissal of the complaint as to them as because of a lack of jurisdiction pursuant to the Colorado Governmental Immunity Act C.R.S. 24-10-101, et. seq. (CGIA).

At the hearing the Intervenor Plaintiff, John E, Schwartz, on behalf of his minor grandchildren, Cody L. Schwartz and Jacob W. Schwartz (Schwartz), was present with his attorney, Lee Sternal. The Defendant, Colorado Department of Transportation (CDOT) was represented by their attorney, Fredrick Haines, First Assistant Attorney General.

FACTS

There is no dispute that this action arises out of a fire that was not started by CDOT but which did burn a bridge on a highway which was under the control and responsibility of CDOT. That as a result of the bridge burning a fire truck containing John W. Schwartz burnt through allowing the fire truck to fall into a gully and causing John W. Schwartz to die. John W. Schwartz was the son of the Intervenor Plaintiff, John E. Schwartz.

Schwartz alleges that CDOT is responsible because of a failure to maintain the bridge by allowing weeds to gather underneath the bridge. CDOT denies these allegations and further claims the bridge burned through no fault to maintain but because of a number of other causes.

REQUIRMENTS OF CGIA

The CGIA bars actions in tort against public entities, subject to the exceptions set out in C.R.S. 24-10-106(1) which provides in part as follows:

(1) A public entity shall be immune from liability in all claims for injury which lie in tort.... Sovereign immunity is waived by a public entity in an action for injuries resulting from:
....
(d) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality....

The term "dangerous condition," is defined in C.R.S.24-10-103(1) as follows: "Dangerous condition" means 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 in constructing or maintaining such a facility.... A dangerous condition shall not exist solely because the design of any facility is inadequate".

There is a difference of opinion between the parties as to what the burden of proof is for Schwartz at this stage of the case. CDOT argues that the Court should focus on the following language in C.R.S. 24-10-103: "… which condition is *proximately caused* by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility". (emphasis added)

In short, CDOT argues that the Court should at this point make a determination that all four of the elements set out by the Colorado Supreme Court in Walton v. State, 968 P.2d 636, 644 (Colo. 1998), are proven as the requirement for proof of jurisdiction of the Court under a waiver to the CGIA. This test has been described as a "but for" test.

Schwartz argues that there is no "but for test in any of the decisions of the Colorado appellate Courts. Mr. Schwartz argues that to force a claimant under the CGIA to prove the entire merits of the case is improper and that instead there should only be the requirement that the claimant prove that the negligence of the public entity contributed to the injuries.

The evidence at the hearing has convinced the Court that CDOT could have and probably did allow weeds to accumulate under the bridge that burnt through and caused the death of Mr. Schwartz. The evidence presented convinced this Court that there were weeds and that they aided the creosote soaked timbers to catch fire.

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 under the bridge that is not the finding of the Court at this stage of determining if the Court has jurisdiction.

THEREFORE it is the finding of the Court that the Plaintiff, Schwartz has sustained his burden of proving that there is a waiver of the immunity set out in the CGIA.

Done this 7th day of January, 2010.

By the Court

Michael Schiferl, Judge