COLORADO COURT OF APPEALS 101 West Colfax, Suite 800 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** ▲
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DEFENDANT-APPELLANT COLORADO DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply 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 2284 words and it does not exceed 18 pages.

s/ *Friedrick C. Haines* (original signature on file)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

TABLE OF AUTHORITIES

Defendant-Appellant Colorado Department of Transportation, by and through First Assistant Attorney General Friedrick C. Haines, submits the following pursuant to C.A.R. 28(c) and 31(a) as its Reply Brief:

ARGUMENT

I. Standard of review.

In his Answer Brief, Mr. Schwartz disputes CDOT's statement of the standard of review at pp. 14-15 of its Opening Brief. The standard of review, as stated there, requires this court to defer to the trial court's findings of fact, disturbing them only if they are clearly erroneous, but matters of law, including statutory interpretations, and rulings made with regard to undisputed facts, are subject to this court's *de novo* review. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Because the plaintiff bears the burden of proof of facts bearing on the court's subject matter jurisdiction, and because the court is authorized to make factual findings related to its jurisdiction, allegations of the complaint have no presumptive truthfulness in the face of a factual challenge under C.R.C.P. 12(b)(1), such as CDOT's motion to dismiss. *Id.*

In this case, facts found by the trial court were only those facts of which there was no dispute. *See* Order of January 7, 2010, at p.2, Rec. p.634. Although the trial court heard evidence of whether, but for CDOT's alleged negligent failure to remove tumbleweeds from under the bridge, the bridge would have survived the fire and so not constituted a "dangerous condition of a public highway . . . which physically interferes with the movement of traffic on the paved portion" thereof, § 24-10-106(1)(d)(I), C.R.S. (2009), it refused to make factual findings related to such proximate cause issue. Order of January 7, 2010, at pp.3-4, Rec. pp.635-636. The trial court's refusal to make findings of proximate cause and its refusal to require Mr. Schwartz to meet a "but for" test of the proximate cause of a dangerous condition for which immunity is waived, is a ruling of statutory interpretation. This appeal relates only to the failure to require Mr. Schwartz to meet the burden of proving proximate cause expressly required by § 24-10-103(1), C.R.S. (2009), a legal ruling to which a *de novo* standard of review applies. *Medina* at 452-53; *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010); *Upper Platte and Beaver Canal Co. v.*

Riverview Commons General Improvement Dist., __P.3d__, 2010 WL 1491635, *2 (Colo. App. 2010) ("In CGIA cases, we defer to the trial court's factual findings if supported by the record, but interpret the statute de novo.").

II. Mr. Schwartz is required to prove that CDOT's negligence "proximately caused" a dangerous condition of the highway that interfered with the movement of traffic.

It is the duty of the court in construing a statute to "determine and give effect to the intent of the legislature." *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001). To do so, it "look[s] 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." *Id*. Section 24-10-103(1) establishes four elements for determining a waiver of governmental immunity involving a dangerous condition of a public facility. *Walton v. State*, 968 P.2d 636, 644 (Colo. 1998). Among these elements is that the "condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility." *Id., see* § 24-10-103(1), C.R.S. Mr.

Schwartz bears the burden of proof of each of the elements of a "dangerous condition," including that CDOT's negligence was the proximate cause of the condition. *See, e.g.*, *Medina* at 452.

In the case of a dangerous condition of a public highway, as alleged in this case, the condition must be one that "interferes with the movement of traffic on the paved portion" thereof. § 24-10-106(1)(d)(I), C.R.S.; *see State v. Moldovan*, 842 P.2d 220, 223-24 (Colo. 1992) (the dangerous conditions for which a government is to be liable are those "which [interfere] with the movement of traffic", although such conditions are not limited to those that have their physical source in the highway surface). Under *Moldovan*, CDOT's failure to maintain "an integral part of a state highway system may constitute a dangerous condition on the highway that physically interferers with the movement of traffic on the paved portion of the highway." *Id*. at 224-25. But Mr. Schwartz misplaces his reliance on *Moldovan* insofar as he argues that it relieves him of the necessity of meeting a "but for" test of proximate cause of the dangerous condition which resulted in the accident. The court in *Moldovan* found that the state's failure to maintain the right-

of-way fence adjacent to the state highway "enabled a cow to run onto the highway, thereby creating a dangerous condition that physically interfered with the movement of traffic." *Id.* at 225. In other words, "but for" CDOT's negligent failure to repair the right-of-way fence, the cow would not have been able to run onto the highway, and an interference with the movement of traffic would not have occurred. Thus, although issues on appeal in *Moldovan* did not include the question of meeting the proximate cause burden, a "but for" test nevertheless appears to have been satisfied. *Id.*

Likewise, *Hallam v. City of Colorado Springs*, 914 P.2d 479 (Colo. App. 1995), also relied on by Mr. Schwartz, does not support a suspension of the "but for" test to satisfy the proximate cause element for establishing waiver of immunity by a dangerous condition of a public highway. As in *Moldovan*, proof of proximate cause was not an issue before the court in *Hallam*, but the question was whether barricades, which had not been maintained in front of a dirt embankment, were "traffic markings" excluded from dangerous conditions for which the City's immunity was waived under § 24-10-106(1)(d), or if they were

traffic safety devices that were integral to the public highway. *Hallam* at 480. The court concluded that the barricades were not "traffic markings" excluded from the waiver of immunity in § 24-10-106(1)(d). The *Hallam* court noted that its conclusion "is consistent with the principle . . . that a legislative grant of sovereign immunity must be strictly construed. Thus, if the General Assembly wishes to provide for sovereign immunity in these circumstances, it must do so plainly and unequivocally." *Id.*, citing *Bertrand v. Board of County Commissioners*, 872 P.2d 223, 225 (Colo. 1994). In this context, it is worth noting that the requirement of proof of proximate cause as an element of a "dangerous condition" for which governmental immunity is waived, is plainly and unequivocally stated in § 24-10-103(1), C.R.S., and in this appeal CDOT requests only that the plain words of the statute be applied according to their ordinary and usual meaning.

Mr. Schwartz also misplaces his reliance on *Tidwell v. City and County of Denver*, 83 P.3d 75 (Colo. 2003). *Tidwell* did not concern proof of the elements of a "dangerous condition" of any kind of public facility,

but it dealt with the waiver of immunity for the operation of a motor vehicle under § 24-10-106(1)(a), C.R.S., and the emergency vehicle exception to the waiver. *Id.* at 80-81. The *Tidwell* court discussed a "relatively lenient" burden that plaintiffs face to establish a waiver of immunity under the CGIA, based on use of the phrase "resulting from," in § 24-10-106(1), in relation to the waiver of immunity for operation of a motor vehicle. *Tidwell* at 86. The court held that the statute's use of the words "resulting from" did not create a burden to prove causation. *Id.* The *Tidwell* decision nowhere discusses the burden of proving proximate cause of a dangerous condition under § 24-10-103(1), but the court drew a sharp distinction between the plaintiff's burden to establish that injuries "resulted from" operation of a motor vehicle and the burden that would arise if the waiver of immunity required proof of causation. *Id.* at 86 (contrasting the legislature's use of the term "caused by" in waivers under § 24-10-106(1)(d)(II) and (III) for dangerous conditions of public highways and sidewalks).

Section 24-10-103(1), C.R.S., requires not just proof that a dangerous condition was "caused by" negligence of a public entity, but express-

ly requires proof that the dangerous condition was "proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility." *Id.* According to the *Tidwell* court, "the legislature had two different concepts in mind" when it used the terms "resulting from" and "caused by," *Tidwell* at 86, and the court expressly held it could not treat "caused by" and "resulting from" as synonymous. *Id.* Likewise, where the statute expressly requires proof of "proximate cause," such legislative intent must be honored. Where *Tidwell* requires a showing of clear legislative intent to support the existence of a waiver of immunity, that showing is provided by the express requirement in § 24-10-103(1) of proof that a dangerous condition (like destruction of the bridge in the wildfire of April 15, 2008) was "proximately caused" by CDOT's negligent act or omission. *Tidwell* at 86.

III. Proof of proximate cause requires Mr. Schwartz to meet a "but for" test.

Mr. Schwartz erroneously argues that the requirement of a "but for" test of proximate cause would require him to prove "sole proximate

cause." He argues that his burden should be satisfied by a showing that CDOT's negligence was a "contributing cause" of the collapse of the bridge. Answer Brief at pp.16-17. Here, as with other authorities on which Mr. Schwartz relies, he misplaces his reliance in *Medina*, 35 P.3d at 459-60. *Medina*'s discussion of "sole cause" and contributing causes concerns whether the design defect exception to the dangerous condition waiver of immunity may bar claims before the court in that case, *id*., and its holding requires that any design defect be the sole cause of a dangerous condition for the waiver exception to apply. *Id*.

Where multiple causes may affect a tort claim, however, or where there may be multiple causes of a dangerous condition of a public facility, a cause must still be a "sufficient cause" such that it meets the test that "but for" the act or omission in question the harm would not have occurred or is a "necessary component" of a set of circumstances that produced the dangerous condition. *June v. Union Carbide Corp.*, 577 F.3d. 1234, 1238-1245 (10th Cir. 2009) (discussing Colorado law); *see Hook v. Lakeside Park Co.*, 142 Colo. 277, 283, 351 P.2d 261, 265 (Colo. 1960); *Smith v. State Compensation Ins. Fund*, 749 P.2d 462, 464 (Colo.

App. 1987); 7 John W. Grund, J. Kent Miller & Graden P. Jackson, Colorado Practice Series, Personal Injury Practice § 12.8 (2d Ed. 2000 & Supp. 2010). Mr. Schwartz failed to put on evidence that the bridge would have survived the wildfire of April 15, 2008, "but for" CDOT's negligent failure to clear tumbleweeds from under the bridge, or, which is to the same effect, that such negligence was a "necessary component" among multiple factors that caused the bridge's destruction. *June* at 1244; *see Hook*, 351 P.2d at 265 (where several events may have brought about the harm, and an event other than the defendant's negligence appears predominant, the alleged negligence cannot be considered a substantial factor); *Smith*, 749 P.2d at 464 (an event that has such a predominant effect in bringing about the harm may make the actor's negligence insignificant and therefore prevent it from being a substantial factor). Evidence presented at the *Trinity* hearing, including testimony of Mr. Schwartz's own experts, showed that the bridge could not have survived the wildfire, whether or not tumbleweeds negligently had been allowed to collect under it.

IV. Mr. Schwartz's claim for an award of attorney fees for this appeal is without merit.

Mr. Schwartz seeks an award of attorney fees for "the time, effort and expense involved in having had to file answer to an appeal that has done nothing but argue issues that have already been decided by our state's highest court." Answer Brief at p.18. However, Mr. Schwartz has not cited a single decision of any Colorado court holding that he is not required to prove CDOT's negligence proximately caused the dangerous condition on which he relies as a waiver of CDOT's immunity. Mr. Schwartz complains about the process enacted under the Colorado Governmental Immunity Act by the Colorado Supreme Court in *Trinity Broadcasting Corp. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), but he makes no showing that CDOT's appeal is improper under § 24-10-108, C.R.S. (2009), or that arguments made by CDOT are without substantial justification. CDOT seeks only to have the plain language of § 24-10-103(1) applied according to its ordinary and usual meaning. Mr. Schwartz's request for an award of attorney fees therefore should be denied.

CONCLUSION

The district court below refused to require Mr. Schwartz to meet a "but for" test that CDOT's negligence was the proximate cause of the dangerous condition from which his injuries resulted. As a question of statutory construction, the district court's order must be reviewed *de novo* and reversed as a matter of law. Because the record in this case does not support a finding that, but for CDOT's negligence, the bridge would have survived the wildfire of April 15, 2008, and the dangerous condition that resulted in Mr. Schwartz's injuries would not have been created, this Court should remand this case with instructions to dismiss all claims against CDOT on governmental immunity grounds.

RESPECTFULLY SUBMITTED this 14th day of January 2011.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Defendant-Appellant Colorado Department Of Transportation's Reply Brief upon all parties herein by e-filing through the File & Serve system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 14th day of January 2011, addressed as follows:

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