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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 E 14th Avenue Denver, CO 80203 (303) 837-3785 Appeal From The District Court Broomfield County, Colorado Honorable Patrick Thomas Murphy, District Court Judge Trial Court Case No. 2013 CV 30055 Plaintiffs-Appellants: ALEX TERRANOVA and FREDERICK TERRANOVA v. Defendants-Appellees: ADAMS 12 FIVE STAR SCHOOL DISTRICT, TYRONE GIORDANO, in his individual capacity, ED HARTNETT, in his individual capacity, CATHY NOLAN, in her individual capacity, LEE PETERS, in his individual capacity, and CHRIS GDOWSKI, in his individual capacity.	COURT USE ONLY
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APPELLANTS' OPENING BRIEF

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COMES NOW the Appellants, Alex Terranova and Frederick Terranova, by and through their counsel of record, WICK & TRAUTWEIN, LLC, and respectfully submit the following Opening Brief:

I. ISSUES PRESENTED FOR REVIEW

A. Did the trial court apply the wrong standard to improperly determine that the defendants' alleged conduct was not willful and wanton, as a matter of law?

B. Did the trial court err in finding the plaintiffs failed to allege sufficient facts to establish a waiver of governmental immunity under C.R.S. §24-10-106(1)(e), i.e. a dangerous condition of a public facility?

C. Did the trial court err in granting the defendants an award of their attorney's fees pursuant to C.R.S. §13-17-201?

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This appeal arises out of a civil action filed by Alex Terranova and his father, Frederick Terranova, for traumatic brain injuries sustained by Alex in March 2011, while he was a student baseball player at Legacy High School in Broomfield, Colorado.

The Terranovas allege the injuries occurred on two separate occasions, just weeks apart. First, on March 3, 2011, Alex Terranova was hit on the back left side of his head with a baseball while wearing his helmet during a practice scrimmage game at Legacy High School. *R.17, ¶ 14.* At that time, Alex Terranova showed signs of a possible concussion, including being dazed. *R.17, ¶ 14.* The head coach, Defendant Tyrone Giordano, personally observed Terranova and his dazed condition, yet Giordano ignored the concussion recognition training that he had received just seven days earlier and also disregarded the required protocol established for such blows to the head. *R.17, ¶ 13, 18.* That is, Giordano failed to properly assess the injuries, to immediately remove Terranova from play, to report the injury and to keep Terranova from further play until he was evaluated by a doctor. *R.17-18, ¶ 18.*

Then, on March 30, 2011, Terranova sustained another serious blow to the head during an unusual and dangerous pick-off drill orchestrated by Giordano at baseball practice at the high school ball field. *R.19, ¶ 24.* This drill, as instructed by Giordano, did not reasonably simulate the actual pick-off of a runner in a baseball game. Instead, the drill placed three pitchers on the pitcher's mound at the high school's baseball field in dangerously close proximity to one another in a direct line - on a mound that is intended for only one pitcher at a time. *R.18, ¶ 21.*

Alex Terranova was the middle of the three pitchers on the mound at the same time. *R.18, ¶ 21.*

During this drill, baseballs were continually being thrown to and from players at first base, second base, and third base and to and from the three pitchers, on the mound. *R.18, ¶ 21.* Terranova, being placed in the middle and on the highest point of the mound, was dangerously in the line of throwing range from both the third base and first base players to the pitchers on either side of him. *R.18, ¶ 21.* According to instructions from Giordano, Terranova was not supposed to be watching the balls being thrown to the other two pitchers on either side of him on the mound, which rendered Terranova unable to anticipate, observe, or protect himself if a missed ball was thrown from either first or third base towards him. *R.18, ¶ 22.* The drill was rendered even more dangerous by virtue of the fact that 1) Giordano used less experienced underclassmen (a Freshman and Sophomore) in the drill, both throwing the ball to the mound and catching the ball on the mound; 2) Giordano did not require the team members to wear helmets during the drill; and 3) Giordano also failed to place available screens around the mound to protect the three pitchers, including Terranova. *R.19, ¶ 22, 26.*

During the performance of this dangerous drill, an underclassman's throw from third base was missed by the underclassman pitcher to the right of Terranova,

and the baseball forcibly struck Terranova on the back side of his unprotected head. *R.19, ¶ 24.* Like the March 3rd incident, Terranova was immediately dazed and confused and showed signs of a possible concussion, yet Giordano once again ignored his recent concussion recognition training and the proper protocol established for such blows to the head. *R.19, ¶ 24, 27.* He instead kept Terranova in play and then allowed him to drive himself home, where Terranova's parents immediately recognized something was wrong and sought medical treatment for him. *R.20, ¶ 28.* Terranova was diagnosed with a second concussion from this second serious blow to his unprotected head. *R.20, ¶ 28.*

As a result of these incidents, Terranova sustained significant head and brain injuries with permanent effects, as detailed in the Amended Complaint. *R.25-26, ¶ 68.*[1]

B. PROCEDURAL HISTORY

Terranova and his father brought a personal injury suit against the Adams 12 School District, Giordano and other named school officials in February 2013. The Amended Complaint alleged claims of willful and wanton conduct on the part of Giordano in his individual capacity, alleging alternative theories of relief based on

[1] The original complaint was amended shortly after filing and prior to any response from the defendants, in order to make some minor corrections. The claims for relief remained the same.

whether Giordano was an employee (Count I) or an independent contractor (Count II). *R.23,* ¶ *42-49.* The second claim for relief in the Amended Complaint alleged a similar claim of willful and wanton conduct on the part of other school and district officials in their individual capacities. *R.24,* ¶ *50-56.*

The third claim for relief in the Amended Complaint was alleged against the school district itself. Count I specifically alleged that the incident of March 30, 2011, arose from a dangerous condition of a public facility located in a recreation area maintained by a public entity, namely the school district, thereby constituting a waiver of sovereign immunity pursuant to C.R.S. §24-10-106(1)(e). *R.24-25,* ¶ *58-61.* As alleged in the Amended Complaint, the dangerous condition was the pitching mound located within Legacy High School's baseball field and existed due to and resulted from the unscreened apex of the mound, combined with its dangerous use by Giordano in the pick-off drill. *R.25,* ¶ *60.* Count II alleged liability on the part of the school district pursuant to the provisions of the Colorado Premises Liability Act. *R.25,* ¶ *62-67.*

On March 25, 2013, the defendants filed a motion to dismiss all the Terranovas' claims based upon immunity asserted pursuant to the Colorado Governmental Immunity Act [CGIA], C.R.S. §24-10-101, *et seq. R.48.* The motion argued the Terranovas failed to adequately allege the injuries resulted from

a dangerous condition of a public facility and thus failed to articulate a waiver of immunity. *R. 51.* The motion also argued that Defendant Giordano was an employee, not an independent contractor, and thus entitled to protections of the CGIA. *R. 56.* Finally, defendants further asserted as grounds for dismissal that the Terranovas failed to allege sufficient facts to support their claims of willful and wanton conduct, arguing Alex Terranova was allegedly injured in a "predictable way." *R. 57, 60.*

The parties fully briefed the issues raised in the motion and the Court held an oral argument hearing on the motion on June 10, 2013. *R. 119*; *Transcript.*

On July 22, 2013, the Court entered an Order granting the motion to dismiss the second and third claims for relief. *R. 159-164.* As for the first claim for relief, alleged against Defendant Giordano individually, the trial court held that the Terranovas could engage in discovery as to whether Giordano was an independent contractor or an employee of the school district. *R. 161.* The trial court found that, if Giordano was found to be an independent contractor, the CGIA claim was inapplicable and the claim for relief against him would be governed by negligence principles. *R. 164.* If he was an employee, then the claim would be governed by a willful and wanton standard; however, the Court determined, as a matter of law,

that the conduct alleged by the Terranovas did not rise to the level of willful and wanton. *R. 164.*

After conducting further discovery on the issue of Giordano's status, the Terranovas filed a voluntary dismissal of Count II of the first claim for relief. *R. 168.* Notwithstanding the fact the Terranovas voluntarily dismissed this part of their claim, the trial court thereafter entered an award of attorney's fees in favor of all the defendants pursuant to C.R.S. §13-17-201, which provides for an award of fees when an entire action is dismissed by a court on a motion made pursuant to C.R.C.P. 12(b). *R. 263-265.*

The Terranovas timely brought this appeal of the trial court's granting of the motion to dismiss, and then later timely amended their appeal to also seek review of the trial court's award of attorney's fees in favor of the defendants.

III. SUMMARY OF ARGUMENT

The trial court erred at the outset in evaluating the Terranovas' claims for willful and wanton conduct under the wrong standard. That is, it reviewed the claim under C.R.C.P. 12(b)(1), the standard for resolving jurisdictional issues under the Colorado Governmental Immunity Act, and determined the factual issues here as a matter of law. However, because claims of willful and wanton conduct are excluded from governmental immunity, the factual allegations underlying such

claims are to be reviewed for sufficiency under C.R.C.P. 12(b)(5). Thus, as long as allegations are not merely conclusory and sufficiently articulate the factual basis for the alleged willful and wanton conduct, the claim must proceed to trial for the jury to resolve the factual issues. The facts relating to the willful and wanton conduct are indeed sufficiently detailed by the Terranovas, and thus this Court should determine, pursuant to its own *de novo* review of the pleadings, that the trial court erred in dismissing these claims.

Likewise, this Court should determine that the trial court erred in dismissing the third claim for relief against the school district based upon its conclusion that the claim was barred by the doctrine of governmental immunity. This Court, on its own *de novo* review, can properly conclude the plaintiffs have sufficiently alleged a claim which falls into the waiver of immunity for a dangerous condition of a public recreation facility. This conclusion is supported by the language of the statutory waiver itself, which refers to the use of such a facility, as well as by the rules of statutory construction and numerous Colorado cases which have found a waiver of immunity under similar circumstances.

Finally, the Court should conclude that the trial court erred in awarding the defendants their attorney's fees under C.R.S. §13-17-201, which provides for an award of fees when an entire action is dismissed on a defendant's C.R.C.P. 12(b)

motion to dismiss. In the first instance, the dismissal underlying the award was improper. Regardless of that issue, the entire action was not dismissed on the defendants' motion; rather, after being allowed to conduct discovery relating to the first claim for relief against Giordano, the Terranovas voluntarily dismissed their remaining claim. Thus, under the plain language of the statute and legal authority interpreting the statute, the award of attorney fees was not proper.

Wherefore, for these reasons discussed more fully below, this Court should reverse the trial court's order of dismissal and its order awarding the defendants their attorney fees.

IV. ARGUMENT

A. The trial court erred in concluding that the alleged conduct of the individual defendants was not willful and wanton as a matter of law.

Standard of Review: As discussed more fully below, the trial court employed the wrong standard in resolving whether the Terranovas sufficiently alleged willful and wanton conduct on the part of the individual defendants. The determination of whether the Terranovas sufficiently alleged such claims should have been made under C.R.C.P. 12(b)(5). *Gray v. University of Colorado Hosp. Authority*, 284 P.3d 191, 198 (Colo.App. 2012). This rule disfavors dismissals. *Denver Post Corp. v. Ritter,* 255 P.3d 1083, 1088 (Colo. 2011).

Under C.R.C.P. 12(b)(5), the reviewing court must review the motion to dismiss *de novo,* employing the same standards as the trial court. *Id.* The reviewing court can uphold a dismissal under Rule 12(b)(5) only where the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Id.*

Preservation of Issue: The Terranovas argued against dismissal of their claims for willful and wanton conduct in their response to the defendants' motion to dismiss, and also argued for the dismissal determination to be made under C.R.C.P. 12(b)(5). *R. 76-86.*

1. The trial court first erred in employing the wrong standard in determining whether willful and wanton conduct was sufficiently alleged by the Terranovas.

The trial court here decided this issue as a matter of law under C.R.C.P. 12(b)(1), which is the standard normally employed in determining whether a claim is jurisdictionally barred by the CGIA. *R.159-160.* However, there is no immunity under the CGIA for state employees when they are sued in their individual capacities for willful and wanton conduct. C.R.S. §24-10-118(2)(a); *Middleton v. Hartman*, 45 P.3d 721, 729 (Colo. 2002). The issue of waiver does not arise. *Id.*

C.R.S. §24-10-110(5)(a) requires that, when a plaintiff alleges a public employee's acts or omissions were willful and wanton, "the specific factual basis

of such allegations shall be stated in the complaint." Conclusory allegations are not sufficient. *Gray*, 284 P.3d at 198. "If the complaint does not satisfy this standard, it must be dismissed for failure to state a claim under C.R.C.P. 12(b)(5)." *Id.* [emphasis added].

"Ordinarily, determining whether a defendant's conduct is willful and wanton is a question of fact." *U.S. Fire Ins. Co. v. Sonitrol Management Corp.*, 192 P.3d 543, 549 (Colo.App. 2008). Whether a plaintiff has pled sufficient facts to state a claim alleging that a public employee's acts or omissions were willful and wanton is a threshold determination to be made by the court. *Gray,* 284 P.3d at 198. However, as long as there are sufficient facts alleged in the complaint, the issue of whether an employee's acts or omissions were willful and wanton must be determined at trial. *Id.* "This is because

> 'the legislature did not intend an individual [public employee's] immunity from suits, although derived from sovereign immunity, to have the same initially preclusive effect from suit [as the immunity of public entities]. This is reflected in the 'willful and wanton' standard which mandates a fact-based determination. Such a determination is not susceptible to resolution at an early stage in the litigation process before significant discovery has been undertaken *unless there are no disputed issues of fact.* Moreover, a 'willful and wanton' determination potentially requests the weighing of testimony and evidence, functions which are usually the province of the jury/trier of fact and not the trial court.'"

Id. (quoting *City of Lakewood v. Brace*, 919 P.2d 231, 246 (Colo. 1996)).

As indicated above, the factual nature of this determination makes it subject to review according to the standards of C.R.C.P. 12(b)(5). Under C.R.C.P. 12(b)(5), the trial court must take the allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Denver Post Corp.*, 255 P.3d at 1088. Dismissals under C.R.C.P. 12(b)(5) are viewed with disfavor. *Id.*

The trial court clearly did not employ this standard here, and thus its determination was improper from the outset.

2. The Terranovas sufficiently alleged willful and wanton conduct, such that dismissal of their first and second claims for relief was improper.

The trial court concluded as a matter of law, without giving the Terranovas the deference required under C.R.C.P. 12(b)(5), that their complaint failed to sufficiently allege claims for willful and wanton conduct on the part of the defendants:

> "Insofar as the allegations that Defendant Giordano acted willfully and wantonly are concerned, the Court finds and concludes that Plaintiffs have failed to plead sufficient facts that, even if proven, would amount to willful and wanton conduct. Mr. Giordano's actions and omissions, even as alleged by Plaintiffs, are not meaningfully different than actions undertaken by baseball coaches at all levels of competitive baseball. Plaintiffs identify no facts that would tend to show Mr. Giordano purposefully disregarded a risk to any of his players, Alex Terranova included. Accordingly, Plaintiffs' allegation that Mr. Giordano acted willfully and wantonly fails as a matter of law and does not operate to waive governmental immunity." *R. 161.*

The trial court went on to reach a similar legal conclusion with regard to the allegations of willful and wanton conduct made against the other school officials. *R. 162.*

However, the trial court's legal determination of this issue is erroneous. When viewed in the light most favorable to the Terranovas under C.R.C.P. 12(b)(5), the detailed factual allegations in the complaint are not conclusory and clearly state claims for relief given the applicable definitions of what constitutes "willful and wanton conduct" under Colorado law.

With regard to how that term is construed, the Supreme Court of Colorado has acknowledged that the phrase is not specifically defined by the CGIA. *Moody v. Ungerer,* 885 P.2d 200, 205 (Colo. 1994). Thus, the courts have generally looked to C.R.S. §13-21-102(1)(b), which defines the term for purposes determining exemplary damages:

> "As used in this section, 'willful and wanton conduct' means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff."

Id.

As discussed in *Moody*, the Supreme Court of Colorado has previously examined at length the term "willful and wanton conduct" in *Pettingell v. Moede,*

271 P.2d 1038, 1042 (Colo. 1954). There, the Court stated that "[t]o willfully and wantonly disregard the rights of others requires a consciousness of heedless and reckless conduct by which the safety of others is endangered." *Id.* According to the Court, "One may be said to be guilty of 'willful and wanton disregard' when he is conscious of his misconduct, and although having no intent to injure any one, from his knowledge of surrounding circumstances and existing conditions is aware that his conduct in the natural sequence of events will probably result in injury to [another], and is unconcerned over the possibility of such result." *Id.* The Court went on to distinguish between ordinary negligence and willful and wanton conduct as follows:

> "The demarcation between ordinary negligence, and willful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful…"

Id., at 1042-43.

In light of the above descriptions of what constitutes willful and wanton conduct under Colorado law, the Court here can determine on its own *de novo* review of the Amended Complaint that the detailed factual allegations set forth by

the Terranovas clearly state a claim for relief so as to withstand a motion to dismiss. This is particularly so when viewed under the lens of C.R.C.P. 12(b)(5):

- The Terranovas alleged that Giordano knowingly disregarded concussion training he had just received (in the first incident, just seven days earlier) concerning how to assess and deal with suspected traumatic brain injuries during an athletic competition; that Giordano disregarded evidence of a concussion sustained by Alex Terranova on March 3, 2011 during a baseball game by failing to appropriately assess signs, symptoms and behaviors; that he failed to immediately remove Alex Terranova from play; failed to ensure he was evaluated by a licensed healthcare professional experienced in evaluating for concussions; failed to inform Alex Terranova's parents of the possible concussion; and failed to keep him out of play until a licensed healthcare professional experienced in evaluating for concussions released him as free to play in further games. *R.17, ¶¶ 13-19.*
- The Terranovas also specifically alleged Giordano acted in a willful and wanton manner in requiring Alex Terranova to participate in the "pick-off" drill under the extremely dangerous circumstances as detailed in the Amended Complaint and as described above, with the

almost certain risk of Alex Terranova being struck in the head, which is exactly what happened, resulting in a *cumulative* concussion, after which Giordano failed yet again to appropriately assess Plaintiff, remove him from play, have him medically evaluated, inform his parents and keep him out of play. *R.18-20,* ¶¶ *20-29.*

- The Terranovas further alleged that the school principal, Defendant Nolan, violated the Superintendent Policy Code 6250 by failing to appropriately monitor her subordinate, Defendant Giordano, and to protect Alex Terranova and other school children from known or reasonably foreseeable harms, in a willful and wanton manner, and failed to assume the administrative responsibility and instructional leadership required by C.R.S. §22-32-126(2) despite that she knew or reasonably should have known of the unreasonably dangerous practices of Giordano. *R. 20,* ¶¶ 30-31.
- The Terranovas asserted in detail the willful and wanton acts and omissions of the District Athletic Director, Defendant Hartnett, pertaining to his inadequate implementation and administration of athletic programs, district-wide, and on account of his failure to

monitor his subordinates, including Giordano, done in a willful and wanton manner. *R. 21,* ¶ 32.

- The Terranovas asserted in detail the acts and omissions of the Assistant Principal and School Athletic Director, Defendant Peters, in dereliction of his responsibilities and duties by failing to insist that Defendant Giordano perform the "pick-off" drill in an appropriate and non-dangerous manner and with use of available protective screens, constituting willful and wanton misconduct. *R. 21,* ¶ 33.
- The Terranovas alleged the existence of various school board policies and statutory provisions, the dereliction of which by Defendant Gdowski as school superintendent, constituted willful and wanton behavior by failing to insist that Defendant Nolan, as principal, require Defendant Giordano, as coach, to perform the "pick-off" drill in an appropriate and non-dangerous manner and with use of available protective screens. *R. 21-22,* ¶¶ 34-37.

If the trial court had properly viewed these allegations under the standard required by C.R.C.P. 12(b)(5), there were more than sufficient allegations and factual questions which precluded dismissal of these claims for willful and wanton conduct. The trial court thus erred in failing to employ the appropriate standard

and in deciding these issues as a matter of law, usurping the role that should be left for a jury.

This is particularly true given the uncontroverted affidavit and report from the Terranovas' expert, Marc Rabinoff, which was not even acknowledged in the trial court's order of dismissal. As outlined in Mr. Rabinoff's report, submitted with the Terranovas' response to the motion to dismiss [*See, R. Exh. 3*] , the injury sustained by Alex Terranova was anything but an expected part of typical baseball play. According to Rabinoff, the pick-off drill orchestrated by Giordano was "totally unacceptable for any coach at any level and clearly reflects behavior that is unprofessional and dangerous to his student athletes." *Id., p. 6.* The report details not only the problems with the unusual and dangerous drill employed by Giordano, but also Giordano's failure to follow standards of care for concussive injury for which he had just received training. *Id.* The uncontroverted report also detailed the ways in which the other named school officials had acted in a manner which could be considered willful and wanton conduct. *Id., pp. 6-8.*

Wherefore, for these reasons discussed above, the trial court erred in concluding, as a matter of law, that the Terranovas claims for willful and wanton conduct were insufficient and should be dismissed. Those claims were indeed sufficiently plead in light of the applicable standard of review and definitions of

willful and wanton conduct, and involved factual questions which should be resolved by a jury. Accordingly, this Court should reverse the trial court's dismissal of those claims.

B. The trial court erred in finding the Terranovas failed to allege sufficient facts to establish a waiver of governmental immunity under C.R.S. §24-10-106(1)(e), *i.e.* a dangerous condition of a public facility

Standard of Review: Whether a claim falls within an exception to immunity under the CGIA is an issue of subject matter jurisdiction for the trial court's determination pursuant to C.R.C.P. 12(b)(1). *Denmark v. State*, 954 P.2d 624, 627 (Colo.App. 1997). Any factual dispute which may affect the existence of subject matter jurisdiction is to be resolved by the trial court as trier of fact. *Id.* Appellate review of this determination is conducted under the highly deferential, clearly erroneous standard. *Id.; Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993).

Preservation of Issue: The Terranovas argued this issue in their response to the defendants' motion to dismiss. *R. 67-74.*

***Argument*:** An immunity analysis should begin with a review of the CGIA, its waiver provisions, and the appropriate standards of review and interpretation. In 1971, the Supreme Court of Colorado abrogated Colorado's common law of governmental immunity after determining that "the doctrine of sovereign and

governmental immunity is unjust and inequitable." *Bertrand v. Board of County Comm'rs*, 872 P.2d 223, 226 (Colo. 1994). The legislature responded by enacting the CGIA.

The CGIA is designed to balance two contradictory purposes. One goal is to protect the public against unlimited liability and excessive financial burdens; the other "basic but often overlooked purpose of the [CGIA] – [is] to permit a person to seek redress for personal injuries caused by a public entity." *State v. Moldovan*, 842 P.2d 220, 222 (Colo. 1992).

The Terranovas specifically alleged that their claim against the school district falls within the specific waiver of governmental immunity found at C.R.S. §24-10-106(1)(e). *R. 24-25, ¶ 59.* This statutory section, which was the focus of the trial court's determination below, states that sovereign immunity is waived if an injury results from:

> "[a] dangerous condition of any . . . public facility located in any . . . recreation area maintained by a public entity . . . ."

A dangerous condition, meanwhile, is defined as follows:

> "[a] physical condition of a facility *or the use thereof* that 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 maintaining such facility."

C.R.S. §24-10-103(1.3)(emphasis added).

Here, the trial court concluded the Terranovas failed to sufficiently allege facts "to show that the baseball mound created a dangerous condition on account of its construction or maintenance, or that Alex Terranova's injury resulted from the baseball mound's inherently dangerous condition." *R. 163.* In doing so, the trial court too narrowly interpreted the waiver of immunity found in C.R.S. §24-10-106(1)(e).

In considering this issue, the Court must look to the guidance from the Supreme Court of Colorado for the standards to be employed in interpreting this statute: "Because governmental immunity under the CGIA derogates Colorado's common law, we strictly construe the statute's immunity provisions....As a logical corollary, we broadly construe the CGIA provisions that waive immunity in the interest of compensating victims of governmental negligence." *Springer v. City and County of Denver*, 13 P.3d 794,798 (Colo. 2000) (citing *Bertrand*, 872 P.2d at 227). Waivers of immunity "are entitled to deferential construction in favor of victims injured by the negligence of governmental agents." *Walton v. State,* 986 P.2d 636, 643 (Colo. 1998). Furthermore, any "exception to a waiver of governmental immunity under the CGIA . . . must be strictly construed." *Medina v. State,* 35 P.3d 443, 460 (Colo. 2001); *Corsentino v. Cordova*, 4 P.3d 1082, 1086

(Colo. 2000) ("[A]lthough we construe immunity waiver provisions broadly, we construe the exceptions to these waivers strictly because the ultimate effect of the exceptions is to grant immunity.").

The trial court did not follow these guiding principles in resolving the issues in this case. In fact, in rejecting the Terranovas' assertion that the unscreened apex of the mound combined with its use in the dangerous and improper pick-off drill constituted a dangerous condition, the trial court interpreted the statutory waiver of immunity in too narrow a manner and in a way which directly contradicts its express language, as reflected in the following statement from the trial court:

> "Allowing this claim under these circumstances would impermissibly undermine the purpose of the CGIA. Expanding 'condition' of a public facility to include 'use' of a public facility would improperly expand the intent of waiver under the CGIA because it would subject every school district in Colorado to a waiver of immunity any time a public facility is used if the manner of use could be alleged as dangerous. This Court believes allowing this claim by expanding 'condition' to include 'use' contradicts the intent of the Colorado legislature to limit tort actions against public employees and public entities." *R. 163.*

As reflected above, the General Assembly specifically defines "dangerous condition" to include the use of a public facility that constitutes an unreasonable risk to the health or safety of the public. The trial court's findings that "expanding 'condition' to include 'use'" thus flies in the face of what the General Assembly itself has defined a dangerous condition to include.

Likewise, the trial court's conclusion expressed above is contrary to other cases in which the Colorado appellate courts have specifically analyzed the existence of a dangerous condition of a public facility to encompass its use. For example, in *Walton v. State,* 968 P.2d 636 (Colo. 1998), the Supreme Court held that the dangerous condition resulted from the use of an unsecured ladder on a slippery floor to access a loft for maintenance. Similarly, in *Hendricks v. Weld County School Dist. No. 6,* 895 P.2d 1120 (Colo.App. 1995), the Court of Appeals held that the dangerous condition resulted from a school's use of a gymnasium with unpadded walls for a game which required children to run at high speeds into a "safe area" immediately in front of the walls. Finally, in *Longbottom v. State Bd. of Community Colleges and Occupational Educ.,* 872 P.2d 1253, 1254 (Colo.App. 1993), the Court of Appeals found a complaint fell within a statutory waiver of immunity where the claim arose from an injury caused by the use of a jointer machine which was not equipped with proper safety guards, and where it was alleged the defendants permitted students to operate the machines without proper instruction or supervision.

These examples are clearly analogous to Adams 12 allowing its baseball pitcher's mound to be used for an unusual and dangerous pick-off drill with thrown balls coming in to the mound from three separate directions without the use of

available screens to protect the center "pitcher" from being hit by balls thrown from his left or right (third base or first base). This deficiency was not due to the design of the baseball field or pitcher's mound but, rather, due to its inherently dangerous *use* in this manner. This inherently dangerous "use" rendered the facility dangerous.

The trial court downplayed this danger based upon its own opinions that "baseball is an inherently dangerous sport" and that players "assume some risk being struck in the head by *a baseball* when they play and practice baseball because the sport depends on the throwing and hitting of *a baseball*." *R. 163-164* [Emphasis added]. The trial court then went on to confuse the issues of willful and wanton conduct with the determination of whether the allegations in the complaint fall into one of the waivers of immunity. *R. 164.*

However, there is one very important distinction between what the trial court opined as the typical throwing and hitting of *a baseball* – a single ball – and a player being placed on an unscreened mound (even though screens were available) with multiple balls being hurled at his unprotected head from different directions. The trial court's opinion that what happened here was an expected risk of playing baseball is contrary to the report of Marc Rabinoff stating that this drill was done in an improper and dangerous manner. In fact, an expert opinion should not even

be necessary: any lay person familiar with the game of baseball would almost certainly agree that the use of the unscreened pitching mound in this manner (i.e. putting a pitcher on a mound with multiple balls being hurled toward him from different directions) is not a typical part or an expected risk of playing the game, and indeed constitutes "a dangerous condition or the use thereof that constitutes an unreasonable risk to the health and safety of the public." This is especially so when the Terranovas' allegations are reviewed according to the principles of statutory construction set forth above.

Therefore, the trial court erred in dismissing the third claim for relief.

C. The trial court erred in granting the defendants an award of attorney's fees under C.R.S. §13-17-201.

Standard of Review: Whether a statute mandates an award of costs or attorney fees is a question of statutory interpretation and is thus a question of law reviewed de novo. *Crandall v. City of Denver*, 238 P.3d 659, 661 (Colo. 2010); *Crow v. Penrose-St. Francis Healthcare System*, 262 P.3d 991 (Colo.App. 2011).

Preservation of Issue: The Terranovas argued against an award of attorney's fees for the defendants, under this statute, in their Objection to Defendants' Motion for Attorney's Fees. *R. 197.*

***Argument*:** It is well-established in Colorado that attorney's fees are not recoverable in a tort action unless there is a statute, court rule, or private contract

providing for such an award to the prevailing party. *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1287 (Colo. 1996); *Bunnett v. Smallwood,* 793 P.2d 157, 160 (Colo. 1990). This reasoning is based on the American rule, which requires each party in a lawsuit to bear its own legal expenses. *Bernhard,* 915 P.2d at 1285.

The rationale behind the rule is broad-ranging: for example, responsibility for one's own legal expenses is thought to promote settlement; poor litigants may be discouraged from instituting actions to vindicate their rights if the penalty for losing were to include paying their opponent's attorney fees; and the difficulty of ascertaining reasonable attorney fees in every case would pose a substantial burden on judicial administration. *Id.; See, Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967).

Here, the trial court awarded defendants' their attorney's fees solely based on one statutory provision found at C.R.S. §13-17-201 [*R. 263*], which states as follows:

> "In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action. This section shall not apply if a motion under rule 12(b) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure." [emphasis added].

Because this statutory provision is in derogation of the common law American Rule cited above, it must be strictly construed. *Sotelo v. Hutchens Trucking Co., Inc.*, 166 P.3d 285, 287 (Colo.App. 2007); see, *City of Wheat Ridge v. Cerveny,* 913 P.2d 1110, 1114 (Colo. 1996) (in light of the American Rule, fee-shifting provision will not be construed as mandatory unless its directive is specific and clear);

In giving this statue the necessary strict construction, the Colorado appellate courts have made clear that it does not apply to all pretrial dismissals under C.R.C.P. 12(b). Rather, an award of attorney fees is appropriate under §13-17-201 only when the trial court dismisses an entire tort action pursuant to C.R.C.P. 12(b). *BSLNI, Inc. v. Russ T. Diamonds, Inc.,* 293 P.3d 598, 601 (Colo.App. 2012); *Dubray v. Intertribal Bison Co-op.,* 192 P.3d 604, 606-07 (Colo.App. 2008); *Robinson v. Colo. State Lottery Div.,* 179 P.3d 998, 1009 (Colo. 2008); *First Interstate Bank v. Berenbaum,* 872 P.2d 1297, 1302 (Colo.App. 1993) (section applies only when an action rather than single claim has been dismissed under C.R.C.P. 12(b)). Thus, the statute does not apply if a defendant obtains dismissal of some, but not all, of a plaintiff's tort claims. *Berg v. Shapiro,* 36 P.3d 109, 113 (Colo.App. 2001).

Here, it is undisputed that the trial court did not dismiss the Terranovas' entire action on the defendants' motion. To the contrary, while the Court did dismiss some of the claims, it declined to dismiss the Defendants' first claim for relief as to the allegations regarding the independent contractor status of Defendant Giordano, instead allowing the Terranovas to conduct limited discovery on that issue. After conducting that discovery, the Plaintiffs filed their own motion to voluntarily dismiss the remaining part of their first claim for relief.

Under these circumstances, the Colorado appellate courts have made clear that the above statute, by implication, allows a plaintiff to avoid the harsh penalty of C.R.S. §13-17-201 by seeking a voluntary dismissal of one or more of his/her claims. *Employers Ins. of Wausau v. RREEF USA Fund-II (Colorado), Inc.,* 805 P.2d 1186, 1188 (Colo.App. 1991); *Houdek v. Mobil Oil Corp.,* 879 P.2d 417, 425 (Colo.App. 1994); *see, also, Zerr v. Johnson,* 905 F. Supp. 872, 874 (D.Colo. 1995) (citing Colorado state case law to reverse an attorney fee award under C.R.S. §13-17-201 where the plaintiff confessed the Rule 12(b) motion and the parties signed a stipulation for dismissal).

The trial court's award of attorney's fees under this statute was also erroneous to the extent that its legal conclusion regarding the purported lack of willful and wanton conduct could be construed as a grant of summary judgment in

favor of the defendants. As expressly stated in the statute, it does not provide for an award of attorney's fees when a Rule 12(b) motion is converted into a motion for summary judgment. The trial court's legal conclusion of these factual allegations under the improperly employed standards of C.R.C.P. 12(b)(1) had the same effect as a grant of summary judgment.

Thus, for these reasons (as well as the fact that the underlying dismissal of claims was improper), the defendants were not entitled to an award of any of their attorney's fees under this statute. The Court should thus reverse the trial court's order granting them such an award.

V. CONCLUSION

WHEREFORE, Plaintiffs/Appellants Alex Terranova and Frederick Terranova respectfully request the Court to:

(a) reverse the trial court's dismissal of their second and third claims for relief, and the dismissal of Count I of their first claim for relief;

(b) reverse the trial court's award of the defendants' attorney's fees;

(c) grant them an award of their costs incurred on appeal; and

(d) Whatever further relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

WICK & TRAUTWEIN, LLC

This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original signed pleading is on file at the offices of Wick & Trautwein, LLC

By: */s/ Kimberly B. Schutt*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF was filed with the court via Integrated Colorado Courts E-filing System (ICCES) this 30th day of April, 2014, with a copy served on:

Thomas J. Lyons
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s/Jody L. Minch

[The original certificate of electronic service signed by Jody L. Minch is on file with the offices of Wick & Trautwein, LLC]