DISTRICT COURT, COUNTY OF SUPREME COURT, STATE OF COLORADO, COLORADO Court Address: Two Est 14th Avenue, Denver, CO 80203 CERTIORARI TO THE COURT OF APPEALS, 05CA1781, DISTRICT COURT, TELLER COUNTY, 02CV49	FILED IN THE SUPREME COURT MAR 10 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Petitioners: **TURENE LOMBARD and PUEBLO SCHOOL DISTRICT #60,** **Respondents:** **COLORADO OUTDOOR EDUCATION CENTER, INC., a Colorado Non-Profit Corporation, and SANBORN WESTERN CAMPS, INC., a Colorado Non-Profit Corporation, d/b/a THE NATURE PLACE.**	▲COURT USE ONLY▲
ATTORNEY(S): Name: Diane Vaksdal Smith, Regis. No.:14340 Attorneys For: Respondent Address: Burg Simpson Eldredge Hersh & Jardine, P.C. 40 Inverness Drive East Englewood, Colorado, 80112 Phone No.: (303) 792-5595 Fax No.: (303) 708-0527 E-Mail: dsmith@burgsimpson.com	Case No. 07SC166

RESPONSE BRIEF OF RESPONDENTS COLORADO OUTDOOR EDUCATION CENTER, INC. AND SANBORN WESTERN CAMPS

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The Defendants-Respondents, Colorado Outdoor Education Center, Inc., d/b/a The Nature Place, and Sanborn Western Camps, Inc., d/b/a The Nature Place, (collectively "Sanborn" or "Defendants"), by and through their attorneys, Burg Simpson Eldredge Hersh and Jardine, P.C., for their Response to the Petitioners' Opening Brief hereby state as follows:

I. ISSUES PRESENTED FOR REVIEW

Whether the Colorado Premises Liability Act, § 13-21-115, C.R.S., abrogates the common law principle of negligence per se in the premises liability context.

Whether courts may presume that landowners have knowledge of the particular provisions of building codes, or other similar codes, in a premises liability case.

II. STATEMENT OF THE CASE

In this case, Plaintiffs-Petitioners Turene Lombard and the Pueblo School District #60 (collectively referred to as "the Plaintiffs") sought to impose liability on Sanborn, based on the argument that Sanborn had constructive notice that internal ladders used on its premises had been constructed in violation of the Teller County Building Code. In response to Sanborn's Motion for Summary Judgment, Plaintiffs adduced no other basis to establish that Sanborn "knew or should have known" of the condition, since the ladders had been constructed in the

1980's, approved for use by the Teller County Building Commission, and thereafter used without incident. Indeed, the record shows that in 17 years after this ladder was constructed, and in the 15-20 years after construction of the other 43 ladders used on the property, Sanborn had not received a single report, incident, complaint or comment about the ladders used at the Outdoor Education Center. That changed after Ms. Lombard came to stay at the Center.

On February 22, 2002, Plaintiffs filed suit against Sanborn, asserting claims for negligence, negligence *per se*, and subrogation. On October 21, 2004, Sanborn filed a Motion to Dismiss. Sanborn argued that the Premises Liability Statute ("the PLA"), C.R.S. § 13-21-115, provided the sole means of recovery for the Plaintiffs' claims and, therefore, the complaint failed to state a claim under C.R.C.P. 12(b)(5). After briefing, the trial court denied the Motion to Dismiss, conditioned on the Plaintiffs' filing of an Amended Complaint to state a claim for relief under the PLA.

On December 3, 2004, Plaintiffs filed the Joint Amended Complaint and Jury Demand. The Amended Complaint added claims for premises liability, but also reiterated the claims for subrogation, negligence, and negligence *per se*. Sanborn again moved to dismiss the negligence and negligence *per se* claims.

After briefing, the trial court granted the motion to dismiss the negligence and negligence *per se* claims, leaving only the premises liability and subrogation claims to be decided.

On June 2, 2005, Sanborn moved for summary judgment with respect to the remaining claims. ROA, Vol. III, pp 335-415. Ms. Lombard opposed Sanborn's motion and filed a cross-motion for summary judgment, asserting that judgment should be entered in her favor. *Id.,* pp. 434-615.

On July 12, 2005, the trial court granted summary judgment in favor of Sanborn, declaring that "[t]he Court is satisfied that based upon the Defendants' motion and the supporting affidavit, the Defendants have met their initial burden of showing the absence of a disputed issue of fact." The Court then shifted the burden of production to the Plaintiffs, to show "the existence of a triable fact." *Id.* The trial court concluded that Ms. Lombard had not met her burden, stating:

> Whether the property was constructed in accordance with the building code is irrelevant, unless Defendants knew or should have known of that violation. While the fact that the Teller County Building Department approved the construction is not dispositive, it certainly supports the Defendants' arguments. In addition, the undisputed fact that the ladder was used without incident for 17 or more years is further support. The Court concludes that consistent with the *Casey* and *Thewlis* cases the Plaintiffs have failed to demonstrate any

> evidence that the Defendants knew or should have known of the alleged dangerous condition....

ROA, Vol. IV, p. 742.[1]

After the trial court denied a motion for reconsideration, Ms. Lombard and the Pueblo School District appealed to the Colorado Court of Appeals. The Court of Appeals affirmed, describing the issues as follows:

> [W]hether a violation of an applicable building code provision on a premises, without more, can constitute a dangerous condition about which the owner actually knew, or should have known, such that the owner is liable under §13-21-115, C.R.S. 2006, for personal injuries sustained by an invitee. Or, put another way, can negligence *per se* based on the violation of an applicable building code provision in the construction of a premises, without more, establish liability under § 13-21-115?

2007 Colo. App. LEXIS 98, *5.

The Court of Appeals concluded that without more, a premises liability claim could not be substantiated: "we conclude here that the common law principle of negligence *per se* is abrogated in the premises liability context by § 13-21-115." *Id.*, *15.

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[1] All record cites herein are to the Record on Appeal presented to the Court of Appeals.

Plaintiffs now seek review of the Court of Appeal's affirmation of the trial court's order dismissing the claims on summary judgment.

III. STATEMENT OF FACTS

Sanborn owns and operates the Sanborn Western Camps in Florissant, Colorado. The Camp has within its borders a separate boys camp, girls camp, and outdoor education center. On February 26, 2000, the Pueblo School District # 60 held a retreat at the Camp. During the retreat Ms. Lombard slipped and fell as she was attempting to descend a loft ladder, which was located in a building used by visitors to the outdoor education center.

Ms. Lombard was staying in Unit 25. The building where Unit 25 is located was built between 1981 and 1983. The loft ladder is a fixed ladder, attached at the top and the bottom, with carpeted rungs to be used for access to the loft area of Unit 25. Accommodations for guests to sleep, cook, or use the facilities are on the main floor area. At the time, the loft ladder in Unit 25 was exactly the same as it was when the Unit was built and approved for occupancy by the local building department. Unit 25 was built according to plans (showing the exact loft ladder at issue in this case) that were designed and drawn by an architectural designer and approved by the local building department. The Unit was inspected and a

certificate of occupancy issued for the unit (with the loft ladder as shown on the plans) upon the completion of construction.

During the 17 years between construction of Unit 25 and Ms. Lombard's fall, hundreds of guests have stayed in the Unit, using the loft ladder without incident. The same loft ladders for access to unit lofts are used in 10 buildings with 44 units (total), all designed, built, approved by the local building department and used without incident for the 15-20 years leading up to Ms. Lombard incident.

Due to the use of these loft ladders by thousands of guests for nearly twenty years without incident, Sanborn understood that the loft ladders were safe for use by its guests. At no time prior to the alleged Lombard incident did anyone ever advise the camp that the loft ladders did not or might not meet the building code, nor did anyone ever raise any issues regarding the safety of the loft ladders. The camp was not aware that there was a question as to whether the ladder met the building code or that there were any safety concerns until this case.

IV. SUMMARY OF THE ARGUMENT

These claims arise from alleged injuries sustained on real property owned and operated by Sanborn: thus, the only potential claim available to Ms. Lombard

is under the Colorado Premises Liability Act, C.R.S. § 13-21-115. She can only prevail under the PLA if she can prove that her alleged damages were "caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known." C.R.S. § 13-21-115(3)(c)(I).

The Court of Appeals properly held that without evidence of the landowner's state of knowledge, a violation of a building code alone is insufficient to impose liability under the PLA. Contrary to the Plaintiffs' argument, this holding does not immunize a landowner from all liability nor does it create a shield for landowner irresponsibility as to the safety of its premises. Instead, the decision of the Court of Appeals properly follows the requirements of the PLA, which permits the imposition of liability only under the standards established by the Act.

Sanborn respectfully requests that the Court hold that the PLA abrogated the common law doctrine of negligence *per se* in the premises liability context. This Court has previously ruled that the PLA "preempts prior common law theories of liability." *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004). To hold that a violation of a building code constitutes negligence *per se* for purposes of attaching

liability under the PLA would be contrary to the plain language of the PLA and this Court's holding in *Vigil*. Indeed, it would be equivalent to imposing strict liability for any and all injury, rather than limiting landowner liability as provided for in the act.

Further, Sanborn asks the Court to hold that courts may not presume that landowners have knowledge of the particular provisions of building codes, or other similar codes, in a premises liability case for purposes of determining whether the landowner knew or should have known of a dangerous condition. Contrary to Plaintiffs' arguments, there would still be incentives for a landowner to inspect his or her land, because failure to do so might cause liability to attach under the PLA, for intentionally induced ignorance.

In the final analysis, the decision of the trial court turned on the simple fact that when Sanborn moved for summary judgment, Ms. Lombard failed to meet her burden to show a genuine issue of material fact sufficient to defeat the motion. Instead, Plaintiffs relied solely on alleged violations of the Teller County Building Code. The Plaintiffs did not offer any evidence that the landowner knew or should have known of an alleged dangerous condition. The trial court's order

dismissing the Plaintiffs' claims was correct on this basis, as was the Court of Appeals' decision.

For these reasons, Sanborn respectfully requests that the Court affirm the decision of the Court of Appeals.

V. ARGUMENT

A. Standard of Review

An order granting summary judgment is subject to *de novo* review. *Morrison v. Goff,* 97 P.3d 921, 924 (Colo. 2004). In order to determine whether the trial court correctly resolved the motions for summary judgment here, it is necessary for the Court to determine whether a negligence *per se* claim may be brought under the PLA under well established principles of statutory construction.

In construing a statute, the Court must give effect to the intent of the General Assembly, looking first to the statute's plain language. *Vigil,* 103 P.3d at 327. Statutes in derogation of the common law must be strictly construed, "so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication." *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997). "[W]hen the legislature speaks with exactitude," the Court "must construe the statute to mean

that the inclusion of specification of one particular set of conditions necessarily excludes another." *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995).

B. The Premises Liability Act Abrogated the Common Law Claim of Negligence *Per Se*.

1. The Background and Purposes of the PLA

Any analysis of the issues in this case must begin with the recognition of the scope of the changes to the law of premises liability over the past decades, which culminated in the adoption of the Premises Liability Act ("PLA"). "No area of tort law was affected more by the 1986 legislative [tort] reforms than was premises liability. Decades of evolution in the common law were swept aside by 1986 House Bill 1205 [the premises liability statute]." 7 John W. Grund & J. Kent Miller, *Colorado Personal Injury Practice - Torts and Insurance*, § 19.1, at 310 (2d. Ed. 2000).

The express, unambiguous language of the PLA "evidences the General Assembly's intent to establish a comprehensive and exclusive specification of the duties landowners owe to those injured on their property." *Vigil,* 103 P.3d at 328. The language demonstrates the legislative intent "to completely occupy the field and supercede the existing law in the area." *Id.*

As set forth in the statute, "its purpose is to protect landowners from liability in some circumstances when they were not protected at common law and to define the instances when liability will be imposed." C.R.S. § 13-21-115(1.5)(d). "The overriding purpose of the premises liability statute is to clarify and to narrow private landowners' liability to persons entering their land, based upon whether the entrant is a trespasser, licensee, or invitee. § 13-21-115(1.5). General negligence law would not provide such protection." *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219 (Colo. 2002).

Accordingly, as demonstrated in cases decided by the Court of Appeals, injured parties are only permitted to recover from a landowner as specifically provided in the PLA. In *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 613 (Colo. App. 2003), in a slip and fall negligence action construing scope of "landowner" under premises liability statute, the Court of Appeals explained that "premises liability act . . . provides the exclusive remedy against a landowner for injuries sustained on the landowner's property." (Citations omitted.) In *Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999), the Plaintiff brought a negligence claim for injuries suffered. The Court of Appeals noted that "plaintiff may recover against a landowner only pursuant to . . . premises liability statute[] and not under

any other theory of negligence, general, or otherwise." In *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 367-68 (Colo. App. 1996), the Court of Appeals affirmed a summary judgment against the plaintiff because "the standards of care for landowners set forth in [premises liability statute] apply in any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property." *See also, Calvert v. Aspen Skiing Co.*, 700 F. Supp. 520, 522 (D. Colo. 1988) (premises liability statute "abrogates all common law claims for negligence"); *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1461 (D. Colo. 1997) ("Language [in subsection (2)] is unambiguous . . . that [a] plaintiff may recover against [a] landowner . . . only pursuant to that statute and not under any other theory of negligence, general or otherwise.").

The Court must determine the Plaintiffs' claims against this backdrop.

2. The PLA Abrogates the Common Law and Does Not Permit Liability to be Imposed under a Negligence *Per Se* Theory.

Plaintiffs argue that the legislature made no reference to eliminating negligence per se (Opening Brief, p. 18), but this is not the standard to be applied. As this Court found in *Vigil*, the language used evidences the intent to completely

occupy the field. 103 P.3d at 328. It seems self-evident that if a person injured on private property cannot bring a simple negligence claim because it is abrogated by the PLA, *see, e.g., Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999), *cited with approval in Vigil*, 103 P.3d at 329, then clearly a negligence *per se* claim must also be preempted.[2] As this Court recognized in *Vigil*, "[b]y using the language 'any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another,' the General Assembly indicated its intent to completely occupy the field and supercede the existing law in the area." 103 P.3d at 328. As this Court further explained, "when the General Assembly used the language, 'only as provided in subsection (3),'" it reiterated its intent to be comprehensive and exhaustive. This language, coupled with the precisely drawn landowner duties in subsection (3), leaves no room for application of common law tort duties." *Id.* While not stated in *Vigil*, the logical extension of that case is to find that the negligence *per se* claim is abrogated.

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[2] As the District Court recognized in *Neiberger v. Hawkins*, 208 F.R.D. 301, 310 (D. Colo. 2002), "[p]laintiffs may not receive through a negligence *per se* claim what they could not receive by bringing a direct claim under the statute.

Petitioners attempt to avoid the clear rational of *Vigil*, by arguing that "[n]egligence *per se* 'does not create a duty owed by a landowner,'" Opening Brief at 18, but this argument is not supported by either law or good sense. At common law, the existence of a duty was a question of law to be determined by the trial court.

> "The question of whether a defendant owes a plaintiff a duty to act to avoid injury is a question of law to be determined by the court." *Smith v. City & County of Denver*, 726 P.2d 1125, 1127 (Colo. 1986); *see also Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980). "The court determines, as a matter of law, the existence and scope of the duty -that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." *Kulik*, 621 P.2d at 317.

HealthONE v. Rodriguez, 50 P.3d 879, 888 (Colo. 2002).

In the context of a negligence *per se* claim, a "violation of a statute or rule, is ... one means of establishing that the individual owed a duty of care and breached that duty." *Hesse v. McClintic*, 2008 Colo. LEXIS 2 (Colo. 2008), *citing Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 78 (Colo. 1998); *accord City of Fountain v. Gast*, 904 P.2d 478, 480 (Colo. 1995); *Yampa Valley Elec. Ass'n v. Telecky*, 862 P.2d 252, 257-58 (Colo. 1993). In order to determine whether a negligence *per se* claim may be asserted, the court must decide whether

a duty exists. That is, the court must determine if "the defendant's actions are in violation of a statute enacted for the public's safety, and where it is established that the violation of the statute proximately caused the plaintiff's injury." *Lyons v. Nasby*, 770 P.2d 1250, 1257 (Colo. 1989). Moreover, the plaintiff "must also show that he or she is a member of the class of persons whom the statute was intended to protect and that the injuries suffered were of a kind that the statute was enacted to prevent." *Canape v. Petersen*, 897 P.2d 762, 764 (Colo. 1995).

This determination of a duty under the negligence *per se* claim is wholly inconsistent with the PLA. When presented with a premises liability claim, the only issue of law to be determined by the trial court is the status of the injured plaintiff. "[A] judge's common law obligation to determine the existence of landowner duties is inconsistent with the limited role the statute assigns the judge, and would impermissibly enlarge the role of the court beyond that indicated in the statute's plain language." *Vigil*, 103 P.3d at 328. Under the PLA, once the plaintiff's status is determined, the level of duty owed is established.

If the plaintiff is an "invitee," then a landowner is liable only if the plaintiff shows an "unreasonable failure to take reasonable care" as required by C.R.S. § 13-21-115(3)(c)(I). If a negligence *per se* claim is permitted, which it should not

be, the plaintiff would not have to show an unreasonable failure to do or not do anything. If Plaintiffs' arguments were permitted, then landowners would be held to a standard of strict liability, rather than the standard of care expressly permitted by the statute. This conflict demonstrates why the negligence *per se* claim is not permitted - it imposes on the landowner a standard of care far different and far broader than provided for in the statute.

Plaintiffs mistakenly argue that if negligence *per se* claim is not permitted, then the PLA will abrogate state and local protections for the health and safety of the public. This argument ignores the duties imposed by the Act. The PLA does not permit a landowner to close his eyes to a dangerous condition on the property or to pretend that it does not exist. "The requirement that a [party] use due diligence in discovering the relevant circumstance or event imposes an objective standard and does not reward denial or self-induced ignorance." *Sulca v. Allstate Ins. Co.,* 77 P.3d 897, 900 (Colo. App. 2003). If the danger is one that the landowner knew of or should have known, then landowner is responsible for the dangerous condition, whether or not it is in violation of a building code. However, the existence of a building code violation, without more, does not say

anything about the landowner's knowledge of the dangerous condition as is required under the Act.

The Plaintiffs' argument that the duty owed to an invitee under the PLA is the same duty as owed in a negligence claim, is not supported by language of the statute. A negligence claim permits the imposition of liability for any failure to exercise reasonable care. *United Blood Services v. Quintana,* 827 P.2d 509, 523 (Colo. 1992). Under the PLA, a landowner is liable only for "an unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.." C.R.S. § 13-21-115(3)(c)(I). As the Court of Appeals observed, "the phrase [unreasonable failure] makes the statement more emphatic and may serve to narrow those dangerous conditions about which a landowner 'knew or should have known.'" 2007 Colo. App. LEXIS 98, *15. Indeed, it is difficult to conceive how the PLA, with its stated purpose of narrowing landowner liability, could be so convoluted as to permit a negligence *per se* claim against a landowner for the "unreasonable failure" to take reasonable care to protect against a dangerous condition that the landowner is presumed to but did not actually know to exist.

C. Courts Should Not be Permitted to Presume that Landowners Have Knowledge of the Particular Provisions of Building Codes, or other Similar Codes, in a Premises Liability Case.

Plaintiff Turene Lombard was an "invitee," as that term is defined in the PLA. Accordingly, the standard of care Sanborn owed to her under the statute is "the unreasonable failure to exercise reasonable care to protect against dangers of which [the landowner] actually knew or should have known." C.R.S. § 13-21-115(3)(c)(I).

Plaintiffs argue that the "knew or should have known standard" is satisfied by the showing of an alleged violation of the Teller County Building Code, but it is not. The fundamental flaw in this argument is that a violation of the code (if it exists) is equivalent to presumptive, rather than actual notice or knowledge of a dangerous condition. [3]

As the Court of Appeals explained, "[n]egligence *per se* is premised on constructive, not actual, notice of the requirements of a statute, ordinance, code, or regulation. *See, e.g., Hecla Min. Co. v. New Hampshire Ins. Co., supra.*" In contrast, the phrase ""should have known' has historically been used in conjunction with 'know' or 'knowledge' to create an objective standard to avoid

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[3] In Plaintiff Lombard's Cross Motion for Summary Judgment, she argued only constructive knowledge and not actual knowledge. ROA, Vol. III, p. 443, ¶ 5.

denial of apparent facts or intentionally induced ignorance." 2007 Colo. App. LEXIS 98, *16-17. "The requirement that a plaintiff use due diligence in discovering the relevant circumstance or event imposes an objective standard and does not reward denial or self-induced ignorance." *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 900 (Colo. App. 2003). This standard requires the party to have "knowledge of facts which, in the exercise of proper prudence and diligence, would enable him or her to discover the facts underlying the claim." *McGee v. Hardina*, 140 P.3d 165, 167 (Colo. App. 2005).

The difference between the negligence *per se* standard and the PLA standard of "knew or should have known" is demonstrated by a simple example. If the Plaintiffs' standard were applied, the owner of a large commercial skyscraper in downtown Denver would be held to have knowledge of an electrical wiring problem behind a wall if it caused a fire that injured persons on the property, regardless of the owner's knowledge of the defect. Even if buried behind a wall, the owner would be liable for negligence *per se* if the wiring problem violated the Uniform Building Code. This is wholly inconsistent with the PLA standard, which limits, rather than expands, liability to those situations where the landowner's liability is conditioned on knowledge of the danger.

In this case, the building department approved the plans for and the ladders as constructed. The approval does not eliminate Sanborn's liability. However, in the 17 years after this ladder was constructed, and in the 20 years that the 43 other identical ladders were constructed, Sanborn did not receive one single complaint or concern about the ladders. Sanborn had no basis to know that the ladders were dangerous and nothing that should have made Sanborn inquire whether the ladder violated any code provision.

Plaintiffs argue that a "landowner is legally obligated to know what the provisions of the area building code require" pursuant to C.R.S. § 30-28-209. Opening Brief, p. 23. However, that statute deals with the remedies permitted by statute for a violation of a county building code. It does not establish a legal obligation for anyone, other than perhaps the enforcement authorities, to know what the building code requires and it does not serve as the basis for a private right of action. *Board of County Comm'rs v. Moreland*, 764 P.2d 812, 817 (Colo. 1988).

Plaintiffs' argument arises from the historical context in which people are presumed to know the law. The adage that "ignorance of the law is no excuse", comes from the context of being prosecuted or fined by the government for

violating the law. It is an evidentiary tool, used and accepted so that in every case ever brought the government does not have to prove that the defendant knew the law that he or she was being charged with violating. Respondents do not challenge this age old proposition.

If the State charged Sanborn with a violation of the building code, then of course they would be presumed to know the law, and ignorance of the law would be no excuse. But that is an entirely different situation from the one before this Court, where the question is whether knowledge of the building code should be imputed for purposes of proving liability under the premises liability act, when only civil litigants are involved.

Furthermore, this argument changes the question on which the Court granted certiorari. The question they are answering is whether *builders* may be presumed to have knowledge of the building code, or other similar codes, in a premises liability case. (Opening Brief, p. 31) However, the question on which the Court granted certiorari is whether *landowners* may be presumed to have knowledge of the building code, or other similar codes, in a premises liability case. This makes perfect sense, since a premises liability case by its very nature asks the question of whether the owner of the land, not the builder of a structure on the

land, should be liable. It is simply not possible for each and every landowner to be charged with notice of the building code requirements in a civil lawsuit, particularly in light of the purpose of the Act.

Plaintiffs' argument that the use of the building code as evidence of the standard of care should be rejected by this Court. First, that issue is not reasonably within either of the issues upon which this Court granted *certiorari*. Moreover, Plaintiffs never offered their expert testimony as "evidence of the standard of care" as they now argue here. Opening Brief, at pp. 20-29. In Plaintiff Lombard's Response to Defendants' Motion for Summary Judgment and Plaintiff Lombard's Cross-Motion for Summary Judgment, Ms. Lombard argued only that the Defendants' conduct constituted negligence *per se* and that the District Court should enter summary judgment in the Plaintiffs' favor. Likewise, Plaintiffs made the same arguments in the Motions for Reconsideration in the trial court and in the briefing before the Court of Appeals.

D. In the Final Analysis, the Trial Court Correctly Granted the Motion for Summary Judgment, Because Plaintiffs Failed to Demonstrate the Existence of a Genuine Issue of Material Fact to Support the Premises Liability Claim.

Plaintiffs offered not one single shred of evidence to show that Sanborn actually knew that the ladder was a dangerous condition: Plaintiffs only argued constructive notice. ROA, Vol. III, p. 443, ¶ 5. It is undisputed that at the time of Ms. Lombard's alleged incident, the loft ladder in Unit 25 was exactly the same as it was when the Unit was built and approved by the local building department. ROA, Vol. III, p. 352, ¶ 5. Unit 25 was built according to plans (showing the exact loft ladder at issue in this case) that were designed and drawn by an architectural designer and approved by the local building department. The Unit was inspected and a certificate of occupancy issued for the unit (with the loft ladder as shown on the plans) upon the completion of construction. ROA, Vol. III, p. 352, ¶ 6; ROA, Vol. III, p. 354 (Certificate of Occupancy). Sanborn has never been advised of any building code problems since that time. *Id.*

It is also undisputed that not one person has ever injured themselves while climbing up or down the loft ladder in the 17 years since this particular ladder was built. It is also undisputed that Sanborn never received a single report of any incident, accident, injury, or any other problem relating to the use or condition of

the loft ladder. ROA, Vol. III, pp. 352-53, ¶¶ 8-14; ROA, Vol. III, pp. 355-58, Nos. 15.1, 11.2, and 16.1.

Indeed, thousands of individuals visited the camp over the 15 to 20 years in which the loft ladders have been in existence and never have there been any reported incidents, accidents, injuries or problems after the certificate of occupancy issued which would have triggered a dutiy to inquire. *Cf. Singleton v. Collins*, 574 P.2d 882, 883 (Colo.App. 1978) (approval for occupancy by the building inspector, indicates compliance with applicable ordinances). Sanborn reasonably believed that the loft ladder was safe, Vol. III, p. 353, ¶ 14. There simply was no basis or reason for Sanborn to question whether the loft ladder was in an allegedly dangerous condition at the time the ladder was built or at any time thereafter. Given the dearth of evidence, the Plaintiffs cannot establish Sanborn's liability under C.R.S. §13-21-115(3)(c)(I), because the Plaintiffs cannot show that Sanborn "knew or reasonably should have known" that the ladders constituted a dangerous condition.

In *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo.App. 1996), the Court of Appeals opined on the standard for determining whether a property owner is not liable, if it is shown that the property owner had no actual

notice of the dangerous condition. *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1461-62 (D. Colo. 1997).

In *Casey*, the plaintiff alleged that she was injured while a guest at Christie Lodge when a storage door under a bunk bed opened and struck her in the shin as she was walking by. She claimed the storage door was a dangerous condition that the defendant knew existed or should have known existed. In its Motion for Summary Judgment, defendant Christie Lodge referenced and attached deposition testimony and responses to discovery which confirmed that there had never been any reported incidents at Christie Lodge of bunk bed storage doors opening on their own, that they had never had a problem with the storage doors falling open and that there had never been an accident at Christie Lodge similar to that alleged by plaintiff. *Id.* at 366.

The trial court held – and the Colorado Court of Appeals agreed – that the evidence submitted by Christie Lodge satisfied its initial burden of production on the issue of whether it knew or should have known of a danger relating to the storage doors and therefore, the burden shifted to the plaintiff to establish a genuine issue of material fact. *Id.* at 366-367. The Court of Appeals concluded as a matter of law that the plaintiff had not satisfied her burden to establish a genuine

issue of material fact and affirmed the trial court's grant of summary judgment in favor of Christie Lodge. *Id.* at 367.

The Court rejected the plaintiff's argument that the evidence that Christie Lodge had installed two "latches" or "catches" on the storage doors in question approximately two months earlier raised a genuine issue of material fact as to whether the repair was adequate. The Court reasoned:

> This argument might be persuasive had there been any evidence of a prior accident involving the storage doors, of the storage doors falling open, or of some other basis by which Christie either knew or should have known of a danger associated with the storage doors. It also might have merit if plaintiff had adduced any evidence that the reason for repair of the door catches had anything to do with the storage door falling open, that the replacement catches were themselves defective, or that their installation was substandard.
>
> However, plaintiff presented no such evidence. Indeed, as indicated in the trial court's order, plaintiff failed to correlate the repair to any evidence that Christie knew or should have known of a danger associated with the doors. The trial court concluded there was "no support for the conjecture that [Christie] should have known of the danger."

Id. With the dearth of any evidence of prior problems, summary judgment was properly granted.

Likewise, in *Sofford*, the United States District Court applied the standard established in *Casey*, and granted summary judgment because the plaintiff failed to show that the property owner knew or should have known of the dangerous condition. There, the plaintiff claimed to have suffered injury when struck by a falling ceiling grid in an elevator. However, the evidence showed that no one had been injured in the elevator in that fashion, or any other, in the 30 years preceding the plaintiff's injuries. The evidence also showed that no one had "noticed anything amiss" in the elevator. *Id.*, 954 F. Supp. 1462.

In a similar case, *Thewlis v. Munyon*, 1994 Ohio App. LEXIS 712 (Ohio Ct. App. 1994),[4] the plaintiff's experts there determined the stairway on which plaintiff fell did not meet the applicable building code and presented an unreasonable hazard. The Court held that summary judgment was nevertheless appropriate in favor of the church/landowner.

In that case, the plaintiff argued that the church had constructive knowledge of the dangerous condition because the deviations of the building code existed for more than four years. The Court rejected the plaintiff's argument, holding, *inter*

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[4] Ohio courts permit reliance by other courts on unpublished decisions. *See e.g., Wagner v. Armbruster*, 108 Ohio App. 3d 719, 726 (Ohio App. 1996).

alia, that "given the years of extensive and safe use of the stairway, the church had no indication that the building code deviations existed or created an unreasonably dangerous condition." *Id.* at. *9. As the court explained in *Thewlis*,

> evidence of the existence of an unreasonably dangerous condition does not by itself establish that a premises owner breached a duty to an injured invitee. Instead, the invitee must additionally establish that, at the time of the injury, the premises owner knew or should have known of the unreasonably dangerous condition before a breach of the duty may be found.

Id., at *7. This is the same analytical framework used under the PLA.

Here, as in *Casey and Sofford*, the Plaintiffs failed to offer any evidence to show that the landowner knew or should have known of a dangerous condition, because there were no prior incidents involving the ladder. Further, as in *Thewlis*, the opinions of the Plaintiffs' retained experts, that the ladder does not meet code or an ANSI Standard, are irrelevant because Sanborn had no knowledge of danger. Sanborn did not have any notice of any code violations in the 17 years since the loft ladder was built, in accordance with the plans submitted to and approved by the Building Department. Additionally, in the 17 years of use, Sanborn never had a single report of any incident, accident, injury or any other problem related to the use of the ladder. ROA, Vol. III, pp. 352-53, ¶¶ 8-14. Here, the Plaintiffs cannot

correlate arguments about code violation to any evidence that Sanborn knew or should have known that the loft ladder was dangerous. As in *Casey*, there is "no support for the conjecture" that Sanborn "should have known of the danger." The trial court properly resolved this issue, in granting Sanborn's motion for summary judgment, the Court of Appeals affirmed that order, and Sanborn respectfully requests this Court to once again affirm the order.

VI. CONCLUSION

The purpose of the PLA is to narrow and limit those instances in which a landowner may be held liable for injuries to persons coming on the land. Plaintiffs failed to meet the standard required under C.R.S. § 13-21-115(3)(c)(I), because Plaintiffs could not show that Sanborn unreasonably failed to exercise reasonable care to guard against a dangerous condition about which Sanborn knew or should have known. Plaintiffs attempted to fill that evidentiary gap by arguing that knowledge could be presumed by way of the negligence *per se* theory of liability. Neither the trial court nor the Court of Appeals agreed.

This Court should affirm those rulings and hold that the PLA abrogates the common law theory of negligence *per se*. This Court should further hold that

landowner knowledge of a building code violation should not be presumed, because that would violate the requirements of the PLA.

Respectfully submitted this 10th day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2008, a true and correct copy of the foregoing **RESPONSE BRIEF OF RESPONDENTS COLORADO OUTDOOR EDUCATION CENTER, INC. AND SANBORN WESTERN CAMPS** was electronically filed via Justicelink and/or placed in the United States mail, first class postage prepaid, addressed as follows:

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