<table>
<tr><td>COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Crowley County District Court, County of Crowley;
The Honorable Michael Schiferl,
Case No. 08 CV 25</td><td rowspan="2">

△ COURT USE ONLY △</td></tr>
<tr><td>JOHN E. SCHWARTZ
In Behalf of His Minor Grandchildren
CODY L. SCHWARTZ and
JACOB W. SCHWARTZ
Plaintiff-Intervener-Appellee,

v.

The Colorado Department of Transportation,
Defendant-Appellant.</td></tr>
<tr><td>Lee N. Sternal
Reg. #0899
414 West 9th Street
Pueblo, CO 81003
Tele.: (719) 545-9746
Fax: (719) 545-1122
Attorney for Plaintiff-Intervener-Appellee</td><td>Case Number: 10 CA 0204</td></tr>
<tr><td colspan="2">AMENDED ANSWER BRIEF
OF PLAINTIFF-APPELLEE SCHWARTZ</td></tr>
</table>

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

RULE 28 REQUIRED STATEMENT RE: STANDARD OF REVIEW AND PRESERVATION FOR APPEAL 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. THE TRIAL COURT PROPERLY DETERMINED THAT GOVERNMENTAL IMMUNITY HAS BEEN WAIVED 12

II. THE "BUT FOR" TEST FOR LIABILITY HAS NO PLACE IN A RULE 12(b) JURISDICTION CHALLENGE 15

III. THIS IS A PROPER CIRCUMSTANCE FOR AN AWARD OF ATTORNEY FEES TO APPELLEE SCHWARTZ 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases — *Pages*

City of Littleton v. State,
832 P.2d 985 (Colo. App. 1991)............20

Colo. City Metro District v. Graber & Son's Inc.,
897 P.2d 874 (Colo. App. 1995)............20

DeCordova v. State,
878 P.2d 73 (Colo. App. 1994)............18

Hallam v. City of Colorado Springs,
914 P.2d 479, 483 (Colo. 1995)............15

Medina v. State,
35 P.3d 443 (Colo. 2001)............1,10, 12, 13, 14, 15, 16

State v. Moldovan,
842 P.2d 220 (Colo. 1992)............16

Swieckowski v. City of Fort Collins,
934 P.2d 1384-80 (Colo. 1997)............14

Tidwell v. City & County of Denver,
83 P.3d 75 (Colo. 2003)............1, 17, 18

Walton v. State,
968 P.2d 636 (Colo. 1998)............10

STATUTES AND AUTHORITIES

C.J.I 9:19............16

C.R.C.P. 12(b)(1)............2, 15, 17, 18, 20

C.R.S. 13-17-102............19

C.R.S. 24-10-103............11

C.R.S. 24-10-108............20

C.R.S. 24-10-114............18

C.R.S. 24-120-106............17

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

It contains 4437 words and does not exceed 30 pages.

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

It contains, under a separate heading, a statement concerning the standard of review and appeal preservation for appeal.

/s/ Lee N. Sternal (original signature on file)

STATEMENT OF THE ISSUES

I. **DOES ESTABLISHING JURISDICTION TO ASSERT CLAIM UNDER THE GOVERNMENT IMMUNITY ACT REQUIRE PROOF OF LIABILITY?**

II. **DID THE TRIAL COURT PROPERLY RESOLVE THE JURISDICTIONAL QUESTION BY FINDING THAT GOVERNMENT LIABILITY WAIVER IS NOT SUBJECT TO THE "BUT FOR" STANDARD OF PROXIMATE CAUSE?**

III. **IS THIS A PROPER CIRCUMSTANCE TO AWARD ATTORNEY FEES AGAINST THE STATE?**

STATEMENT OF THE CASE

The legal issues raised by this appeal have already been decided by our State Supreme Court in **Medina v. State**, *35 P.3d 443 (Colo. 2001)* and **Tidwell v. City & County of Denver**, *83 P.3d 75 (Colo. 2003)*. Nevertheless, as to the pertinent facts of this matter, it is uncontroverted that John W. Schwartz, the father of four, died on April 15, 2008 because a fire had destroyed state highway 96 bridge L-21-U near Ordway Colorado.

It is also uncontroverted that bridge L-21-U had been constructed of creosote treated timber and although put into service in 1937, its wood construction was not at all obvious to persons traveling upon its asphalt and steel guard rails demarked

surface. It was acknowledged that Bridge L-21-U did not commence its service with accumulated tumbleweeds packed under its east span.[1] The jurisdictional issue was whether governmental immunity had been waived by a dangerous fire hazard condition having been allowed to exist because the recommended maintenance of removing the tumbleweeds packed under its east end had been ignored and those tumbleweeds provided the fuel that caused the bridge to burn.

It was over the objection of Schwartz that the court granted CDOT's motion for the evidentiary hearing that was held on January 6, 2010. The witnesses that testified at that hearing included the actual authors of most of the exhibits which had been utilized by Schwartz in his successful resistance to CDOT's ***Rule 12(b)(1)*** motion to dismiss which order is the subject of CDOT's appeal. The attorney general's "Statement of the Case" however, omits mention of much of the relevant testimony adduced from its own witnesses at that "evidentiary" hearing. Any fair evaluation of that testimony quickly discerns the many factual disputes that were presented to the trial court.

Carl Miller testified that he was going west on Highway 96 and drove his truck into the ravine because the east end of the bridge was completely burned

[1] See the April 23, 2009 deposition of Gerald Hoefler at p. 7, lines 16-21. R-223

away (R-791 lines 3-5).[2] The east end of the bridge had been the specific location that had been cited in all bridge inspection reports since the year 2000 inspection as requiring maintenance in the form of tumbleweed removal.

Bret Ellis, the CBI agent with the job title of fire investigator, testified that the tumbleweeds noted in the various bridge inspection reports under span number 2 "were a contributing factor for the spread of a fire" (R-818 lines 23-24). The formal investigation report of Mr. Ellis, at page 7 specifically declares:

> "Once the fire traveled to this bridge, the RA determined that the years of accumulated dry vegetation below the bridge in the drainage ravine had been burning and therefore ignited the wooden bridge supports which caused the bridge to be severely weakened by the fire and has resulted in the bridge collapse" (R-823 lines 8-12).

Agent Ellis was subsequently asked the question:

> "Would you agree, agent Ellis, that if, in fact, there were years of trapped stacked tumbleweeds underneath that bridge, that contributed to this bridge burning?"

To which his answer was:

---

[2] The court reporter's transcript of that January 6, 2010 hearing comprises of 241 consecutively numbered pages. References made in this Answer Brief, however, in compliance with Rule 28, are to the electronic assigned "R" page numbers.

> "It is a contributing factor, yes, sir" (R-828
> lines 4-7).

During cross examination by First Assistant Attorney General Haines, agent Ellis acknowledged that he had inferred that there was "a fuel load of tumbleweeds under the bridge at the time the fire came along" (R-832 line 20-23). Agent Ellis' report was admitted as exhibit 3 through 3-10A. (R-210 to 218)

Albert Riemenschneider owns the land both north and south of where bridge L-21-U had been. He acknowledged that the only weed condition that would have concerned him would have been if the weeds were actually blocking the channel where the water would be expected to flow (R-879 lines 7-19). He also acknowledged he does not remember what the conditions were in respect to weeds underneath the ends of the railroad bridge which was just to the north of bridge L-21-U (R-880 lines 8-12) and which also burned.

Walter Chapman, who was the fire chief of the Ordway volunteer fire department and a member of the Ordway volunteer fire department for 31 years, testified that if there had been tumbleweeds under the highway bridge they "would have contributed to the burning of the bridge" (R-889 lines 6-9). It was also Mr. Chapman's opinion that if the weed fire had been 30 feet away from the bridge it would not have been hot enough to start the bridge on fire (R-889 line 21-25).

The photographs taken by news reporter, Susan Piper, showed the flames clearly burning at the south side of the east end of the bridge and that it was the east end that had more of the flames (R-914, line 13 through R-915). CDOT exhibit 8 was identified by Ms. Piper as a photograph taken by her, which shows a utility pole that was still standing but with its bottom portion burned away. Ms. Piper agreed that condition had been caused by some heat source that had only affected the lower part of the pole (R-916 line 9- R-917 line 2).

Thomas Moss was the state bridge inspector who had personally inspected bridge L-21-U on several occasions. He identified plaintiffs' exhibit 2-15 (R-273) as the bridge inspection report of February 9, 2000 with the recommendation "clean tumbleweeds from around pier 2 and beneath span 2" and referenced specific maintenance code number 358.04 (R-935 lines 7-15).

Mr. Moss testified that on February 25, 2002 he personally had made the maintenance recommendation that the tumbleweeds be cleared from around pier #2 and beneath span #2 (R-939 lines 6-10). He identified plaintiffs' exhibit 2-14 (R 281) as a diagram that he had personally made in association with his personal inspection, as his drawing of the tumbleweeds as he found them to be stacked "from the ground level to the bottom of the bridge" and that the way they looked then was "similar" to what he had seen at the time of his inspection in 2004 (R-

938). He agreed that the tumbleweeds piled from the ground level to the bottom of the bridge underneath span #2 at its east end constituted a fire hazard (R-937 line 8-15). Moss also felt that the state highway right of way was probably 30 feet from the bridge itself (R-936 lines 18-20).

When Mr. Moss inspected the bridge again on February 24, 2008 he again made the same recommendation that needed maintenance included to "clean tumbleweeds from around pier #2 and beneath span #2" and agreed it was the "very same recommendation" that he had "made six years earlier" (R-940 lines 4-13). He also again agreed that the weeds which had been allowed to accumulate under span #2 represented a "real fire hazard" and that if the weeds caught fire "the bridge could be lost" (R-940 lines 18-24).

Another CDOT called witness was Mr. Kenneth Churches. He identified himself as the bridge inspector who was the team leader at the time of the January 2008 bridge inspection (R-946 lines 17 – R-947 line 17). His report was admitted as CDOT exhibit #11 (R-1043-1046). At its page four the needed maintenance activity recommendation of "clean tumbleweeds from Pier #2 and span #2" is again declared (R-948 lines 13-16).

Mr. Churches established that when the bridge inspection team from Denver makes these reports and submits them to a regional maintenance office they really

have no idea what happens since the state has no follow up process in respect to the recommendations made concerning required maintenance (R-950 line 18-24). During his cross examination he acknowledged that the recommended maintenance he had made in January of 2008 for removal of the tumbleweeds under the east end of span #2 was the same problem that had been observed in 2002 and at that time in 2002 the "target year" for that required maintenance had been declared to be 2008 but that at the time of inspection in 2008 the "target year" to complete it was moved ahead to the year 2011 (R-954 lines 1-21) even though the estimated cost was only $100.[3]

Mr. Jeremiah Buford, who is a state "TM-1" worker stationed in the Sugar City region #2, was also called by the attorney general. Mr. Buford established that the specific area of maintenance of his particular office did include the L-21-U bridge that had been at milepost 103.6 and that they had inspected it once every six months during his 10 years as a state employee (R-956 line 8 – R-958 line 17). Mr. Buford established that when his unit did a maintenance activity the work would be reflected in a document called a "work order" (R961 lines 12-20). His opinion was that "if there is no paper work, then I don't think it would have been

---

[3] It was never explained why there would have really been any additional costs to the state that was more than what was being paid to the maintenance workers as their normal salaries.

done" (R-963 lines 1-2). Mr. Buford also established that when his local work crew unit inspected the bridges their concern was for whether the tumbleweeds were impeding the flow of water in the channel.

> "And if it is not impeding the flow of water or obstructing water waste, then we ---we generally leave it."

CDOT introduced no evidence that the tumbleweeds had ever been cleared from beneath the east end of span #2. When the attorney general asked Mr. Buford what kind of training was given to his work detail in respect to bridge maintenance his response was:

> "There's no training on this for us."
>
> "From the training we get to do these bridge inspections, there is no training on it. We go and do what we know under that bridge and it is very vague. We look for stuff that is wrong with the structure that's very obvious and it gets reported to get fixed. I mean, we're --- we're not trained to do any of this so . . .(R-972 lines 13-24) . . ."

Mr. Buford acknowledged the state right of way is part of the responsibility of his work unit to maintain (R-968 line 25 through R-969 line 2). He also believes the state right of way was 30 feet from the edge of the bridge (R-969 line 20 through R-970 line 3).

Mr. Buford also established that he had seen grass fires started along highway 96 from a thrown cigarette (R-977 lines 2-8). He also agreed that a carelessly thrown cigarette could start tumbleweeds on fire near or under a wooden bridge (R-978 lines 1-4). Mr. Buford had a family member who did lose their home in this same fire. During his re-cross examination Mr. Buford noted that the house had probably been lost because the evergreens around it had been caused to catch fire by the burning weeds (R-982 lines 8-21).

The last witness called by the attorney general was Steven Becker, the undersheriff of Crowley County. Becker testified that when he had his patrol car "stopped on the bridge" he could see the flames coming up the north (east) side of it but that he personally did not feel any heat from the fire (R-990 line 13 through R-991 line 4).

RULE 28 REQUIRED STATEMENT
RE: STANDARD OF REVIEW AND RESERVATION FOR APPEAL

Appellee Schwartz does not agrees that Appellant CDOT, at pages 14 through 18 of its brief, has correctly declared that the standard of review is de novo. Plaintiff's factual allegation that the tumbleweeds provided the fuel source which caused the bridge to burn and that the state order that they be removed had been ignored for years were both vigorously contested issues by CDOT. Therefore, the correct standard of review is "clearly erroneous". The "de novo"

standard would be applicable if the plaintiff's factual issues were undisputed **Walton v. State**, *968 P.2d 636 (Colo. 1998).*

Schwartz agrees, however, that CDOT has correctly called attention to those places in the record where preservation of its issue concerning the "but for" test of liability can be found. The fact appellant has also made mention of the case law relevant to statutory interpretation and the **Medina v. State** and **Walton v. State** holdings, however, makes it all the more frustrating that the state decided to go forward with this appeal since the issues it raises have already been addressed and decided by our State Supreme Court.

SUMMARY OF THE ARGUMENT

The argument of the attorney general that for a waiver of governmental immunity to occur in respect to the maintenance of a state roadway it is necessary that the obstruction to the movement of traffic be a known condition on the surface of the roadway itself is exactly the same argument addressed and decided adversely to it in **Medina v. State,** *35 P.3d 443 (Colo. 2001).*

Also, by asserting the "but for" standard as the requirement for proof of causation the state improperly attempts to require the trial court to determine the ultimate issue of negligence as a necessary element of jurisdiction. The

legislature's definition of "dangerous condition" at ***C.R.S. 24-10-103*** does not mention it is subject to the "but for" test of causation.

CDOT's argument as to what is necessary to establish jurisdiction fails to recognize any distinction between what is necessary to establish jurisdiction from what is necessary to prove liability. It's appeal, therefore, is an abuse of the right to question jurisdiction. It represents nothing less than a punitive attitude towards claimants seeking to cause them to go to the trouble and expense of proving liability twice.

The appeal of the attorney general improperly equates jurisdiction with the burden of proof Schwartz will face at trial to establish negligence. Neither Schwartz nor any other GIA plaintiff should have to prove the elements of negligence and causation to the trial court as a prerequisite to being allowed to present that same evidence to the jury or whomever is the finder of fact.

Jurisdiction was properly established by the clear evidence that the required bridge maintenance did specify the removal of tumbleweeds, because they were a recognized fire hazard and that this maintenance had not only not been done but that the several recommendations that it be done were ignored. The inspections from at least 2002 through January 2008 had consistently noted the presence of compacted accumulated tumbleweeds under the east span of that wood bridge. ag

The maintenance manual declares they were supposed to have been removed. Since existence of a recognized and long known fire hazard is clearly a "dangerous" condition to a wooden highway bridge, the plaintiffs' burden of proof in respect to jurisdiction was convincingly established.

Because the issues raised by CDOT have previously been resolved by our state's highest court, and since the applicable standard of review is "clearly erroneous", this is a proper circumstance for assessment of attorney fees against the state for having had to respond to an appeal which properly deserves to be characterized as "frivolous".

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT GOVERNMENTAL IMMUNITY HAS BEEN WAIVED.

The attorney general makes reference to the 1986 statutory amendment in **Medina**, *supra*. The concurring opinion of then Supreme Court Justice Kourlis, in **Medina** includes the observation:

> "It does not follow from these amendments, however, that a dangerous condition of a public highway that 'physically interferes' with the movement of traffic on the paved portion of the highway is limited only to those dangerous conditions that have their physical source in the highway surface

> itself. Such a construction, in our view, cannot be squared with the statutory text adopted by the general assembly in 1986."

The Opening Brief filed in behalf of CDOT, nevertheless, again raises this "roadway surface" argument without acknowledgment that the "dangerous condition" can begin elsewhere.

The attorney general's other argument is that for governmental immunity to be waived requires proof that the loss would not have occurred "but for" the negligence of the state. That argument was also addressed and rejected in **Medina** which made it clear that for waiver to attach it is only necessary that the negligence be established as a contributing cause rather than as the sole proximate cause of the complained of loss.

At the evidentiary hearing it was overwhelmingly established that the "dangerous condition" was the accumulation of literally years of packed tumbleweeds under the east span of former bridge L-21-U. Because the bridge was constructed of creosote soaked wood, it was subject to a recognized risk of loss if it was not maintained to keep it free of the fire hazard known to be presented by accumulated tumbleweeds. The accumulated tumbleweeds on multiple times had been the subject of ignored maintenance removal recommendation by the state's own bridge inspection department.

Medina, *supra*, established that the duty of the trial court when faced with having to determine whether governmental immunity has been waived in respect to the development of a "dangerous condition" is to determine whether the highway has been maintained in the same general condition "as initially constructed". In the case at bar, however, "initial construction condition" was a non-issue since it was uncontroverted that the bridge in question had not been put into service with years of accumulated tumbleweeds packed under its east end from ground level to bridge underside.

Medina, at page 462, approved the holding in **Swieckowski v. City of Fort Collins**, *934 P.2d 1380, 1384-80 (Colo. 1997)* and affirmed that:

> "Maintenance means keeping the road in the same general state of being, repair or efficiency as initially constructed"

and concluded, at page 463 that immunity is waived when:

> ". . .an injury results from a failure to maintain a public highway when it is caused by a condition of the road that develops subsequent to the road's initial design."

Additional guidance is found in **Medina** at p. 454 where it is noted that to establish a waiver of immunity a plaintiff must establish the physical condition constitutes an unreasonable risk to the health or safety of the public, which condition is known to exist and was created by the negligent act or omission of the

public entity. All of these criteria, of course, were satisfied by the known fire hazard created by tumbleweeds packed under creosote soaked wooden bridge supports.

Medina also cited, at p.455, with approval to **Hallam v. City of Colorado Springs**, *914 P.2d 479, 483 (Colo App. 1995)* which held that:

> "A dangerous condition is not limited to those conditions that have their physical source in the highway surface itself."

The issue of governmental immunity in respect to a dangerous highway condition is whether the injuries were caused by breach of the state's duty to maintain. The trial court was bound to find that this duty to maintain had been breached when presented with the multiple inspection reports recommending tumbleweed removal maintenance that was never done. CBI Agent Ellis investigated the fatal crash scene and declared that the packed tumbleweeds provided the fuel source that caused the bridge to burn. This expert opinion testimony satisfied to a far higher standard than necessary the proof that is required for ***Rule 12(b)(1)*** purposes to prove that the injuries, in this case death, were proximately caused by a lack of maintenance.

II. THE "BUT FOR" TEST FOR LIABILITY HAS NO PLACE IN A RULE 12(b) JURISDICTION CHALLENGE.

The Attorney General improperly argues that the requirement of establishing "proximate cause" means the sole proximate cause referred to as the "but for" standard. This argument overlooks **Medina's** reference, at p.460, to **State v. Moldovan**, *842 P.2d 220 (Colo. 1992)* which held that immunity is waived when the state's failure to maintain only "contributes" to the injuries.

The fact there can be more than one cause for any particular injury is, of course, recognized as a possibility in any negligence claim. See ***CJI 9:19*** which discusses "concurrent" causes. In fact, "sole proximate cause" is typically raised in reference to a defendant's claim that an injury in question was solely caused by someone else. The Attorney General attempts to completely reverse this usual reference to "sole proximate cause" by arguing it is the plaintiff's burden to prove the state was the "sole proximate cause" and in the absence of such proof there is no waiver of immunity. **Medina,** however, at page 460, absolutely refutes the Attorney General's attempted perversion of the element of liability by making it clear that "sole proximate cause" is not the standard and that for immunity to be waived it is only necessary that the state's negligence be a "contributing" cause:

> "If the state's failure to maintain did indeed contribute to plaintiff's injuries, then there has been a waiver of immunity under the CGIA" (emphasis supplied).

No case cited in the state's opening brief held that for governmental immunity to be waived the state's negligence must be the "sole proximate" cause of the injury.

The other state Supreme Court decision which is ignored by the CDOT appeal is **Tidwell v. City & County of Denver**, *83 P.3d 75 (Colo. 2003).* **Tidwell** makes it clear that the issue of causation has very limited application in respect to ***12(b)(1)*** jurisdiction challenges. It specifically declares that plaintiffs in ***12(b)(1)*** challenges are to be afforded the reasonable inferences of the evidence. Specifically, the ***24-120-106*** phrase "injuries resulting from" was determined to not mean "caused by":

> "The phrase "resulting from" clearly requires some relationship between a plaintiff's injuries and the public entity's conduct before a waiver of immunity is triggered. However, nothing in our previous cases or the statute requires a plaintiff to show that his injuries were "caused by" the public entity's conduct in the tort sense."

Also, see the further explanation at page 86 of **Tidwell**:

> ". . .we determine that a waiver will exist when a plaintiff alleges facts proving a minimal causal connection between the injures and the specified conduct ." (emphasis supplied)

Tidwell also makes it clear that when jurisdiction is put at issue by a ***12(b)(1)*** motion, the trial court is not obligated to determine what is properly the obligation of the finder of fact. The CDOT appeal of this ***12(b)(1)*** issue, however,

is nothing less than a disregard of **Tidwell** and an attempt to impose the finder of fact obligation upon the trial court in what is supposed to only be a factual attack on the jurisdiction allegations of the complaint.

III. THIS IS A PROPER CIRCUMSTANCE FOR AN AWARD OF ATTORNEY FEES TO APPELLEE SCHWARTZ

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 should not go unaddressed. What is particularly objectionable is that the amount of potential monetary exposure to the state for the wrongful death of the father of four minors is the miserably insignificant amount, pursuant to ***24-10-114***, of only one hundred fifty thousand dollars which "compensation" also includes all costs and interest. **DeCordova v. State**, *878 P.2d 73 (Colo. App. 1994).*

In view of these circumstances, not only would it also be equitable to award attorney fees to undersigned counsel for Schwartz, it would serve to perhaps make it less likely others will have to go through this same unpleasant appellate process should they be fortunate enough to prevail against a ***Rule 12(b)(1)*** motion. To deny this request for attorney fees will, arguably, only encourage the apparent

"let's take two bites out of the apple" attitude of the attorney general[4]. It is simply wrong that the office of our Attorney General should attempt to require that a tort plaintiff against the state must first completely prove their liability case to the trial court before they even get the chance to prove it to the "finder of fact", presumably the jury.

That sought to be imposed "prove the case twice" process is a double imposition of litigation costs. Those costs typically are far greater than what they have been in this case since the necessary experts, thankfully, have been state employees. Usually, of course, they are not and it is for all of those other times that it is especially important that attorney fees be awarded this time. The fact those costs of litigation are often oppressive and do result in the lack of attorney and client willingness to undertake otherwise meritorious cases also cannot be denied[5]. So, what can be said, in view of the already decided adverse to it law, is

---

[4] According to the reasons provided for one of the requested enlargements of time, the Solicitor General also personally reviews and approves each appellate opening brief.

[5] Reduction of litigation costs is a principle goal of the Institute for the Advancement of the American Legal System recently approved "Civil Access Pilot Project" announced in October which incorporates elements of "Oregon type" limited discovery. IAALS is headed by former Justice Kourlis and the Supreme Court's decision to do this pilot is, arguably, an acknowledgment that costs do, indeed, sometimes effectively slam shut the courthouse door.

the "substantial justification" for this appeal that should permit the state to avoid the sanction of ***13-17-102*** for having filed it? Such justification seems nonexistent.

A city has been held liable for an award of attorney fees when it filed claims that lacked legal foundation. See **City of Littleton v. State**, *832 P.2d 985 (Colo. App. 1991)*. The Governmental Immunity Act has been specifically declared to not shield public entities from award of attorney fees for the filing of a frivolous claim. See **Colo. City Metro District v. Graber & Son's Inc.**, *897 P.2d 874 (Colo. App. 1995)*.

The position of Appellee Schwartz is that had he lost the ***12(b)*** motion at the trial court he would have been subject to an award of attorney fees to the state. So, there is no reason for him to be feeling lenient towards the state when it has caused him to appear and to file answer to an appeal which never should have been filed.

It never should have been filed because it exceeds the intended jurisdictional challenge afforded by the interlocutory appeal right of ***24-10-108***. It also never should have been filed because it argues issues that are already decided law that is adverse to it. See **City of Littleton**, *supra*.

CONCLUSION

There was nothing clearly erroneous" about the trial court's conclusion that accumulated tumbleweeds contributed to the burning of bridge L-21-U. They were

a recognized requirement of ignored maintenance related to a very known fire danger. The order of the trial court determining that governmental immunity has been waived in respect to this case of a dangerous condition of a public roadway should be affirmed and this matter should be remanded to the trial court for allowance of an award of a reasonable attorney fee to Schwartz for having had to participate in this appeal.

RESPECTFULLY SUBMITTED this 16th day of December 2010.

LEE N. STERNAL, P.C.
/s/ Lee N. Sternal (original signature on file)
Lee N. Sternal, #0899
414 West Ninth Street
Pueblo, CO 81003
Attorney for plaintiff Appellee

CERTIFICATE OF MAILING

This is to certify that I have duly served the foregoing Plaintiff-Intervener Appellee's Amended Answer Brief upon all parties herein by e-filing through Lexis/Nexis File and Serve this 16th day of December 2010. Also, one paper copy was mailed to the Court of Appeals together with a CD containing a PDF file via U.S. Mail.

COLORADO COURT OF APPEALS
1111 West Colfax
Denver, CO 80204

Clerk, Crowley County District Court
CROWLEY COUNTY JUDICIAL BUILDING
110 East 6th Street, Rm 303
Ordway, CO 81603

John Suthers, Attorney General
Fredrick Haines, First Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

/s/Jill Mandarich (original signature on file)