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Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Appeal from the District Court, Broomfield County, State of Colorado
2013-CV-30055
Honorable Patrick Thomas Murphy

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.

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Case No.: 2013CA2062

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ANSWER BRIEF

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).

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It contains, under a separate heading, a statement of whether such party agrees with opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

_X_ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/Keith Goman

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Statement of Facts 2

C. Course of Proceedings and Disposition Below…….5

III. SUMMARY OF THE ARGUMENT 7

IV. ARGUMENT 10

A. The District Court Correctly Determined that the Specific Facts Alleged by the Terranovas Did Not, as a Matter of Law, Constitute Willful and Wanton Misconduct. 10

STANDARD OF REVIEW 10

B. The Court Correctly Concluded that the District was Immune from Suit as a Matter of Law Because Alex Terranova's Injuries Did Not Result From a Public Facility's Dangerous Condition 19

(i) Alex Terranova's Injury Did Not Result From the Baseball Mound's Dangerous Condition 20

(ii) The Mound's Allegedly Dangerous Condition was Not Proximately Caused by Negligent Maintenance or Construction 21

C. The District Court was Without Discretion to Deny Defendants Their Reasonable Attorney Fees and Costs 24

V. CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page

Booth v. Univ. of Colo.
64 P.3d 926, 929 (Colo. App. 2002)..... 20, 23

Brighton Sch. Dist. v. Lyons
873 P.2d 26, 28 (Colo. App. 1993).....26

City of Lakewood v. Brace
919 P.2d 231 (Colo. 1996).....13

Crandall v. City & County of Denver
238 P.3d 659, 663 (Colo. 2010).....25

Douglas County v. City & County of Denver
203 P.3d 615, 619 (Colo. App. 2008).....22

Employers Ins. of Wausau v. RREEF USA Fund-II, Inc.
805 P.2d 1186 (Colo. App. 1991).....27

Fogg v. Macaluso
892 P.2d 271, 277 (Colo. 1995).....19

Fresquez v. Baldwin
2009 U.S. Dist. LEXIS 71882 (D. Colo. 2009).....15

Gray v. Univ. of Colo. Hosp. Auth.
284 P.3d 191, 198-199 (Colo. App. 2012) 11, 13

Hendricks by & Through Martens v. Weld County School Dist. No. 6
895 P.2d 1120, 1123 (Colo. App. 1995).....24

Houdek v. Mobil Oil Corp.
879 P.2d 417 (Colo. App. 1994).....27

Jarvis v. Deyoe
892 P.2d 398 (Colo. App. 1994)..... 10, 11

Jenks v. Sullivan
826 P.2d 825, 827 (Colo. 1992).....23

Katz v. City of Aurora
85 F. Supp. 2d 1012, 1022 (D. Colo. 2000) 11

Longbottom v. State Bd. of Community Colleges & Occupational Educ.
872 P.2d 1253 (Colo. App. 1993).....24

Loveland v. St. Vrain Valley Sch. Dist. Re-1j
2012 COA 112, P32 (Colo. App. 2012) 16

McDonald v. Lakewood Country Club
461 P.2d 437, 440 (1969) 17

Medina v. State
35 P.3d 443, 451-52 (Colo. 2001) 19

Moody v. Ungerer
885 P.2d 200 (Colo. 1994)..... 10, 11, 12, 14

Pettingell v. Moede
271 P.2d 1038, 1042 (Colo. 1954).....13

Sanchez by & Through DeFerdinando v. School Dist. 9-R
902 P.2d 450, 453 (Colo. App. 1995).....23

Smith v. Town of Snowmass Village
919 P.2d 868 (Colo. App. 1996) 25

Specht v. Jensen
853 F.2d 805, 807-809 (10th Cir. 1988).....18

Stauffer v. Stegemann
165 P.3d 713, 718 (Colo. App. 2006).....25

Tidwell v. City and County of Denver
83 P.3d 75, 81 (Colo. 1985).....10

Tidwell v. City and County of Denver
83 P.3d 75, 85 (Colo. 2003).....19

Tozer v. Scott Wetzel Services, Inc.
883 P.2d 496, 499 (Colo. App. 1994).....18

Trinity Broadcasting of Denver, Inc. v. City of Westminster
848 P.2d 916 (Colo. 1993)..... 20, 26

Walton v. State
968 P.2d 636, 644 (Colo. 1998).....24

Wilson v. Meyer
126 P.3d 276 (Colo. App. 2005).....11

STATUTES AND OTHER AUTHORITIES

C.R.C.P. 12(b)..... 1, 2, 7, 9, 12, 19, 20, 25, 27, 28

C.R.S. § 13-17-201 ..... 1, 2, 7, 9, 10, 25, 26, 27, 28

C.R.S. § 22-32-126(2).....16

C.R.S. § 24-10-101 19

C.R.S. § 24-10-103(1.3).....21

C.R.S. §24-10-103(2.5).....22

C.R.S. § 24-10-106(1)(e) 8, 20, 21

C.R.S. § 24-10-110(5)..... 10, 11

C.R.S. § 24-10-118(1) 14

Defendants Adams 12 Five Star Schools (the District), Tyrone Giordano, Ed Hartnett, Cathy Nolan, Lee Peters, and Chris Gdowski submit this Answer Brief supporting the trial court's order dismissing Plaintiffs' claims pursuant to C.R.C.P. 12(b) and granting Defendants their attorney fees.

I. STATEMENT OF THE ISSUES

1. Whether the trial court correctly determined the Terranovas failed to allege specific facts that, if proven, would demonstrate willful and wanton conduct.

2. Whether the trial court correctly determined that Alex Terranova's injury did not, as a matter of law, result from a public facility's dangerous condition.

3. Whether the trial court correctly awarded Defendants their attorney fees pursuant to the mandatory provisions of C.R.S. § 13-17-201 after granting Defendants' C.R.C.P. 12(b) motion to dismiss.

II. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs Alex and Frederick Terranova sue Defendants for Alex Terranova's baseball injuries allegedly sustained March 3 and March 30, 2011. The Terranovas' first claim for relief, against Defendant Giordano only, alleged that (1) Giordano's willful and wanton misconduct caused Alex Terranovas' March 3 and March 30 injuries, and that, alternatively, (2) Giordano was an

independent contractor not entitled to Colorado Governmental Immunity Act (CGIA) protections. Their second claim for relief alleged that the willful and wanton misconduct of Defendants Hartnett, Peters, Nolan, and Gdowski (hereinafter, the supervisors) caused Alex Terranovas' March 30 injury. Their third and final claim for relief, against the District, alleged that Alex Terranova's March 30 injury arose from a dangerous condition of the baseball mound, a public facility.

On Defendants' joint C.R.C.P. 12(b) motion to dismiss, the district court determined that the Terranovas failed to adequately allege an exception or waiver of the CGIA and, accordingly, dismissed each of the Terranovas' claims except the independent contractor allegation against Defendant Giordano. The district court delayed ruling on the independent contractor issue and permitted the Terranovas limited discovery about Giordano's employment status. After conducting discovery, the Terranovas dismissed this claim rather than participate in a C.R.C.P. 12(b) *Trinity* hearing. On December 18, 2013, with all claims dismissed on Defendants' Rule 12(b) challenge, the court awarded Defendants attorney fees and costs pursuant to C.R.S. §13-17-201. The Terranovas appeal.

B. Statement of Facts

In 2011, Alex Terranova was a twelfth-grade varsity baseball player for Legacy High School, a school within the District. Tyrone Giordano was Legacy

High School's varsity baseball coach, Lee Peters was the school's assistant principal and Cathy Nolan was Legacy's principal. Chris Gdowski was the District's superintendent, and Ed Hartnett was the District's athletic director.

The Terranovas claim that, during a baseball try-out March 3, 2011, Alex Terranova was hit in the helmet by a student-pitched baseball while batting.[1] After being struck, he appeared "dazed" but continued playing that day and in the coming weeks. R. CF, P. #18, ¶ 14, 19. Giordano, though he recently received concussion training, "purposely failed to assess" Alex Terranova's condition. R. CF, P. #17 ¶ 18. His failure to assess, however, is not alleged to have caused Alex Terranova any additional harm; being struck by the pitch is not alleged to have left Alex unfit to continue playing baseball safely, nor did it allegedly leave him more susceptible to injury. R. CF, P. #18, ¶ 19. Giordano was the only defendant alleged to have been present March 3, 2011, and the only defendant alleged to know it happened. Based on these facts, the Terranovas assert that Alex Terranova's March 3 injury was caused by Giordano's willful and wanton misconduct. *Id*.

Four weeks later, during a March 30, 2011 practice, Alex Terranova and his teammates practiced pick-offs. During the drill, Alex Terranova's role was to

[1] Defendants agree that the Terranovas' Amended Complaint was properly treated as the operative complaint and the subject of Defendants' motion to dismiss. The following allegations come exclusively from the Amended Complaint, R. CF, P. #15-27.

throw the ball from the pitcher's mound to second base, simulating picking-off base-runners. Other students were practicing the same drill at the same time, each throwing to a different base while standing on the pitcher's mound. R. CF, P. #18, ¶ 21. The drill had been done before in the same manner. R. CF, P. #18, ¶ 20. Neither Alex Terranova nor anyone else complained that the drill was dangerously orchestrated, or that it should be performed some other way. Giordano is the only defendant alleged to have been present at the ball field on March 30, 2011. R. CF, P. #15-27.

During the drill, an errant, student-thrown baseball hit Alex Terranova's head. R. CF, P. #19, ¶ 24. He was immediately dazed and confused, but was not removed from play and was allowed to drive home after practice. R. CF, P. #20 ¶ 27, 28. As before, although Giordano "purposefully ignored" the signs of a potential concussion, Alex Terranova is not alleged to have suffered additional harms because of this failure. R. CF, P. #19, ¶27, 28. Based on these facts, the Terranovas assert that every individually named defendant — the baseball coach, the school's athletic director, the school's principal, and the District's athletic director and superintendent — acted willfully and wantonly, causing Alex Terranova's March 30 injury.

Finally, in their third claim for relief, the Terranovas allege that Alex Terranova's March 30 injury also resulted from the dangerous condition of a public facility, the baseball pitcher's mound. R. CF, P. #22, ¶ 41.

C. Course of Proceedings and Disposition Below

The Terranovas sue Defendants pursuant to the provisions of the CGIA. R. CF, P. #16, ¶ 9. The CGIA bars all tort actions against public employees and public entities unless an enumerated exception applies. As each of the defendants is either a public entity or a public employee,[2] Defendants are immune from suit unless the Terranovas demonstrate that the CGIA is waived or an exception applies.

The Terranovas assert two bases for waiving or excepting immunity:[3] (A) the conduct of every individually-named defendant was willful and wanton, R. CF, P. #23-4 ¶ 43, 51-54; and (B) Alex Terranova's injury resulted from a dangerous

[2] Defendants asserted in their motion to dismiss that each defendant is either a public entity or public employee and, therefore, presumptively entitled to governmental immunity. Except as discussed below relating to the allegation of Giordano's employment status, the Terranovas did not dispute this assertion. *See, e.g.*, R. CF, P. #49 and R. CF, P. #64 – 87.

[3] Although the Amended Complaint initially alleged a third theory of recovery, Plaintiffs voluntarily dismissed their claim that Defendant Giordano was an independent contractor after limited *Trinity* discovery revealed no facts on which such a claim could rest.

condition of a public facility, here, "the baseball field mound located within Legacy High School's baseball field[.][4]" R. CF, P. #25 ¶ 60.

The district court rejected the Terranovas' proposed CGIA exceptions. First, the district court determined that the factual details supporting their willful and wanton allegations, accepted as true, were inadequate as a matter of law. R. CF, P. #246-7(the factual allegations, even "if true, do not amount to willful and wanton behavior as a matter of law"). Second, the district court concluded that, as a matter of law, the Terranovas failed to adequately allege that Alex Terranova's March 30 injury resulted from a dangerous condition of a public facility. R. CF, P. #247. Specifically, the court determined that the Terranovas "have not sufficiently alleged 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. CF, P. #248. Having rejected the Terranovas' proposed bases for waiving or excepting CGIA immunity, the district court dismissed all claims against all defendants for want of subject matter jurisdiction, except one. R. CF, P. #244-249.

[4] Claim (A) was alleged in Plaintiffs' first claim (against Defendant Giordano) and in Plaintiffs' second claim (against the supervisors). Claim B was raised in Plaintiffs' third claim for relief against the District only.

The district court delayed ruling on Plaintiffs' allegation that Defendant Giordano was an independent contractor, permitting the Terranovas limited discovery on the issue. R. CF, P. #246. After receiving Giordano's discovery responses, the Terranovas voluntarily dismissed this claim August 20, 2013. R. CF, P. #250-252. With all claims now dismissed on Defendants' Rule 12(b) challenge, final judgment entered September 24, 2013. R. CF, P. #253-4.

On December 16, 2013, the district court awarded Defendants their attorney fees and costs as mandated by C.R.S. § 13-17-201. The Terranovas appeal.

III. SUMMARY OF THE ARGUMENT

The district court properly granted Defendants' C.R.C.P. 12(b) motion to dismiss because the Terranovas failed to allege a viable exception to the Defendants' governmental immunity.

Public employees are immune from suit for torts committed in the scope of their duties unless they willfully and wantonly caused injury. To properly plead a willful and wanton claim, a plaintiff must articulate specific facts supporting the allegation. The district court applied the correct legal standard in determining that the Terranovas failed to adequately identify facts supporting their willful and wanton allegations against the individually-named defendants. Instead, the well-

pled facts demonstrated only that a student-thrown baseball injured Alex Terranova on two occasions.

Giordano is the only defendant alleged to have been present for either injury. His conduct—permitting Alex Terranova to practice batting on March 3, and organizing a drill for Alex Terranova and other players to practice pick-offs March 30—was not willful and wanton as a matter of law. While Giordano is also alleged to have purposely failed to assess Alex Terranova's concussion symptoms, this failure did not cause Alex's injuries.

The allegations against the supervisors also fall short. None of the supervisors helped devise the pick-off drill or saw it carried out. Instead, they are alleged to have merely inadequately supervised Giordano. Negligent supervision does not, as a matter of law, support an inference of willful and wanton conduct. Accordingly, the district court properly dismissed the Terranova's willful and wanton allegations.

The district court properly dismissed the Terranovas' claim against the District, as well. The Terranovas alleged that Alex's March 30 injury resulted from the baseball mound's dangerous condition, attempting to establish a waiver of governmental immunity under C.R.S. §24-10-106(1)(e), the public facility exception. To properly plead this exception, the Terranovas must demonstrate that

the March 30 injury occurred as a result of: (1) the physical condition of a public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility.

There was nothing dangerous, or even substandard, about the baseball mound's condition. The Terranovas contend that the use of the mound as the focus for the pick-off drill rendered it an actionable dangerous condition. A dangerous condition cannot arise solely from a facility's use, as the district court correctly recognized. Further, even if one presumes that the unsafe *use* of the mound created a dangerous *condition*, the dangerous condition was not proximately caused by negligent maintenance or construction - the Terranovas do not even attempt to argue otherwise in their Opening Brief. They do not, therefore, allege a viable public facility exception and the district court properly determined that the District, too, is immune from the Terranovas' suit.

Finally, Defendants were mandatorily entitled to their attorney fees and costs by operation of C.R.S. §13-17-201 because they prevailed on their C.R.C.P. 12(b) motion to dismiss. The district court's initial ruling on Defendants' 12(b) motion

dismissed all claims against five of six defendants: Hartnett, Nolan, Peters, Gdowski and the District. The one surviving claim against Giordano, alleging he was an independent contractor and not entitled to CGIA protection, was voluntarily dismissed after limited *Trinity* discovery. The Terranovas' dismissal of one claim against one defendant does not nullify C.R.S. §13-17-201. Instead, Defendants are mandatorily entitled to their attorney fees by the statute's terms; the district court, in fact, was without discretion to *deny* Defendants' fee application.

IV. ARGUMENT

A. The District Court Correctly Determined that the Specific Facts Alleged by the Terranovas Did Not, as a Matter of Law, Constitute Willful and Wanton Misconduct.

Standard of Review: Defendants disagree with Plaintiffs' assertion that "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." Opening Brief p. 9. As discussed more fully below, the trial court applied the correct legal standard in determining that the Terranovas' specific factual allegations, accepted as true, did not rise to willful and wanton misconduct as a matter of law. C.R.S. § 24-10-110(5); *see also Moody v. Ungerer*, 885 P.2d 200 (Colo. 1994); *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (Colo. 1985); *Jarvis v. Deyoe*, 892 P.2d 398 (Colo. App. 1994). Whether the district court

correctly decided that the specific factual allegations were insufficient as a matter of law is reviewed *de novo* by this Court. *See, e.g., Moody*, 885 P.2d at 205.

Preservation of Issue: Defendants agree the Terranovas adequately preserved this issue for appeal.

Argument: The district court applied the correct legal standard in reviewing the sufficiency of the Terranovas' pleadings. C.R.S. § 24-10-110(5)(a) ("In any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint."). When a plaintiff alleges that a public employee's conduct was willful and wanton, the trial court must determine as a threshold matter whether the plaintiff's specific factual allegations support a reasonable inference that the public employee acted willfully and wantonly. *Jarvis*, 892 at 402. Conclusory allegations are insufficient. *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005); *see also Katz v. City of Aurora*, 85 F. Supp. 2d 1012, 1022 (D. Colo. 2000).

Thus, the question before the district court was whether the Terranovas pled specific facts sufficient to support a reasonable inference that Defendants Giordano, Hartnett, Peters, Nolan and Gdowski acted willfully and wantonly. *See Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191, 198-199 (Colo. App. 2012). This is the legal standard the district court applied when analyzing the Terranovas'

allegations. *See, e.g*., R. CF, P. #246 ("[i]nsofar 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."); *see also* R. CF, P. #247 (the claims against the supervisors, "if true, do not amount to willful and wanton behavior as a matter of law"). After determining that the Terranovas' specific allegations did not amount to willful and wanton behavior as a matter of law, the district court properly dismissed the Terranovas' claims against Defendants Giordano, Hartnett, Peters, Nolan and Gdowski. *See, e.g.*, *Moody*, 885 P.2d at 205 ("Because Trooper Moody's actions were not willful and wanton as a matter of law, the court of appeals erred in reversing the trial court's order dismissing [the plaintiff's] claims").

The Terranovas argue that the trial court resolved the question under C.R.C.P. 12(b)(1) when it should have evaluated the claims pursuant to C.R.C.P. 12(b)(5). Opening Brief p. 9. Their argument is misplaced. Whether a plaintiff has adequately alleged an immunity waiver or exception is a question the trial court must resolve pursuant to C.R.C.P. 12(b)(1). *See, e.g., Moody*, 885 P.2d at 204 (defendant immune from liability because his actions were not willful and wanton as a matter of law). Evaluating the sufficiency of the plaintiff's factual allegations

is, under these circumstances, a necessary first step in determining subject-matter jurisdiction. *Id*. Neither *Gray, supra*, nor *City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996) hold otherwise. Instead, the *Gray* and *Brace* decisions direct a trial court to do exactly as the district court here did: review the sufficiency of the pleadings, accept the well-pled factual allegations as true, and determine whether the specific facts amount to willful and wanton conduct as a matter of law. *See, e.g.*, *Gray*, 284 P.3d at 199 (the trial court's task is to "determine whether the complaint adequately alleged that the [defendant's] actions or omissions were willful and wanton"). If they do not, then the public employee is immune from suit and properly dismissed from the case. Accordingly, the district court applied the correct legal standard in determining that the Terranovas' specific factual allegations, accepted as true, do not support a reasonable inference of willful and wanton conduct.

Willful and wanton misconduct, though not defined specifically in the CGIA, has been interpreted by Colorado's Supreme Court as follows:

> Willful action means voluntary; by choice; intentional; purposeful. Wantonness signifies an even higher degree of culpability in that it is wholly disregardful of the rights, feelings and safety of others.

Pettingell v. Moede, 271 P.2d 1038, 1042 (Colo. 1954). The conduct is almost sinister, consisting of a state of mind that is "at times even implying an element of

evil." *Moody*, 885 P.2d at 205. The district court applied this definition of willful and wanton conduct to the Terranovas' factual allegations, examining whether the specific facts alleged gave rise to a reasonable inference of reckless, intentional, or purposeful disregard of Alex Terranova's rights, feelings or safety.

The most that can be reasonably inferred from the specific factual allegations of the Terranovas' Amended Complaint about the March 3 injury is that Giordano attended concussion training and then permitted Alex Terranova to practice batting while wearing a helmet. Although the Terranovas also allege that Giordano "purposefully ignored (his) concussion recognition training" after the pitch hit Alex Terranova, they never allege that this failure *caused* Alex's injury nor do they allege he was rendered unfit to continue playing baseball such that he was inappropriately exposed to further injury. R. CF, P. #17, ¶ 18. Public employees are immune from tort actions "unless the act or omission *causing such injury* was willful and wanton[.]" C.R.S. § 24-10-118(1)(emphasis added). Here, even assuming Giordano's purposeful failure to assess Alex Terranova's symptoms rises to willful and wanton conduct, it did not cause his head injury and cannot, therefore, waive governmental immunity. On these facts, the district court correctly determined that the Terranovas "identif(ied) no facts that would tend to show Mr.

Giordano purposefully disregarded a risk to any of his players, Alex Terranova included." R. CF, P. #246.

On March 30, 2011, Giordano orchestrated a pick-off drill as he had done in previous practices. R. CF, P. #18, ¶ 20. No one complained to Giordano (or any Defendants) that the pick-off drill was unsafe. During the drill, one student threw a baseball that another student missed, striking Alex Terranova's head. R. CF, P. #19, ¶ 24. Afterwards, Giordano is alleged to have purposefully failed to diagnose Alex's concussion and respond appropriately but, as before, there is no allegation that these after-the-fact failures *harmed* Alex Terranova. R.20, ¶ 28 (Alex Terranova was permitted to drive home after the March 30 blow to the head, presumably without incident).

The district court correctly determined that these facts, even if proven, would not amount to willful and wanton conduct. R. CF, P. #246. Nothing in these allegations support an inference that Giordano knew Alex Terranova would be injured and purposefully ignored that risk. The Terranovas' assertions to the contrary are no more than conclusory allegations. *See Fresquez v. Baldwin*, 2009 U.S. Dist. LEXIS 71882 (D. Colo. 2009) ("The mere recitation of the words 'willful' and 'wanton' . . . is not sufficient to avoid the immunity afforded public employees from all claims that lie or could lie in tort.")

Regarding the supervisors, the only specific facts the Terranovas allege are that the supervisors owed a general or statutory duty[5] to monitor their subordinates and protect students against harm, and they wantonly and willfully failed to require Giordano to "perform the 'pick-off' drill in an appropriate and non-dangerous manner." R. CF, P. #21-22, ¶ 34-37. The supervisors are immune from tort suits for negligent supervision. *Loveland v. St. Vrain Valley Sch. Dist. Re-1j*, 2012 COA 112, P32 (Colo. App. 2012) (the CGIA does not waive immunity for tort claims alleging negligent supervision). The Terranovas simply attach a willful and wanton label to a negligent supervision claim. They do not allege specific facts that would plausibly support a willful and wanton finding against the supervisors. The Terranovas do not allege, for example, that the supervisors ever saw the pick-off drill being performed, that they fielded complaints from players or concerned parents about the drill, or that they knew even one other player had been injured practicing pick-offs this way. Overall, the Terranovas allege no facts that would even potentially supply the school's principal or athletic director — much less the

[5] *See, e.g.*, R. CF, P. #20, ¶ 31 (pursuant to C.R.S. § 22-32-126(2) the principal shall assume the administrative responsibility and instructional leadership . . . for the planning, management, operation and evaluation of the education programs of the schools); *see also* R. CF, P. #21, ¶ 32 (the District Superintendent Policy Code 6250 requires the District Athletic Director to establish and administer procedures to implement the athletic program district-wide); *see also* R. CF, P. #21, ¶ 35 ("The superintendent shall not cause or allow any practice, activity, decision or organizational circumstance which is . . . imprudent").

district's athletic director or superintendent — with the *mens rea* necessary to make a viable claim for willful and wanton misconduct.

Attaching an expert report to the Terranovas' response to Defendants' motion to dismiss does not cure the deficient Amended Complaint. Dr. Rabinoff's report was not included or mentioned within the Terranovas' initial or amended complaint.[6] A court may not consider matters outside the complaint when determining the sufficiency of a plaintiff's allegations. *McDonald v. Lakewood Country Club*, 461 P.2d 437, 440 (1969) ("[I]n passing upon a motion to dismiss a complaint, the court can consider only matters stated therein and must not go beyond the confines of the pleading.")

Even if the district court erroneously considered Dr. Rabinoff's report it would not change the outcome. Dr. Rabinoff's report does little more than repeat the conclusory allegations made in the Terranovas' Amended Complaint. R. Exh. #3 P. #9 ("my preliminary opinion is that the individually-named defendants may each have acted in a willful and wanton manner toward Mr. Terranova for reasons stated above"). He candidly admits he has few, if any, specific facts to support his assertion that (*e.g.*) the district supervisors did (or failed to do) anything to cause

[6] Instead of attaching the report to the Amended Complaint, the Terranovas conceded it was "outside the pleadings" and asked the district court to consider the report and convert Defendants' motion to dismiss into "one for summary judgment." R. CF, P. #84.

Alex Terranova's injuries. [7] Further, Dr. Rabinoff's report opines on legal standards and conclusions without establishing any basis for his expertise or opinion. For example, he writes that "the school principal is the one in charge of all that happens at Legacy High School and answers to the superintendent on all these matters." R. Exh. #3, P. #6. If he is offering a legal analysis of a school principal's duties, he never explains his qualifications or basis for doing so, nor why the district court should defer to an expert's opinion on a question of law. *Tozer v. Scott Wetzel Services, Inc*., 883 P.2d 496, 499 (Colo. App. 1994) (expert may not render opinions on a question of law); *Specht v. Jensen*, 853 F.2d 805, 807-809 (10th Cir. 1988) (same). On the other hand, if his statement is offered to explain why he believes the school principal's behavior "may have been willful and wanton," *id*. at P. 9, he offers no further factual elaboration or explanation — the sentence quoted above, in fact, is the only sentence that mentions *anything* about the school principal. Overall, Dr. Rabinoff's report adds no specific facts beyond those set forth in the complaint to support a willful and wanton claim. His report was rightly disregarded by the district court.

[7] *See, e.g*., R. Ex. #3 ("At this time I have no information or evidence that the Adams 12 Five Star Schools did or did not do any of these actions to best provide a safe, effective and efficient environment for all their student athletes, concerning drill development and review and concussions in sport.").

In conclusion, because the Terranovas failed to allege specific facts to support their allegations of willful and wanton conduct, the district court rightly dismissed the Terranovas' first and second claims against Defendants Giordano, Hartnett, Peters, Nolan and Gdowski.

B. The Court Correctly Concluded that the District was Immune from Suit as a Matter of Law Because Alex Terranova's Injuries Did Not Result From a Public Facility's Dangerous Condition.

Standard of Review: Defendants agree with the Terranovas' statements concerning the standard of review. *See* Opening Brief at P. 19.

Preservation of Issue: Defendants agree the Terranovas preserved this issue for appeal.

Argument: The CGIA bars all tort actions against public entities unless an enumerated exception applies. C.R.S. § 24-10-101 *et seq*. Whether an exception applies to a particular claim is a question of subject matter jurisdiction the Court must decide pursuant to C.R.C.P. 12(b)(1). *Medina v. State*, 35 P.3d 443, 451-52 (Colo. 2001); *see also Fogg v. Macaluso*, 892 P.2d 271, 277 (Colo. 1995). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff must show that governmental immunity is waived. *Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003) .

The Terranovas attempt to establish a waiver of governmental immunity under C.R.S. § 24-10-106(1)(e), the public facility exception. To do so, the Terranovas must demonstrate Alex Terranova's March 30 injury occurred as a result of: (1) the physical condition of a public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility. *Booth v. Univ. of Colo.*, 64 P.3d 926, 929 (Colo. App. 2002). The Terranovas' allegations fall short because (i) Alex Terranova's injury did not "result from" the baseball mound; and (ii) the mound's allegedly dangerous condition was not proximately caused by negligent construction or maintenance.

(i) Alex Terranova's Injury Did Not Result From the Baseball Mound's Dangerous Condition.

The Terranovas' fail to satisfactorily allege that Alex Terranovas' injury "occurred as a result of" the condition of the baseball mound. Instead, even accepting their allegations, [8] Alex was injured by a student-thrown baseball, not

[8] Under C.R.C.P. 12(b)(1) and *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), a court is permitted to receive evidence and resolve factual disputes if necessary to determine subject matter jurisdiction. Regardless, the district court correctly determined it was not necessary to resolve

the mound — he merely happened to be standing on the mound when hit. The Terranovas cannot and do not link the alleged injury to any "dangerous condition" of the baseball mound and, accordingly, cannot rest their claims on the public facility exception. *See* C.R.S. § 24-10-106(1)(e) ("Sovereign immunity is waived by a public entity in an action for injuries *resulting from* . . . [a] dangerous condition of any public hospital, jail, [or] public facility") (emphasis added).

(ii) The Mound's Allegedly Dangerous Condition was Not Proximately Caused by Negligent Maintenance or Construction.

To qualify as a dangerous condition, the condition must be proximately caused by negligent maintenance or construction. C.R.S. § 24-10-103(1.3). The Terranovas assert that "the unscreened apex of the mound combined with its use in the dangerous and improper pick-off drill constitute(s) a dangerous condition." Opening Brief p. 22. Because this "condition" is not proximately caused by negligent maintenance or construction, the district court correctly determined that the Terranovas failed to adequately allege a cognizable public facility exception. R. CF, P. #248.

In the district court, the Terranovas argued that using the "unscreened" mound as a location for the pick-off drill constitutes negligent maintenance

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factual disputes to decide the jurisdictional questions presented by Defendants' motion to dismiss.

because the mound "was not used at all in a way to replicate the actual conditions existing during a real baseball game" and "failed of its essential purpose" when Mr. Terranova was hit with a baseball. R. CF, P. #73. This line of argument was not repeated on appeal; in fact, the Terranovas never explain how the mound's dangerous condition was proximately caused by negligent maintenance in their Opening Brief. Regardless, failing to screen the mound is not negligent maintenance; maintenance is specifically defined to "*not* include any duty to upgrade, modernize, modify or improve the design or construction of a facility." C.R.S. §24-10-103(2.5) (emphasis added). Placing screens around the baseball mound, as the Terranovas assert Giordano was obliged to do, is upgrading, modifying or improving the design of the baseball mound. *See, e.g., Douglas County v. City & County of Denver*, 203 P.3d 615, 619 (Colo. App. 2008) (the "failure to post warning signs or to supervise does not involve the use of a dangerous physical condition that is associated with its maintenance"). Accordingly, the district court correctly rejected the Terranovas' proposed public facility exception.

Side-stepping the negligent maintenance prong, the Terranovas instead present an argument previously rejected by the Colorado Supreme Court. They argue that a dangerous condition of a public facility can arise solely from the

manner in which a public facility is used, regardless of whether the facility's condition is intrinsically dangerous. Opening Brief p. 22. Colorado's Supreme Court rejected this argument in *Jenks v. Sullivan,* 826 P.2d 825, 827 (Colo. 1992):

> Jenks argues that the plain meaning of the phrase 'or the use thereof' relates to uses in a building. In light of the legislation following our abolishment of sovereign immunity, we are convinced that the legislature did not intend such an expansive reading of the dangerous condition exception. This conclusion is supported by the language of the statute, our cases construing the Act, and the decisions of other courts which have considered similar exceptions.

See also Sanchez by & Through DeFerdinando v. School Dist. 9-R, 902 P.2d 450, 453 (Colo. App. 1995) (plaintiffs' argument that "the use thereof" modifies "facility" was rejected by the supreme court when it held "the dangerous condition must stem from 'a physical or structural defect in the [public] building' rather than from an activity conducted within the building."). Accordingly, the dangerous condition must stem from a physical or structural defect in the public facility, as opposed to an allegedly improper use of the facility.

On this point, each decision cited by the Terranovas is distinguishable because, in the cited cases, the dangerous condition is at least plausibly attributable to negligent maintenance or construction.[9] Because that is not the case, here—

[9] *See* Opening Brief p. 23 and cases cited therein: *Booth v. Univ. of Colo*., 64 P.3d 926, 930 (Colo. App. 2002) ("there is evidence that the dangerous condition

there is nothing deficient about the baseball mound that was even arguably caused by negligent maintenance or construction—the Terranovas' proposed public facility exception is without precedent and contrary to the statute's plain language. The district court correctly rejected it, and correctly determined the Terranovas failed to allege a viable public facility exception. Consequently, the district court's dismissal of the Terranovas' third claim for relief should be upheld as the District was properly found to be immune from suit pursuant to the CGIA.

C. The District Court was Without Discretion to Deny Defendants Their Reasonable Attorney Fees and Costs.

Standard of Review: Defendants agree that the Terranovas correctly state the standard of review as to whether Defendants are entitled to attorney fees.

Preservation of Issue: The Terranovas adequately preserved the issue for appeal.

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created by the placement of the dry erase board was caused by activities associated with the construction and maintenance of the classroom."); *Walton v. State*, 968 P.2d 636, 644 (Colo. 1998) (question of fact whether the State created a dangerous condition of a public facility by, among other things, negligent maintenance of a slippery floor); *Hendricks by & Through Martens v. Weld County School Dist. No. 6*, 895 P.2d 1120, 1123 (Colo. App. 1995) (ruling that "the dangerous condition, however, must stem from a physical or structural defect in the building" and holding that an unpadded gymnasium wall qualifies); *Longbottom v. State Bd. of Community Colleges & Occupational Educ.*, 872 P.2d 1253 (Colo. App. 1993) (the operation of a woodworking machine without safety guards that, presumably, was capable of being constructed to include safety guards is potentially a dangerous condition).

Argument: C.R.S. § 13-17-201 "unequivocally mandate(s) an award of costs and attorney fees to a defendant when it prevails on a pre-trial C.R.C.P. 12(b) motion to dismiss." *Crandall v. City & County of Denver*, 238 P.3d 659, 663 (Colo. 2010). The Terranovas assert that Defendants are not entitled to any attorney fees because they voluntarily dismissed one part of their first claim for relief against one defendant after contesting Defendants' motion to dismiss and conducting discovery. They are mistaken.

The district court's initial order dismissed all claims against five of six defendants, namely, the District, Hartnett, Nolan, Peters and Gdowski. R. CF, P. #244-249. § 13-17-201 mandates an award of attorney fees when all claims against a defendant are dismissed, even though other claims persist against other defendants. *Stauffer v. Stegemann*, 165 P.3d 713, 718 (Colo. App. 2006); *see also Smith v. Town of Snowmass Village*, 919 P.2d 868 (Colo. App. 1996). The Terranovas cite no statutory or case law support for their assertion that a defendant is not entitled to attorney fees simply because another claim persists against a co-defendant. Accordingly, the district court had no basis to *deny* the fee application from the District, Hartnett, Nolan, Peters and Gdowski.

As to the remaining claim against Giordano, the district court delayed ruling on his C.R.C.P. 12(b) motion to dismiss pending limited discovery about his

employment status. R. CF, P. #246 (*citing Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993)). After conducting discovery, the Terranovas voluntarily dismissed their remaining allegation against Giordano and then initiated this appeal. R. CF, P. #251.

Defendant Giordano is also entitled to his attorney fees. A contrary ruling would violate the intention of C.R.S. § 13-17-201. Here, Plaintiffs opposed Giordano's Rule 12(b) motion in writing and at oral argument. R. CF, P. #74-75 *and* R. Tr. (date) P. #29. The court dismissed the primary, substantive allegation against him—that he acted willfully and wantonly—and delayed ruling on the alternatively pled independent contractor theory.[10] R. CF, P. #246. If the later dismissal of one claim against one defendant absolves the Terranvoas from paying attorney fees, Plaintiffs would achieve a result counter to the intention of C.R.S. §13-17-201: they could fully and unsuccessfully litigate every aspect of

[10] The assertion that Giordano was an independent contractor was also contrary to the claims against the other defendants. The claim against the supervisor defendants was premised on the notion that they should have more closely supervised their employee, Giordano, and by their failure acted willfully and wantonly. They could not supervise or direct his professional judgment if he was an independent contractor. *See Brighton Sch. Dist. v. Lyons*, 873 P.2d 26, 28 (Colo. App. 1993) (the most important factor in distinguishing an independent contractor from an employee is whether the alleged employer exercises control over the means and methods of accomplishing the contracted service). As a practical matter, the Terranovas could not have proceeded forever on two mutually exclusive theories; dismissal of one or the other was inevitable.

Defendants' Rule 12(b) motion, appeal the rulings adverse to them, and avoid paying attorney fees by the later-in-time dismissal of one, alternatively pled claim. Plaintiffs should not be rewarded because they conceded, after more than seven months of litigation, that one claim against one defendant was — and always had been — entirely without factual support. *See*, *e.g.*, *Houdek v. Mobil Oil Corp*., 879 P.2d 417 (Colo. App. 1994) ("By enacting § 13-17-201, the General Assembly intended to discourage unnecessary litigation of tort claims."); *Cf. Employers Ins. of Wausau v. RREEF USA Fund-II, Inc.*, 805 P.2d 1186 (Colo. App. 1991) ("we conclude that the General Assembly did not intend § 13-17-201 to apply to a situation in which, as here, a plaintiff files a confession to a defendant's C.R.C.P. 12(b) motion to dismiss in such a manner that defendant *is not required to expend additional efforts beyond the filing of its motion*.")(emphasis added).

Finally, the Terranovas claim that the attorney fee award was improper because Defendants' C.R.C.P. 12(b) motion "could be construed as a grant of summary judgment" because "the trial court's legal conclusion . . . had the same effect as a grant of summary judgment." Opening Brief p. 28-29. Certainly, granting a Rule 12(b) motion has the same *effect* as granting a Rule 56 motion, in that both result in dismissal. That alone does not convert a 12(b) motion into a motion for summary judgment and void C.R.S. § 13-17-201. The mandatory

attorney fees are only avoided if "a motion under rule 12(b) . . . is *treated* as a motion for summary judgment." C.R.S. § 13-17-201 (emphasis added). Here, the district court did not apply summary judgment standards to Defendants' motion to dismiss, nor did it consider matters outside the pleadings.[11] Instead, the court determined that the Terranovas' Amended Complaint failed to meet applicable legal standards pursuant to C.R.C.P. 12(b). R. CF, P. #244-249. Therefore, Defendants are mandatorily entitled to their attorney fees pursuant to C.R.S. § 13-17-201.

CONCLUSION

The district court applied the correct legal standard in determining that the Terranovas failed to identify specific facts supporting their willful and wanton allegations. The district court also rightly concluded that the baseball mound's allegedly dangerous condition did not make out a viable public facility exception and, regardless, the mound's alleged dangerousness did not cause Alex Terranova's injury. Accordingly, Defendants respectfully ask that this Court affirm

[11] The only matters outside the pleadings brought to the court's attention were Giordano's pay information and Dr. Rabinoff's expert report, added as an attachment to the Terranovas' response to the motion to dismiss. The former exhibit concerned an issue not ruled on by the court, R. CF, P. #246, and the latter was offered by the Terranovas and, as they point out, "was not even acknowledged in the trial court's order of dismissal." Opening Brief p. 18.

the trial court's judgment dismissing the Terranovas' complaint and awarding Defendants attorney fees and costs.

DATED this 4th day of June, 2014.

HALL & EVANS, L.L.C.

*E-Filed-Original duly signed and on file at the offices of Hall & Evans, L.L.C.**

s/ Keith M. Goman
Keith M. Goman, Esq., #37769
Thomas J. Lyons, Esq., #8381
of HALL & EVANS, L.L.C.
ATTORNEYS FOR DEFENDANTS

* *In accordance with C.R.C.P. 121-1-26(9), a printed copy of this document with original signatures is being maintained by this office and will be made available for inspection by other parties or the Court.*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2014, I caused a true and correct copy of the foregoing to be served via ICCES File and Serve, upon each of the following:

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