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

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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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WICK & TRAUTWEIN, LLC

By: */s/ Kimberly B. Schutt*
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COMES NOW the Appellants, Alex Terranova and Frederick Terranova, by and through their counsel of record, WICK & TRAUTWEIN, LLC, and respectfully submit the following Reply Brief:

I. SUMMARY OF REPLY ARGUMENTS

At issue in this appeal is whether the trial court erroneously dismissed the Terranovas' claims for personal injuries Alex Terranova sustained while a student baseball player at Legacy High School in Broomfield, Colorado. As discussed at length in the Terranovas' Opening Brief, they contend the trial court employed the wrong legal standard to find that the allegations of the Amended Complaint did not constitute willful and wanton conduct on the part of the individual defendants as a matter of law, and that the trial court erroneously concluded that the Terranovas' claims were barred by the Colorado Governmental Immunity Act. The appeal also challenges the trial court's statutory award of attorney's fees to the defendants under C.R.S. §13-17-201.

In their Answer Brief , the Defendants-Appellees agree that all of the issues the Terranovas have raised on appeal have been properly preserved in the trial court below. They also appear to agree that this Court must employ a *de novo* review of the trial court's dismissal of these various claims.

Under this *de novo* review, the Court should reverse the trial court's dismissal and its award of attorney's fees, notwithstanding the defendants' arguments to the contrary in their Answer Brief. Those arguments are flawed for the following reasons, which will be the narrow focus of this Reply Brief:

1) The claims of willful and wanton conduct – which are expressly excluded from the CGIA – should have been reviewed under a C.R.C.P. 12(b)(5) standard rather than a C.R.C.P. 12(b)(1) standard, as specifically discussed in *Gray v. University of Colorado Hosp. Authority*, 284 P.3d 191, 198 (Colo.App. 2012). The authority cited by the defendants in arguing to the contrary does not even mention these two different standards, let alone support the defendants' proposition that this issue was properly resolved under C.R.C.P. 12(b)(1). Therefore, as argued in the Opening Brief, the trial court erred at the outset by failing to apply the proper and more lenient standard of review, under which dismissals are disfavored.

2) Defendants' Answer Brief repeatedly argues that the Terranovas' allegations of willful and wanton conduct were merely "conclusory." This argument is belied by the Amended Complaint itself, which consists of 13 pages of detailed allegations setting forth numerous specific facts supporting those claims. Under the governing legal authority discussed below, they are not the unsupported

"bare-bones" assertion of willful and wanton conduct which the courts have deemed to be conclusory. Rather, they more than adequately articulated the facts giving rise to the Terranovas' claims of willful and wanton conduct, such that those claims must be allowed to go forward and be resolved by a jury.

3) With regard to the issue of governmental immunity, the defendants' argument turns primarily on an assertion that the alleged dangerous condition of a public recreation facility supposedly did not arise from negligent "construction" or "maintenance," and thus the defendants assert this claim must automatically be barred. However, the defendants' construction of this statutory language is too narrow. This case is directly analogous to several cases in which the Colorado appellate courts rejected such a narrow interpretation of "dangerous condition," and the Court should likewise reject that argument here and find that the Terranovas' claims sufficiently allege a waiver of governmental immunity.

Finally, as discussed below, the trial court's award of attorney's fees should be reversed, even if this Court affirms dismissal of some but not all of the claims, given the joint defense presented by the Defendants below. Also, Defendants' Answer Brief does not articulate any basis for their generic request for an award of attorney's fees on appeal, contrary to the requirements of C.A.R. 39.5, thus this

request must also be denied even if the Defendants are successful in defending dismissal of the claims on appeal.

II. ARGUMENT

A. The claims of willful and wanton misconduct were improperly dismissed by the trial court.

1. The trial court erred at the outset in failing to assess the allegations of willful and wanton conduct under a C.R.C.P. 12(b)(5) standard of review.

The Terranovas' Opening Brief discussed how the trial court erroneously applied a C.R.C.P. 12(b)(1) standard of review in dismissing the Terranovas' claims of willful and wanton conduct alleged against Defendant Giordano and the other individually named school officials. C.R.C.P. 12(b)(1) is the standard to be employed in determining whether a particular claim is barred by the immunity provisions of the CGIA. However, as discussed at length in *Gray v. University of Colorado Hosp. Authority*, 284 P.3d 191, 198 (Colo. App. 2012), claims of willful and wanton conduct are specifically excluded from immunity under the CGIA, and the sufficiency of such claims must therefore be evaluated under the more lenient standard of C.R.C.P. 12(b)(5). Under C.R.C.P. 12(b)(5), the trial court must take the allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Denver Post Corp. v. Ritter,* 255 P.3d 1083, 1088 (Colo. 2011). Dismissals under C.R.C.P. 12(b)(5) are viewed with disfavor. *Id*.

Notwithstanding the clear directives of *Gray*, Defendants assert in their Answer Brief that the determination as to whether wilful and wanton conduct has been sufficiently alleged should be done under C.R.C.P. 12(b)(1). *Answer Brief, at 12*. In support for this assertion, they cite *Moody v. Ungerer*, 885 P.2d 200 (Colo. 1994). However, nowhere in *Moody* does the Supreme Court even mention C.R.C.P. 12(b)(1), let alone engage in any analysis of the two very different standards of review.

Therefore, this Court should follow the sound reasoning of *Gray* and review the allegations of the Amended Complaint according to the standards of C.R.C.P. 12(b)(5). It would be patently unfair to a plaintiff to review such claims under the C.R.C.P. 12(b)(1) standard, when claims of willful and wanton conduct are expressly excluded from the harsh jurisdictional bar created by the CGIA.

2. The Terranovas' allegations of willful and wanton conduct are far from conclusory.

The Defendants' Answer Brief repeatedly asserts the Terranovas have made mere "conclusory" allegations of willful and wanton conduct and their Amended Complaint is thus insufficient as a matter of law. However, this assertion flies in the face of the Amended Complaint (R. 15-27), attached hereto for the Court's convenience as Appendix 1, which consists of 13 pages of specific, detailed allegations of the facts giving rise to these claims.

The Colorado appellate courts do not appear to have specifically defined "conclusory" in this context, but their various decisions suggest that an allegation or affidavit is conclusory when it states a legal conclusion without providing any factual support for the statement. *See, e.g., White v. Jungbauer*, 128 P.3d 263, 266 (Colo.App. 2005) (conclusory opinion is one which is unsupported by any evidence); *Keith v. Kinney*, 140 P.3d 141, 153 (Colo.App. 2005) (rejecting an affidavit containing a single conclusory statement not accompanied by any factual assertions); *People v. Altman*, 960 P.2d 1164, 1170 (Colo. 1998) (rejecting a "bare-bones" affidavit which contained a wholly "conclusory" statement devoid of facts from which a magistrate could independently determine probable cause).

Therefore, as discussed in *Gray*, "a complaint must 'do more than merely assert' that a public employee's acts or omissions were willful and wanton; it must, at a minimum, also 'set forth specific facts to support a reasonable inference' that the employee was consciously aware that his or her acts or omissions created danger or risk to the safety of others, and that he or she acted, or failed to act, without regard to the danger or risk." *Gray*, 284 P.3d at 198-199 (*quoting Wilson v. Myer*, 126 P.3d 276, 282 (Colo.App. 2005)). Employing this standard, the *Gray* court went on to find the complaint in that case set out numerous factual allegations against the defendant doctor (as the Amended Complaint does here)

and sufficiently stated a claim of willful and wanton conduct on the part of that defendant, warranting reversal of the trial court's dismissal of that claim.

Likewise, in *Davis v. Paolino*, 21 P.3d 870, 873 (Colo.App. 2001), the Court of Appeals found the defendant's allegations that the defendant corrections officer "spilled coffee and juice on the floor, willfully and wantonly and intentionally creating a dangerous condition, when by his deliberate actions of not cleaning up this mess he made, nor insuring that it be cleaned up, he willfully and wantonly intended for someone to be injured by its presence, as can be shown by the duration of its being a hazard (over 2 hours) without being cleaned up" sufficiently stated a claim of willful and wanton conduct. The Court reversed the trial court's dismissal of the claim for willful and wanton conduct, finding the claim should be allowed to go forward "at least until the facts can be fleshed out by discovery or presentation of an appropriate affidavit…" *Id*.

The Terranovas discuss at length at pages 15-17 of their Opening Brief just some of the numerous factual allegations supporting the claims of willful and wanton conduct against the individual defendants. Those allegations are more extensively set forth in the Amended Complaint itself. Further, contrary to the Defendants' assertions, those allegations detail not only the acts and omissions constituting the willful and wanton conduct on the part of these individuals, but

they also specifically allege that those willful and wanton acts and omissions caused the injuries of Alex Terranova. This is true with regard to both the orchestration of the dangerous pick-off drill itself, as well as with regard to Defendant Giordano's having disregarded his recent concussion training in responding to Alex Terranova being struck in the head – twice.

Further, the allegations are sufficiently plead against both Defendant Giordano and the other school district officials named as defendants in the Complaint. While the Defendants argue that these claims against the other school officials are in the nature of negligent supervision and claims of this sort do not fall within the immunity waivers of the CGIA, the Defendants overlook the fact that the claims against these other individual defendants are for willful and wanton conduct. Again, by the express provisions of the CGIA, such claims are outside the CGIA. The unreported decision cited by Defendants for this proposition, namely *Loveland v. St. Vrain Valley Sch. Dist. RE-1J,* 2012 COA 112, P32 (Colo.App. 2012), thus is not applicable (to the extent it is controlling at all in the first instance).

The Defendants' arguments about the "conclusory" nature of the Terranovas' claims of willful and wanton conduct are thus simply without merit. The Court can rightfully find, pursuant to its own *de novo* review of the Amended

Complaint and the standards of review under C.R.C.P. 12(b)(5), that the Terranovas have sufficiently alleged claims of willful and wanton conduct against the individual defendants. Therefore, the trial court committed reversible error in dismissing those claims.[1]

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

As discussed at length in the principal briefs, the Court must determine, on *de novo* review, whether the Terranovas have alleged a claim against the school district which falls into the waiver of immunity for

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

The parties agree that, in making this determination, the Court must look to the definition of a "dangerous condition" found in C.R.S. §24-10-103(1.3):

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[1] Defendants argue that the affidavit of defense expert Marc Rubinoff cannot be considered in evaluating the sufficiency of the allegations. This might be true under C.R.C.P. 12(b)(5), as it is a matter outside of the pleadings and would arguably convert the motion into one for summary judgment. However, under C.R.C.P. 12(b)(1), the standard of review urged by Defendants, the Court is not restricted to the face of the pleadings but can properly consider affidavits and other evidence. *City of Lakewood v. Brace*, 919 P.2d 231, 244 (Colo. 1996). Defendants cannot have it both ways.

> "[a] physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee . . . in maintaining such facility."

Here, the Terranovas have alleged that the dangerous condition was the unscreened apex of the pitcher's mound combined with its use in the dangerous and improper pick-off drill. The trial court went out of its way to reject this theory based upon its conclusion that "expanding 'condition' of a public facility to include 'use' of a public facility would improperly expand the intent of waiver under the CGIA." *R. 163*. As discussed in the Opening Brief, however, this conclusion is patently wrong and contrary to the express language of the statute itself, which specifically defines a dangerous condition to include the use of the public facility.

The Answer Brief does not address this erroneous conclusion, but simply argues that a dangerous condition allegedly cannot arise solely from a facility's use. According to the Defendants, even if the use of the mound created a dangerous condition, the Terranovas have allegedly failed to argue that the condition was caused by negligent maintenance or construction.

However, this is not true. The Terranovas have pointed to specific legal authority in which the appellate courts have found a waiver of immunity for the

dangerous use of a public facility under circumstances directly analogous to this one. *See, Walton v. State,* 968 P.2d 636 (Colo. 1998) (dangerous condition resulted from the use of an unsecured ladder on a slippery floor to access a loft for maintenance); *Hendricks v. Weld County School Dist. No. 6,* 895 P.2d 1120 (Colo. App. 1995) (dangerous condition resulted from a school's use of a gymnasium with unpadded walls for a game which required children to run at high speeds into a "safe area" immediately in front of the walls); *Longbottom v. State Bd. of Community Colleges and Occupational Educ.,* 872 P.2d 1253, 1254 (Colo.App. 1993) (complaint fell within a statutory waiver of immunity where the claim arose from an injury caused by the use of a jointer machine which was not equipped with proper safety guards, and where it was alleged the defendants permitted students to operate the machines without proper instruction or supervision).

In the similar case of *Walton*, the Supreme Court of Colorado discussed the fact that a "dangerous condition," as defined by the statute, "must be associated with construction or maintenance, not solely design, of the public facility." *Walton*, 968 P.2d at 644. The Court went on to find, based upon circumstances similar to this case, that the plaintiff's injuries there were not solely due to inadequate design of the building, but rather were tied to the use of the state of the building, i.e. how it had been maintained. *Id.*, at 645. The Court found in that case that the

allegations sufficiently fell within the statutory waiver of immunity for a dangerous condition of a public facility, and this Court would be acting consistently with the above authority to do likewise here. *Id*. That is particularly true given the applicable standards for interpreting such waivers of immunity broadly and in favor of victims injured by negligent government employees.

Further, the Terranovas also would point out that their Amended Complaint contains specific allegations as to the fact this dangerous condition was created by negligent maintenance of the public facility, as opposed to any design flaw. More specifically, paragraphs 20-26 of the Amended Complaint allege the pitcher's mound was not kept "in the same general state of . . . *efficiency*" as initially constructed in the sense that the pitcher's mound, as used, was not at all used in a way to replicate the actual conditions existing during a real baseball game. Three baseballs are not simultaneously being thrown to at an unscreened pitcher's mound from several different directions during a real game. Further, the use as alleged of the pitcher's mound for a "pick-off" drill in the manner it was conducted constituted an act or omission of the public entity and public employees that constituted a failure to *preserve* the "facility" from "failure," in the sense that the pitcher's mound failed of its essential purpose of allowing a single pitcher to throw

a single pitch to a single batter and, instead, made the facility comprised of the pitcher's mound a rather effective head injury-producing machine.

Therefore, as in the analogous cases cited above and discussed in the Opening Brief, this Court should find that the Terranovas have sufficiently alleged a statutory waiver of immunity for a dangerous condition of a public recreation facility. Thu, the trial court erred in dismissing the third claim for relief.

C. Defendants are not entitled to an award of attorney's fees, either in the trial court or on appeal.

The Terranovas' Opening Brief sets forth extensive argument and legal authority as to why the trial court erred in giving all of the Defendants' a statutory award of attorney's fees under C.R.S. §13-17-201, and those arguments will not be repeated here.

To the extent the Defendants argue that certain of the defendants should be entitled to an award of their attorney's fees if this Court reverses dismissal of some of the claims but not all of them, such an assertion is without merit. As stated on page 2 of the Defendants' own Answer Brief, the defendants' presented a joint motion of dismissal and joint defense to these claims. The Defendants made no showing below as to the attorney's fees incurred with regard to any particular claim against any specific defendant, nor did the trial court differentiate among the defendants in its order awarding fees. Thus, even if the dismissal of one of the

claims is affirmed, it is still not a dismissal of the "entire action" from the standpoint of this joint defense.

Further, in addition to the flaws in the attorney fee award below, the Defendants have simply made a generic request in the prayer for relief of their Answer Brief asking this Court to award them attorney's fees on appeal. The Defendants have articulated no basis for such an award of fees incurred on appeal, and thus the request must be denied outright as contrary to the requirements of C.A.R. 39.5.

Thus, this Court should reverse the trial court's award of fees below and also deny the Defendants' generic request for fees incurred on appeal.

III. CONCLUSION

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

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

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

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

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

RESPECTFULLY SUBMITTED this 18th day of July, 2014.

WICK & TRAUTWEIN, LLC

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF was filed with the court via Integrated Colorado Courts E-filing System (ICCES) this 18th day of July, 2014, with a copy served on:

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s/Jody L. Minch

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

APPENDIX

Appendix 1: Amended Complaint and Jury Demand – pages 1-13 (R. 15-27)