DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, CO 80112	 DATE FILED: September 8, 2011 2:54 PM CASE NUMBER: 2011CV664 ▲COURT USE ONLY▲
Plaintiff: SARA L. BURNETT v. Defendants: STATE OF COLORADO/DEPT. OF NATURAL RESOURCES/DIVISION OF PARKS & OUTDOOR RECREATION	Case Number: 11CV664 Division: 308

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) AND AWARDING REASONABLE ATTORNEY FEES

THIS MATTER comes before the Court on Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and Request for Attorney Fees Pursuant to §13-17-201 C.R.S. The Court has reviewed the motions, the Court file, and applicable law to now find and rule as follows:

I. FACTUAL BACKGROUND

The parties have stipulated to the following undisputed facts for the purposes of Defendants' motion to dismiss: (1) Plaintiff paid a fee to enter Cherry Creek State Park; (2) Plaintiff was camping in a tent at Cherry Creek State Park in a designated camping area, at an improved campsite, at the time she was injured (as described in Tim Metzger's affidavit); (3) Plaintiff was injured when her tent was struck by a tree branch; (4) the branch that struck Plaintiff's tent likely fell from a tree adjacent to the improved campsite; (5) the improved campsite was a public facility within the meaning of the Colorado Governmental Immunity Act (CGIA); and (6) Park personnel, or individuals contracted by the Park, had trimmed trees adjacent to the improved campsite on past occasions.

The parties further agree that the matters set forth in the affidavit of Tim Metzger (Park Manager for Cherry Creek State Park) are undisputed. Within Mr. Metzger's affidavit, the following agreed upon facts are of particular importance: (1) Cherry Creek State Park is located on land owned by the Army Corps of Engineers and leased by the State of Colorado; (2) the Park contains thousands of trees located in areas frequented by the public including along park trails and within designated campground areas; (3) the Park contains a designated camping area with 135 campsites featuring either basic or full hook-up amenities; (4) foliage adjacent to campsites varies with some campsites flanked by trees with overhanging branches, some flanked by trees without overhanging branches, and some without any adjacent trees; and (5) all the cottonwood

trees that are adjacent to the campsite used by Plaintiff are mature, likely existed at the time the Park was created, and were not planted by park staff.

II. STANDARD OF REVIEW

Pursuant to C.R.C.P. 12(b)(1), the defendant in a civil case is entitled to dismissal of the operative Complaint if the Court lacks jurisdiction over the subject matter. In the context of the CGIA, a claim that does not fall within a waiver of governmental immunity must be dismissed as the Court lacks jurisdiction over the subject matter. *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (Colo. 1992). The plaintiff bears the burden of proving the Court's jurisdiction. *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995). Because the jurisdictional facts are not in dispute, an evidentiary hearing is not necessary for the determination of immunity issues. *Tidwell v. City & County of Denver*, 83 P.3d 75, 85-86 (Colo. 2003).

III. DEFENDANTS HAVE NOT WAIVED IMMUNITY, BECAUSE THE TREE AT ISSUE IN THE INSTANT CASE WAS NOT INTEGRAL TO THE IMPROVED CAMPSITE AND THEREFORE THE TREE WAS NOT A "PUBLIC FACILITY" AS DEFINED UNDER CGIA

Pursuant to the CGIA, a public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort. 24-10-105(1) C.R.S. Despite granting general immunity to public entities for tort claims, the CGIA provides limited exceptions whereby the public entity waives its immunity. 24-10-106(1) C.R.S. Pertinent to this case is the exception set forth in subsection (e) which waives immunity in an action for injuries resulting from a dangerous condition of any public facility located in any park or recreation area maintained by a public entity. 24-10-106(1)(e) C.R.S. However, section (e) is also qualified as it states "nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area…." *Id*. Thus, the sole issue in this case is whether the tree adjacent to Plaintiff's improved campsite falls within the definition of a "public facility" under the CGIA.

The Colorado Court of Appeals addressed whether a tree within a state park is a public facility within the meaning of the CGIA in *Rosales v. City and County of Denver*, 89 P.3d 507 (Colo. App. 2004). In *Rosales*, the "[p]laintiff was injured when a tree branch fell on her while she was picnicking at a City park." *Id*. at 508. Although the phrase "public facility" is not defined in the CGIA, the *Rosales* Court concluded the phrase "public facility" refers to something that is built or constructed by a public entity to serve some public purpose and does not refer to a natural object such as a tree. *Id*. at 509-510. The court derived this definition from the express language of the CGIA and the logical inferences drawn from its provisions. First, the court noted that the phrase public facility was grouped with other constructed facilities (hospitals, jails, water facilities, electrical facilities, gas facilities and sanitation facilities). Second, 24-10-106(1)(e) C.R.S. grants public entities immunity from injuries caused by the natural condition of any unimproved property. Finally, had the General Assembly "intended to waive immunity for all dangerous conditions located in a park or recreational area, it would have

provided that immunity was waived for 'a dangerous condition in a park or recreation area' rather than for a dangerous condition of a public facility in a park or recreation area." *Id*.

Although the *Rosales* Court excluded natural objects from the definition of a public facility, the court did recognize circumstances whereby a tree could be considered a public facility under the CGIA constituting a waiver of governmental immunity. Specifically, the *Rosales* Court held that a tree in a park or recreation area could not be a public facility unless a public entity incorporates the tree into a facility in such a manner that "it becomes an integral part of the facility and is essential for the intended use of the facility." *Id*. at 510. Although the trial court concluded the tree was incorporated into the facility because it provided shade, protection, and aesthetic value, the Court of Appeals held that such contributions were not integral or essential to the facility. *Id*. at 508, 510.

In this case, Plaintiff has failed to establish that the cottonwood trees adjacent to her improved campsite were an integral part of the campsite (an acknowledged public facility) or that the specific tree was essential for the intended use of the campsite in accordance with *Rosales*. Integral, as explained above, requires the tree to be essential to the intended use of a facility. Plaintiff's assertion that the cottonwood trees adjacent to her campsite are integrated into the campsite, even if true, fails to satisfy the test set forth in *Rosales* as integration is not synonymous with integral. Moreover, *Rosales* expressly rejected Plaintiff's present assertion that trees are integral and essential to a public facility because they provide protection, shade, and aesthetic value. Trees cannot be considered essential to the intended use of the campsites within Cherry Creek State Park when numerous campsites do not have adjacent or surrounding trees. Thus, the Court is not persuaded that the pertinent facts in this case are distinguishable from those in *Rosales*. The fact that Plaintiff was injured on a designated campsite that she paid to use is irrelevant. Neither of these facts establishes that the tree was integral or essential to the improved campsite. *Rosales*, 89 P.3d at 510.

IV. DEFENDANTS ARE ENTITLED TO REASONABLE ATTORNEY FEES

Pursuant to §13-17-201 C.R.S., a defendant shall have judgment for reasonable attorney fees associated with defending the action if such action is dismissed on defendant's motion under C.R.C.P. 12(b). §13-17-201 C.R.S. An award of attorney fees is mandatory when a trial court dismisses an action under the CGIA for lack of subject matter jurisdiction. *Ferrel v. Colo. Dept. of Corr.*, 179 P.3d 178, 189 (Colo. App. 2007). Because this Court grants Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b), due to lack of subject matter jurisdiction, Defendants are entitled to receive reasonable attorney fees associated with defending this action.

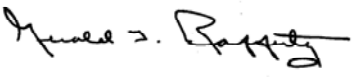
V. CONCLUSION

Because the adjacent trees are simply a natural condition of the improved campsite and not integral or essential to the campsite, Defendants retain their sovereign immunity under the CGIA. Therefore, this Court lacks jurisdiction over the subject matter and hereby **GRANTS** Defendants' Motion to Dismiss and **AWARDS** Defendants Reasonable Attorneys Fees associated with filing this Motion to Dismiss. Defendants have thirty (30) days to file a Bill of Costs for reasonable attorneys fees.

IT IS SO ORDERED.

Done this 8th day of September, 2011.

BY THE COURT:



Gerald J. Rafferty
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of September, 2011, true and correct copies were sent via email, U.S. Mail and/or hand delivery addressed as follows:

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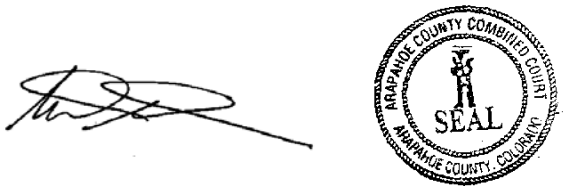

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Clerk, Division 308
Arapahoe County District Court