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SUPREME COURT, STATE OF COLORADO
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Opinion by the Court of Appeals
Case No. 2011CA2141, Fox, J.; Carparelli, J. dissenting.

Appeal from Arapahoe County District Court
Case No. 2011CV664, The Hon. Gerald J. Rafferty

SARA L. BURNETT,

Petitioner,

v.

STATE OF COLORADO/DEPARTMENT OF NATURAL RESOURCES/DIVISION OF PARKS & OUTDOOR RECREATION,

Respondent.

▲COURT USE ONLY▲

Case No: 2013SC306

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PETITIONER'S OPENING 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).

Choose one:

☑It contains 9,306 words.

❑It does not exceed 30 pages.

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

For the party raising the issue:

☑It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p.___), not to an entire document, where the issue was raised and ruled on.

❑For the party responding to the issue:

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

☑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/ *Timms R. Fowler*
Timms R. Fowler

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

I. STATEMENT OF THE ISSUES

Whether the court of appeals erred in concluding that the government did not waive immunity under § 24-10-106(1)(e), C.R.S. (2013), of the Colorado Government Immunity Act, for injuries caused by a tree that fell on a camper in an improved campsite in a state park.

II. STATEMENT OF THE CASE

A. Nature of the case.

This is a personal injury action against the State of Colorado, its Department of Natural Resources, and the Department's Division of Parks and Outdoor Recreation (collectively the "State"). Burnett was injured at night, while she was sleeping in her tent, which was pitched on the improved tent pad in the campsite, designated as Campsite No. 14, in Cherry Creek State Park.

Campsite No. 14 and the tent pad used by Burnett were nestled in, among, and under a mature stand of cottonwood trees. Four trees are situated around and effectively surround the tent pad used by Burnett, and some of their trunks are within inches of the tent pad as shown in the photographs attached as **Appx**. **1**. One tree is situated between the picnic table and paved/asphalt pad and dirt tent pad. R:12 (Ex. 2 to Complaint [photo of Campsite No. 14 and trees]); R:13 (Ex. 3 to Complaint [photo of limb causing injuries to Burnett]); R:14 (Ex. 4a and 4b to Complaint [photos of designated tent pad situated in, among, and under the trees,

and of dead branches and a limb that had been previously sawed directly above tent pad]).

During the night, which allegedly was not windy or stormy, a large branch fell from one of the overhanging or immediately adjacent cottonwood trees and struck Burnett in the head and neck causing a skull fracture, vertebral fracture, and other acute injuries.

The State challenged Burnett's Complaint arguing that the district court lacked subject matter jurisdiction because the State was immune, pursuant to the Government Immunity Act (the "CGIA"). The district court granted the motion.

The district court concluded that the tree that lost the large branch was not part of a public facility and, therefore, did not constitute a dangerous condition for which the State waived immunity under § 24-10-106(1)(e), C.R.S. The district court concluded specifically that under the test announced in *Rosales v. City & County of Denver*, 89 P.3d 507 (Colo. App. 2004), the subject tree was not integral or essential to the function of a public facility. Therefore, the tree was not part of any public facility and could not constitute a dangerous condition.

Burnett appealed, and the court of appeals affirmed on substantially the same grounds. *Burnett v. State*, 2013 COA 42, 2013 WL 1245366, ___ P.3d ___, (Colo. App. 2013) attached as **Appx. 2** (the majority). The Honorable Russell J. Carparelli issued a dissenting opinion. *Burnett* at ¶¶27-70 (the dissent).

The majority rejected Burnett's reading of the plain text of the CGIA and her common-sense contention that the campground and Campsite No. 14 should be viewed as functional units when applying the text of the CGIA. *Burnett* at ¶¶17-18. *See also id.* at ¶¶19-22.

B. Proceedings below.

Burnett brought suit against the State. Burnett alleged that she was an invitee to Cherry Creek State Park, camped there on the evening of July 18, 2010, and was injured early in the morning of July 19, 2010. R:2-3, ¶¶6-15. Burnett alleged that her injuries were caused by the State's violation of its duties under the Premises Liability Act. *Id.*

Burnett contended that Cherry Creek State Park was "a public facility under the terms of the Colorado Governmental Immunity Act." Burnett alleged that the State had waived its sovereign immunity for the injuries she sustained as the result of the limb that fell and struck her, while sleeping in her tent in the improved campsite and on the tent pad provided by the State for that purpose. *See* Burnett's Complaint at R:1-15. *See* **Appx. 1**; R:12, 14.

Burnett asserted that the trees immediately adjacent to the designated campsites were "integrated" into the public facility. R:6, ¶26. Specifically, Burnett alleged that they were incorporated "meaning that the [State park] had incorporated the tree into the public facility in such a manner that it became an

integral part of the facility and was essential for the facility's intended use." R:6, ¶26, n. 1.

Burnett alleged that the State through its employees, agents, and representatives was aware of the dangerous condition of the trees, meaning the dead branches on trees surrounding the campsites, and that before Burnett was injured, the State had taken precautions to protect the public by trimming the dead branches. R:7, ¶27.

Burnett asserted that the State knew of the danger posed by the cottonwood trees immediately adjacent to the designated campsites and that dead branches falling from the cottonwood trees would pose a danger to campers. R:7, ¶28. She also alleged that the knowledge of the danger was evident to the State based upon its admitted prior practice to prune or trim the cottonwood trees immediately adjacent to and overhanging the area where Burnett pitched her tent before she was injured. R:7, ¶28.

The State filed a Motion to Dismiss (R:29-37) and argued that it was immune from Burnett's suit under the CGIA (R:31-33). The State specifically asserted that the tree branch constituted a "natural condition" and, therefore, there was not a dangerous condition existing on the public facility. Absent a dangerous condition, the State argued it was immune. R:33-37.

Burnett opposed the State's motion arguing that the park was a public facility and the focus of the analysis should not be limited to whether a particular tree within the park is considered a public facility, but rather whether the campsite itself, and specifically Campsite No. 14, including the adjacent trees, should be considered as a public facility.[1] R:47.

Burnett and her friend set up a tent on the dirt or gravel tent pad in Campsite No. 14. R:48 (citing ¶¶11-12 of her Complaint). Burnett argued that the trees adjacent to these campsites had been "incorporated into the public facility in such a manner that it is an integral part of the facility and it is essential for the facility's intended use." R:49-50 (citing her Complaint at ¶26). She argued that the trees adjacent to these spaces, and "specifically campsite #14, regardless whether [the trees] were planted or existed previously, are for purposes of protection, shade and aesthetic value; and were, prior to the subject incident, maintained by park personnel." R:55.

Burnett also pointed out that her Complaint included photographs of the trees adjacent to Campsite No. 14 showing at least one branch had previously been sawed off and removed. R:56 (**Appx. 1**). Burnett contended that the State must

[1] Burnett in her response requested an evidentiary hearing under *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), to "afford the plaintiff the opportunity to establish waiver of Governmental Immunity." R:48. However, Burnett later withdrew her request because the parties agreed to a stipulated set of facts.

have been aware of the danger from falling branches as evidenced by the steps taken to eliminate the dangerous condition depicted by the branch that had been pruned. Furthermore, according to a statement by a park ranger, the State used to trim and remove dead tree limbs. R:57. Burnett asserted that the State, despite knowing of the danger to campers, made a "conscious decision to stop trimming the dead branches." *Id.* Burnett argued there had been "no storm or wind, and she had no way of knowing the campsite specifically designated for overnight camping could lead to severe injury from a falling tree limb." R:57.

Burnett contended that "contrary to the intent of the Governmental Immunity Statute" the State "invite[d] members of the public" onto its land, "charged a fee for entering the land and an additional fee to camp; knowing of the danger of falling tree limbs from cottonwood trees over 70' high; knowing they stopped trimming dead tree limbs; and subjecting unwitting members of the public to be exposed to such dangers." R:57. Nevertheless, the district court granted the State's motion to dismiss and the court of appeals affirmed.

III. STATEMENT OF THE FACTS

Four trees surround the tent pad, and some of their trunks are within inches of the dirt or gravel tent pad, which is outlined by sunken timbers as shown in the photos attached as **Appx. 1**. R:12 (Ex. 2 to Complaint [photo of Campsite No. 14

and trees]); R:14. The parties stipulated that various facts were undisputed for the purposes of the Motion to Dismiss as follows:

> 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. The improved campsite is described in Tim Metzger's affidavit at ¶¶6 and 8;
>
> 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 Government Immunity Act (CGIA); and,
>
> 6) Park personnel, or individuals contracted by the Park, had trimmed trees adjacent to the improved campsite on past occasions.

R:67 (as set forth in the State's Reply Brief); *see also* the Order granting the Motion to Dismiss at R:76-77.

The parties also stipulated that the "matters" set forth in the Affidavit of Tim Metzger, the Park Manager at Cherry Creek State Park, were undisputed[2] as follows:

> …
>
> 4. Cherry Creek State Park is located on land owned by the Army Corps of Engineers and leased by the State of Colorado. The 4,200 acre Park provides opportunities for a wide variety of recreational activities and serves as an important habitat for birds and animals. The Park contains approximately 30 miles of trails, including 15 miles of paved trails.
>
> 5. The Park contains thousands of cottonwood trees and other types of trees located in areas frequented by the public. Some trees are located in the Park's campground area. ...
>
> 6. The Park contains a designated camping area with 135 campsites, some of which include basic amenities and some of which are full hook-up sites. Full hook-up sites contain the following: a concrete parking pad, a level dirt pad with a picnic table and a fire pit, and electric, water, and sewer connections. All basic campsites contain the following: a parking pad, a level dirt pad with a picnic table and a fire pit[.]
>
> 7. Some campsites are flanked by trees with overhanging branches. Some campsites have no adjacent trees. Some campsites have trees with no overhanging branches. Campers with tents can pitch their tents on the level dirt area of the campground site, but they are not

[2] The affidavit was attached to the State's Motion to Dismiss and was also attached as Exhibit A to the State's Reply Brief. R:67 (reply citing to affidavit) (Affidavit of Tim Metzger appended at R:73-75). The district court's order also recited the matters deemed to be undisputed. R:76-77.

> restricted to that particular location. Tents are allowed on the concrete pad, on grassy areas near the parking pad or level dirt area, or on areas covered by crushed granite.
>
> 8. The campsite used by Sara Burnett on July 19, 2010, is a full hook up campsite. The campsite is flanked by several cottonwood trees. All the trees are mature, and some reach heights of approximately 75 feet. Because the trees are mature, it is likely that all the trees existed at the time the Park was created in 1959. None of the trees were planted by Park staff. None of the trees are located on the improved portions of Ms. Burnett's campsite.
>
> 9. I examined Ms. Burnett's campsite the day after Ms. Burnett was injured. The foliage created by the trees was fairly dense. Neither I nor any other member of my staff was able to determine the location where the tree branch that struck Ms. Burnett split from a tree adjacent to the camping site.

Affidavit of Tim Metzger. R:73-75.

IV. PRESERVATION OF ISSUES AND STANDARDS OF REVIEW

Burnett preserved her arguments in her Response to the State's Motion to Dismiss (R:46-59), as discussed above.

The question of whether immunity has been waived under the CGIA is an issue of subject matter jurisdiction for the trial court's determination. *Estate of Grant v. State*, 181 P.3d 1202, 1204 (Colo. App. 2008); *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

"Whether the trial court had subject matter jurisdiction for a claim under the CGIA is a question of statutory interpretation that we review *de novo*." *Herrera v.*

City & County of Denver, 221 P.3d 423, 425 (Colo. App. 2009). An "appellate court will not disturb the trial court's findings of jurisdictional fact unless they are clearly erroneous." *Medina*, 35 P.3d at 452; *Springer v. City & County of Denver*, 13 P.3d 794, 799 (Colo. 2000).

"However, if all relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law, in which case appellate review is *de novo.*" *Medina*, 35 P.3d at 452; *Springer*, 13 P.3d at 799.

V. SUMMARY

The General Assembly waived immunity for Burnett's injuries. Based upon the totality of the circumstances, waiver exists because Burnett's injuries fall within the purview of the recreational waiver created by § 24-10-106(1)(e). The text of the waiver depends upon the definition of a dangerous condition, § 24-10-103(1.3), which includes either the "physical condition" of a public facility or the "use" of a public facility that may pose an unreasonable risk to the public. Burnett's injuries fall within the scope of the recreation waiver and both definitions of a dangerous condition for three reasons.

First, the trees constitute part of Campsite No. 14 and its physical condition. As the campsite was built, situated, and maintained, the trees became part of the

campsite. The photographs of the campsite are compelling and depict that the campsite and its facilities are nestled in, among, and under the trees. *See* **Appx. 1**.

The State admittedly pruned or trimmed the adjacent trees, but stopped that maintenance before Burnett was injured. Accordingly, Burnett's injuries fall within the scope of the waiver and definition of a dangerous condition based upon the physical condition of a recreational facility.

Second, Burnett's injuries do not fall within the purview of the stated exception to the recreational waiver for injuries "caused by the natural condition of any unimproved property" set forth by § 24-10-106(1)(e). The trees' apparent natural condition was altered by the State's placement of a highly improved campsite under their canopy, over their roots, and within inches of their trunks. *See* **Appx. 1**.

Therefore, the cottonwood trees ceased to be in their natural condition. As the campsite was built, situated, and maintained in, among, and under the trees, it is located on improved rather than unimproved property. *See id.*

The State admitted maintaining the trees by pruning them, which further altered their natural condition as depicted. **Appx. 1** (R:14 [Ex. 4b to Complaint]). Previous to Burnett's injuries, the trees were maintained by the State as part of the campground and campsite. Thus, the trees ceased to be merely a natural condition of unimproved property. Accordingly, Burnett's injuries were caused by the

physical condition of the Campsite No. 14 and not a natural condition of unimproved property.

Third, Burnett's injuries fall within the purview of the recreational waiver and definition of a dangerous condition because she was injured using the campground and Campsite No. 14 as intended and in the state in which those facilities were provided to her. Burnett was camped at night in the highly improved campsite on a tent pad as provided for such use, and these facilities were situated in, among, and under the cottonwood trees. Accordingly, Burnett's injuries fall within the meaning of the second definition of a dangerous condition regarding the use of a recreational facility.

The district court and majority, however, viewed the evidence and text of the CGIA too narrowly. The courts erred by concluding that the trees constituted a natural condition of unimproved land.

Finally, the district court and majority erred by following the test announced in *Rosales*. The test was applied too narrowly because the State had incorporated the trees into the subject campsite, as the photographs and stipulated facts reveal, and the dissent illuminates that error. Second, the *Rosales* test is too restrictive and is not supported by the plain text of the CGIA, which is illuminated by the dissent as well. *Rosales* should be distinguished, if not disapproved outright.

VI. ARGUMENT

A. Introduction.

The photographs show that the cottonwood stand is part of Campsite No. 14, and the trees are part of the campground as well. Common sense would so dictate. Therefore, the trees are part of a public recreational facility for which immunity is waived, pursuant to § 24-10-106(1)(e), and are not the natural condition of unimproved property, which is an exception to that waiver.

Considering the totality of the circumstances,[3] the plain text of the CGIA,[4] the structure of the CGIA overall,[5] and this Court's directives to construe immunity waivers broadly and exceptions narrowly,[6] the dismissal of Burnett's Complaint is erroneous.

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[3] In enacting a statute, the General Assembly intends a "just and reasonable result" and one that is "feasible," which thereby mandates a practical result as well. *See* C.R.S. § 2-4-201(1)(a)-(d). These sweeping directives beckon consideration of the totality of the circumstances.

[4] Also, "[a]ll general provisions, terms, phrases, and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the general assembly may be fully carried out." C.R.S. § 2-4-212. Accordingly, the plain and ordinary meaning of the words chosen by the General Assembly should govern and be "liberally construed" to "fully carr[y] out" the General Assembly's "true intent." *See id.*

[5] Finally, the "entire statute is intended to be effective." C.R.S. § 2-4-201(1)(b).

[6] *See* C.R.S. § 2-4-212.

B. The purpose and construction of the CGIA.

"[T]he purpose of the CGIA is to allow Colorado's law of negligence to operate against governmental entities, except to the extent that it has barred suit against them." *Springer*, 13 P.3d at 803. "One of the basic purposes of the CGIA is to allow a person to recover for personal injuries caused by a public entity." *Herrera*, 221 P.3d at 425.

"[W]hile on the one hand the purpose of the CGIA is to protect the public against unlimited liability and excessive fiscal burdens, its purpose on the other hand, 'is to allow the common law of negligence to operate against governmental entities except to the extent it has barred suit against them.'" *Medina*, 35 P.3d at 453 (quoting *Walton v. State*, 968 P.2d 636, 643 (Colo. 1998)). "This balance is for the legislature alone to reach. This history of, and policy behind, the CGIA informs our analysis of the issue before us." *Medina*, 35 P.3d at 453.

"Strict construction of the scope of legislatively created immunity is consistent with one of the basic but often overlooked purposes of the Governmental Immunity Act—that is, to permit a person to seek redress for personal injuries caused by a public entity." *State v. Moldovan*, 842 P.2d 220, 222 (Colo. 1992). "The state's immunity must be strictly construed because the act derogates the common law." *Herrera*, 221 P.3d at 425; *Sweickowski v. City of Fort Collins*, 934 P.2d 1380, 1384-85 (Colo. 1997).

"Waivers are construed broadly to effectuate their intended goals." *Herrera*, 221 P.3d at 425 (citing *Springer*, 13 P.3d at 803). "We broadly construe these provisions waiving immunity in the interest of compensating victims of governmental negligence, but construe the exceptions to these waivers strictly because the ultimate effect of the exceptions is to grant immunity." *Estate of Grant*, 181 P.3d at 1204-05.

C. Structure of the CGIA.

1. The waivers for dangerous conditions of public facilities.

The CGIA contains eight waivers pertaining to different subjects.[7] *See* § 24-10-106(1)(a)-(h). Each waiver pertains either to the "operation" of certain public facilities or the existence of "a dangerous condition" of various public facilities. Sections 24-10-106(1)(a), (b), (f), (g), and (h) set out the five operationally based waivers, but none are at issue here.

Sections 24-10-106(1)(c), (d), and (e) set out the three waivers based upon "a dangerous condition" of certain public facilities as follows:

> (c) A dangerous condition of *any public building*;
>
> (d) (I) A dangerous condition of *a public highway, road, or street* ….
>
> (e) A dangerous condition of *any* public hospital, jail, *public facility located in any park or recreation area*

[7] Section 24-10-103 is attached as **Appx. 3**, and § 24-10-106 as **Appx. 4**.

> *maintained by a public entity*, or public water, gas, sanitation, electrical, power, or swimming facility. 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* or on a highway, road, or street right-of-way.

C.R.S. §§ 24-10-106(1)(c), (d), and (e) (emphasis added).

Accordingly, the recreation waiver applies to injuries caused by "a dangerous condition of any … public facility located in any park or recreation area maintained by a public entity." That waiver, however, must be read with the definition of a dangerous condition, and the structure of the CGIA overall to give effect to the plain text.

2. The definition of a dangerous condition is based upon either the physical condition of the facility or the use of the facility.

The CGIA expressly defines a "dangerous condition" related to the waiver provisions regarding "any ... public facility located in any park or recreation area." Section 24-10-103(1.3) states:

> "Dangerous condition" means either 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 *constructing or maintaining such facility*....

C.R.S. § 24-10-103(1.3) (emphases added).

Reading the plain text of the recreation waiver with the definition of a dangerous condition and considering the statutory structure of the CGIA reveal the General Assembly's intent to waive immunity for Burnett's injuries.

D. Assembling and applying the plain text of the CGIA to the stipulated facts proves that the State waived immunity for Burnett's injuries resulting from either the physical condition or use of the park's camping facilities.

1. The text of the waiver uses words and phrases with broad meaning and creates only two stated exceptions.

The General Assembly chose words and phrases with broad meaning to create the waiver, but set forth only two stated exceptions for injuries caused either by the "natural condition of any unimproved property" or a "backcountry landing" facility as explicitly defined. The pertinent text of the recreation waiver and the definition of a dangerous condition, when assembled with the two exceptions, provides as follows:

> Sovereign immunity is waived by a public entity in an action for *injuries resulting* from:[8]
>
> A "*Dangerous condition*" ... mean[ing] either a *physical condition of a facility or the use thereof* that constitutes an unreasonable risk to the…safety of the public…which condition is proximately caused by the negligent act or

[8] C.R.S. § 24-10-106(1).

> omission of the public entity…in constructing or *maintaining* such facility[9]
>
> of *any … public facility located in any park or recreation area maintained by a public entity*[10]
>
> *Nothing* in this paragraph (e)…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….[11]
>
> The waiver of sovereign immunity created in paragraph (e) of subsection (1) of this section does not apply to any *backcountry landing facility* located in whole or in part within any park or recreation area maintained by a public entity. For purposes of this paragraph (c), "*backcountry landing facility*" means any area of land or water that is unpaved, unlighted, and in a primitive condition and is used or intended for the landing and takeoff of aircraft, and *includes any land or water appurtenant to such area*.[12] (Emphasis added.)

2. Burnett's injuries were caused by an alleged dangerous condition because the trees are part of the campsite's "physical condition" and Burnett "used" the camping facilities as intended and in the "state" that the facilities were provided to her.

The parties stipulated that Burnett had paid a fee to enter Cherry Creek State Park. R:67. They agreed that the improved campsite she used was a "public facility" within the meaning of a CGIA. *Id.* The branch that struck Burnett and

[9] C.R.S. § 24-10-103(1.3).

[10] C.R.S. § 24-10-106(1)(e).

[11] The language from C.R.S. § 24-10-106(1)(e) narrowing the waiver and increasing the scope of immunity must be strictly construed.

[12] C.R.S. § 24-10-106(1.5)(c).

her tent "likely fell from a tree adjacent to the improved campsite." *Id.* The park "contains a designated camping area with 135 sites, some of which include basic amenities and some which are full-hookup sites." *Id.*

Campsite No. 14 was a full-hookup site which contained "a concrete parking pad, a level dirt pad with picnic table and fire pit, and electric, water, and sewer connections." R:73-75. "Campers with tents can pitch their tents on the level dirt area of the campground site, but they're not restricted to that particular location." R:73-75, ¶8. "Tents are allowed on the concrete pad, on grassy areas near the parking pad or level dirt area, or on areas covered by crushed granite." R:73-75, ¶7.

Here, Campsite No. 14 used by Burnett was a full-hookup campsite. R:73-75, ¶8. "The campsite is flanked by several cottonwood trees." R:73-75, ¶8. "None of the trees are located on the improved portions of Ms. Burnett's campsite." R:73-75, ¶8.

The precise location from where the branch split and fell striking Burnett was not determined. R:73-75, ¶9. Nevertheless, she was struck by a branch from a tree adjacent to the campsite and sufficiently close to cause her injuries. *See id.*

a. Burnett's injuries were caused by the physical condition of Campsite No. 14 as built, situated, and maintained.

The physical condition of the Campsite No. 14 includes the adjacent and overhanging cottonwood trees. The CGIA does not provide any explicit definition or limit on what constitutes the physical condition of a facility and does not define what constitutes a "public facility" with regard to a park or recreational area.

Here, the pictures of Campsite No. 14 are compelling and the stipulated facts establish that the State built, situated, maintained, and provided this improved campsite in, among, and under the cottonwood trees from which the branch fell injuring Burnett. *See* **Appx. 1** (the photographs) and the stipulated facts.

In short, the State placed the improved campsite among the trees and in such close proximity that the trees are a part of this particular campsite. Whether other campsites were nestled among and under a stand of cottonwood trees is irrelevant, because only Burnett's use of Campsite No. 14 is at issue here.

Although Burnett stipulated that "[n]one of the trees are located on the improved portions of Ms. Burnett's campsite" *per se* (R:75, ¶8), that does not mean the trees were not part of the site, did not constitute part of the site's physical condition, or did not impact the state of the campsite. *See Padilla ex rel. Padilla v. School Dist. No. 1 in City & County of Denver*, 25 P.3d 1176, 1181 (Colo. 2001) (a defect "also includes other physical conditions that the governmental entity creates

in association with constructing or maintaining a facility"). *Burnett*, dissent at ¶¶43-45.

Because the tree trunks were within inches of the campsite's improvements and the trees' canopy reached over the site, the trees are part of the site and certainly part of its physical condition. Undoubtedly, the trees' roots pass underneath the improved campsite as well.[13]

As Burnett contended on appeal and the dissent explains, to conclude the trees are not effectively part of the campsite facilities because the trunks are not surrounded by some man-made improvement is contrary to common sense — as well as the purpose, intent, and text of the CGIA. *Burnett*, dissent at ¶¶49-50, 53-67.

Nothing in the CGIA precludes a natural feature from being incorporated into a facility especially where the natural feature runs under, around, and over the man-made improvements. *See City of Colorado Springs v. Powell,* 48 P.3d 561, 566 (Colo. 2002) ("The city seeks to narrow the scope of section 24-10-106(1)(f) to negligence regarding the concrete flume through which the water runs. Such a narrow view disregards the reality that areas immediately surrounding a facility often affect the overall condition of the facility."). The concept that the area

[13] The location of the roots were not part of the record, however, given the number of trees surrounding the tent pad, judicial notice may be taken. "[J]udicial notice may be taken at any stage of a proceeding, whether in the trial court or on appeal." *Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo.1980); C.R.E. 201(f).

surrounding a facility can give rise to a dangerous condition is further discussed below regarding intrusion of an object onto or into a facility (Section G).

Here, the State stipulated that Campsite No. 14 was an improved, public facility. R:67; 74, ¶6; 75, ¶8. Viewing Campsite No. 14 as a functional unit or functioning facility, the trees visibly are incorporated into the campsite.

Furthermore, the trees certainly are located with the bounds of the campground itself. The State stipulated that the park contained a "designated camping area." R:74, ¶6. Moreover, the State stipulated that "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." R:67, ¶2. "Some trees are located in the Park's campground area. ... The Park contains a designated camping area with 135 campsites, some of which include basic amenities and some of which are full hook-up sites." R:74, ¶¶5-6. Accordingly, the trees are part of the campground facilities and are located on improved property when viewed at the *campground* level.

The impact of the trees on the physical condition of Campground No. 14 is further established because the State stipulated that the branch which struck Burnett fell from an adjacent tree. R:67, ¶4; 74, ¶7; 75, ¶9. If the trees were remote and not part of this campsite, Burnett could not have been injured by the trees when using the site. The mechanism of injury includes the trees as a causal

factor. *See Powell,* 48 P.3d at 566; Section G. The trees affected the physical condition of Campsite No. 14 as an improved camping facility. Therefore, Burnett's injuries fall within the recreational waiver and are part of the Campsite No. 14's physical condition even if the trees trunks are not located precisely within an improvement. *Burnett*, dissent at ¶66. The trees and campsite improvements comprise one functional camping facility as built, situated, and maintained.

b. How the State situated and maintained Campsite No. 14 relative to the "adjacent" trees make the trees part of the site and not a natural condition of unimproved property.

Burnett's injuries do not fall within the purview of the stated exception to the recreational waiver for injuries "caused by the natural condition of any unimproved property" set forth in § 24-10-106(1)(e). The trees' apparent natural condition was altered by the State's placement of a highly improved campsite under their canopy, over their roots, and within inches of their trunks. Trees do not naturally nestle themselves around, under, and over a highly improved campsite. Therefore, the cottonwood trees ceased to be in their natural condition.

Furthermore, as the campsite was built, situated, and maintained in, among, and under the trees, the trees are located on improved rather than unimproved property as a practical matter. Again, although Burnett stipulated that the tree trunks were not located on an improved portion of her campsite *per se*, that does not mean the trees are not situated or so proximate to the improvements to be

located on improved rather than unimproved property. The trees are located within the designated 135-site campground itself, which is itself a public facility. Hence, the trees are located on "improved property."

The State also admitted that it had maintained the trees by pruning them (R:67, ¶6), which altered their natural condition. They were pruned or trimmed and thereby maintained by the State as part of the campground and campsite. *See id.* The trees ceased to be a natural condition because of such maintenance. Accordingly, Burnett's injuries were caused by the physical condition of the Campsite No. 14 and not a natural condition of some unimproved property.

c. Burnett's injuries were caused by using Campsite No. 14 as intended and as the facility was provided to her.

The General Assembly waived immunity for Burnett's injuries because she was injured while using the campground facilities precisely as intended by the State. Burnett was injured at night while sleeping in her tent that was pitched in the campground, specifically in Campsite No. 14, which was highly improved. Her tent was pitched on a pad as nestled in and among the cottonwood grove. Accordingly, Burnett's injuries are the direct result of using the facilities of Campsite No. 14 as the State intended that they be used. Burnett was using the campground, specifically Campsite No. 14, as they were provided to her. She was injured doing what the State invited her to do — camp beneath the trees and sleep there at night.

Burnett's injuries did not arise from a rogue, third-party intervening tortfeasor as in *Jenks v. Sullivan*, 826 P.2d 825, 827 (Colo. 1992), *overruled in part on other grounds by Bertrand v. Board of County Commrs. of Park County*, 872 P.2d 223, 227 (Colo. 1994). In *Jenks*, the "use" of the facility involved a shooting, which was not an intended use and had nothing to do with any aspect of the "state" of the building itself. Therefore, the use of the building could not constitute a dangerous condition. *Jenks* and its progeny are not controlling here involving Burnett's use of the campsite. Burnett used the site precisely as intended. She also used the campsite in the state in which it was provided to the public.

Jenks indicates that the use need only be related to the "state" of a public facility to constitute a dangerous condition. This Court has noted that the "linchpin of our 'use' inquiry under *Jenks* is that 'the statute refers to an injury arising from the state of the building itself *or the use of a state of the building*.'" *Walton*, 968 P.2d at 645 (quoting *Jenks*, 826 P.2d at 827).

Here, the proximity of the trees impacted the "state" of the subject camping facility. Certainly, the canopy towering above the campsite impacted the state of the site and its use. Therefore, Burnett's use falls within the second definition of a dangerous condition based on the "use" of a public facility that allegedly poses an unreasonable risk of harm.

E. A structural analysis the CGIA reveals that only two exceptions to the recreational waiver exist, the statute does not define what a public facility is regarding parks and recreation areas, and the General Assembly could have narrowed the scope of the recreational waiver or created exceptions for camping facilities, but did not.

A review of the structure of the CGIA supports Burnett's reading of the statute's plain text and the dissenting opinion. First, the CGIA provides only two stated exceptions to the recreation waiver. First is the exception regarding "backcountry landing" facilities, but that exception has no application here. The second exception, of course, is for the natural condition of unimproved property. That exception is inapplicable, as discussed above. The existence of those two exceptions demonstrates that the General Assembly could have limited the scope of the recreational waiver or created explicit exceptions for campgrounds or campsites, but did not do so.

Second, the General Assembly carved out an exception from the recreational waiver for "backcountry landing" facilities, but did not do so with regard to camping facilities. In carving out that exception, however, the General Assembly expressly included "appurtenant" natural features, including "any land or water appurtenant to such area" § 24-10-106(1.5)(c). The provision creating the exception specifically identifies and includes "land…appurtenant to such area," and, therefore, an inference may be drawn that appurtenant land would otherwise

be included in the waiver — when not explicitly excluded. Therefore, the tree trunks adjacent to or appurtenant to Campsite No. 14 are included in the waiver.

In any event, applying the ordinary meaning of the recreational waiver's text is consistent with the General Assembly's word choice and the CGIA's structure. The General Assembly could have narrowed the scope of the recreational waiver or created an explicit exception regarding campsites or camping facilities, but did not do so.

The third structural aspect of the CGIA that lends support to Burnett's reading of the plain text is the fact that the General Assembly did not define what constitutes a "public facility" relative to parks and recreation areas. In contrast, the General Assembly has explicitly defined what constitutes a public facility with regard to "sanitation" and "water treatment."

In response to an opinion issued by this Court, the General Assembly stepped in and defined explicitly what does and does not constitute a "public sanitation facility." *See* § 24-10-103(5.5). Similarly, in response to another opinion issued by this Court, the General Assembly amended the CGIA to define explicitly what does and does not constitute a "public water facility." *See* § 24-10-103(5.7). These definitions clarify and limit the scope of what constitutes a public facility in those two specific contexts.

Here, however, the General Assembly has not done so with regard to public facilities in parks and recreation areas. Accordingly, the plain text and ordinary meaning of the expansive phrase "public facility" applies in the context of a park and recreation area. Absent some limiting definition provided by the General Assembly, facility[14] should be given its ordinary and broad meaning, which includes Campsite No. 14, its physical condition, its use, and physical state as it was built, situated, and maintained in, among, and under the cottonwood trees.

F. The district court and court announcing *Rosales* erred by not viewing Cherry Creek State Park, its campground, and specifically Campsite No. 14, as being part of a "functional system" as mandated by the Colorado Supreme Court.

Any purportedly natural features should be viewed with the man-made features in a unified and functional way. Here, the district court failed to consider the campground, or specifically Campsite No. 14, as a functional system used to facilitate and promote the purpose of overnight camping. The district court, here, and the *Rosales* Court improperly failed to adhere to the analyses prescribed by and holdings announced by this Court.

When construing a waiver pertaining to a dangerous condition of a public facility, the facility must be viewed as a functional system. *See Moldovan*, 842

[14] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY defines the word to mean "(a)(1): something that makes an action, operation, or course of conduct easier — usually used in plural <*facilities* for study> …[and/or] b: something (as a hospital) that is built, installed, or established to serve a particular purpose…."

P.2d at 223-24. *Moldovan* analyzed the previous holding in *Stephen v. City & County of Denver*, 659 P.2d 666, 668 (Colo. 1983). In *Stephen*, the Court held that government immunity had been waived because the stop sign constituted a dangerous condition which interfered "with the movement of traffic" although the sign itself was not physically interfering with the movement of traffic or located on the travel portion of the highway. *Moldovan*, 842 P.2d at 223-24.

Stephen evaluated the provisions granting the waiver for public roads and highways, pursuant to § 24-10-106(1)(d), and based on the plain text concluded that the "legislative emphasis on maintenance of roads and highways in a condition that promotes the safe movement of traffic reflects concern that those facilities *function* in a way consistent with that purpose." *Stephen*, 659 P.2d at 668 (emphasis added); *Moldovan*, 842 P.2d at 224.

Quoting *Stephen*, *Moldovan* further explained that:

> The necessity of stop signs to regulate traffic flow in the interest of public safety needs no elaboration. Viewing a road and street system functionally, it is apparent that stop signs are integral parts of roads and highways. We believe that to construe "dangerous condition" to be limited to the physical condition of the road surface gives too cramped a reading to the statute and ignores the purpose for which this exception to sovereign immunity was created.

Stephen, 659 P.2d at 668; *Moldovan*, 842 P.2d at 224.

The General Assembly responded and amended the provision to exclude traffic signs, signals and markers in order to "nullify" the Supreme Court's decision in *Stephen*. *Moldovan*, 842 P.2d at 224. However, as critical here, the court in *Moldovan* further stated that despite that nullification in *Stephen*:

> It does not follow from these amendments, however, that a dangerous condition on 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.

Moldovan, 842 P.2d at 224. *See Medina*, 35 P.3d at 458.

In *Medina*, the Court explained that the subject highway was "built without shoulders, without ditches, and with very steep highway clearance rock cuts. Inherent in such a design is a risk of rocks dislodging from the cut slope and striking vehicles traveling below." *Medina*, 35 P.3d at 460 (the slopes were cut and altered, and not in their natural condition).

In the instance case, the State admitted that Campsite No. 14 is a highly improved site. It contains amenities including electrical hookup, utility hookup, and sewer hookup, along with a parking area, picnic table, and improved tent pad for camping. Obviously as built and situated, the campsite and its amenities were man-made improvements incorporating and placing the tent pad under and in direct proximity to the cottonwood trees from which the branch fell injuring Burnett.

Having laid out, built, and improved Campsite No. 14, as the State admits it did, it placed campers at risk to be injured by tree limbs falling upon them from the trees. This is similar to the cow wandering onto the roadway surface in *Moldovan* and the boulder tumbling down onto the roadway striking the claimant's car in *Medina*. It is a failure to maintain the surrounding area that is sufficiently proximate to the man-made facilities to cause injury that gives rise to a waiver. This is true when the facility is properly viewed as a functional system.

The State admits performing maintenance on the trees in the campground by pruning them. The State sufficiently incorporated the trees into the campground facility, and specifically the facilities of Campsite No. 14, to warrant maintenance. The State presumably would not trim or prune the branches of trees in their natural condition on unimproved property.

Accordingly, the facts establish that Burnett's injuries were caused by using the "improved property" and man-made features of the campground, and specifically Campsite No. 14, as intended and as invited by the State. Thus, an object intruded into or upon the man-made improvements of the campsite, here the tent pad, causing injury to Burnett. *See Moldovan*; *Medina*, 35 P.3d at 458-461.

The Court in *Medina* stated that the "real question is whether the plaintiffs' injuries were solely attributable to the risk of rocks falling inherent in the original design of the slope – or whether their injuries were at least partly attributable to an

increase in the risk of rocks falling that developed over time as a result of lack of maintenance." *Medina*, 35 P.3d at 460.

Here, Burnett was injured not merely because of the risk posed by a falling branch inherent in the original design and layout of the campground and Campsite No. 14, but her injuries "were at least partly attributable to an increase in the risk" of branches "falling that developed over time as a result of lack of maintenance." *Id.* The State admits, and one photograph shows, that the branches of trees adjacent to the campsites had been pruned in the past, but the State admittedly ceased such maintenance.

The undisputed facts and admissions by the State establish that maintenance and pruning had been done on these "adjacent" trees for some time prior to the injuries sustained by Burnett. Accordingly, the State waived its sovereign immunity with regard to the injuries sustained by Burnett.

G. Immunity is waived when a maintenance failure causes objects to intrude upon or interfere with the intended use of any public facility.

With regard to causation, the State waived immunity by creating the dangerous condition whereby Burnett was hit by a falling tree branch, while sleeping on the tent pad provided by the State. Burnett was not hit by a limb falling from a tree while merely hiking through the park and no such issue need be decided here. Burnett was invited to use, and did use, the campground, Campsite

No. 14, and its tent pad as the State had intended and as the facilities had been provided. Her use was of an extended duration, meaning overnight, while her vigilance was relaxed consistent with the intended use of the tent pad for sleeping.

This Court need not decide whether waiver exists where a visitor frolics in a meadow, passes a lone tree in an unimproved portion of the park, and is hit by a falling branch. Burnett's case is different.

This Court and the court of appeals have held repeatedly that when objects intrude upon or interfere with the intended use of a public facility, even when the intrusion emanates from an area adjacent to the facility, waiver exists. In *Moldovan*, the state allowed a right-of-way fence to fall into disrepair, which in turn "enabled a cow to run onto the highway, thereby creating a dangerous condition that physically interfered with the movement of traffic and caused serious injuries to Moldovan as he traveled on the paved portion of the highway." The same is true here, where Burnett was using the improved campsite situated in and among a stand of cottonwood trees when she was injured by the falling branch. The Colorado court of appeals has likewise concluded that rocks falling onto roadways from adjacent areas constitute a dangerous condition. *Schlitters v. State*, 787 P.2d 656, 658 (Colo. App. 1990); *Belfiore v. Colorado State Dept. of Highways*, 847 P.2d 244 (Colo. App. 1993) (similar result).

In *Moldovan*, *Medina*, *Schlitters*, and *Belfiore*, the waiver pertained to foreign objects intruding upon and interfering with the use of the traveled portion of a highway. Here, however, the State situated the tent pad immediately next to and underneath a stand of mature cottonwood trees, which allegedly created an unreasonable risk of injury from falling branches. However, that risk was enhanced by, and Burnett's injuries were caused by, the State's wholesale failure to maintain, or at least continue to prune, the adjacent and admittedly 70-year-old trees, leading to their deterioration over time. *See* § 24-10-103(2.5) (maintenance "is the act or omission of a public entity … in keeping a facility in the same general state of repair or efficiency as initially constructed *or in preserving a facility from decline or failure*.") (emphasis added).

H. *Rosales* is distinguishable from the facts presented here by Burnett, and *Rosales* is, in part, not well reasoned because the opinion departs from the plain text of the CGIA and principles announced by the Colorado Supreme Court.

1. Introduction.

First, the division announcing *Rosales v. City & County of Denver*, 89 P.3d 507 (Colo. App. 2004), did not view or even consider the picnic table, tree, and surrounding area as a "functional system" as the Colorado Supreme Court has held and directed. This is evident from the discussion set forth in the opinion and its lack of consideration for the analysis presented in *Moldovan*, *Medina*, and other cases discussed above.

Second, the division in *Rosales* did not discuss how the text of the CGIA was to be construed. The opinion construed the phrase "any public facility" narrowly, which constitutes error. Moreover, the opinion rests on the division's novel construction of the CGIA, which departs from the plain text and ordinary meaning of the words chosen by the General Assembly. The word "facility" denotes facilitation of some use or purpose — not merely "fabrication" by man or woman. The division in *Rosales* ignored the plain meaning of facility despite quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY.

Third, here, the district court rejected Burnett's argument that her case was distinguishable from *Rosales* and failed to appreciate the distinguishing facts. The district court did not appreciate that the State admitted that the campground was an improved facility and specifically Campsite No. 14 was an improved site. Campsite No. 14 is an improved site and constitutes a functional unit within the larger campground facility itself. The State integrated cottonwood trees into the facilities of both Campsite No. 14 and the designated campground.

2. *Rosales* is distinguishable from Burnett's case.

The evidence and allegations presented by Burnett and the undisputed facts establish that the trees were not simply a natural feature located nearby, but indeed were part of Campsite No. 14 as a functional system. Moreover, the trunks of the mature cottonwood trees were located within inches of admittedly improved

property, the trees' canopy hung over the improved property itself, and their roots ran under the improved property. The nature and extent of the improvements at Campsite No. 14 are markedly greater and of a different nature than the existence of the mere picnic table in *Rosales*.

Campsite No. 14 was designed, built, and maintained to provide for overnight camping with amenities such as electricity, sewer hookup, and a designated tent pad. As such, Campsite No. 14 was an improved public facility in and of itself. The campsite was also part of the campground, which is a public facility improved by the State. As such, both the campground and specifically Campsite No. 14 used by Burnett fall squarely within the plain text of the waiver for park and recreation facilities, as discussed above.

The trees were integral to Campsite No. 14. The fact that some campsites did not have trees is irrelevant. A tree need not be integrated into every campsite to be considered part of one specific campsite or part of the campground facilities overall. The district court's reasoning in this regard was narrow and misplaced as was the Court's reasoning in *Rosales*, which did not take a functional approach.

Although the district court ignored the fact that a fee was charged to use the improved "full hook-up" Campsite No. 14, the fact a fee was charged is further evidence that the State was managing and maintaining the improvements and campground facility with the camping fees collected. No fee was at issue in

Rosales. The division in *Rosales* was not presented with any of the undisputed facts presented here proving that the property was highly improved or that the tree or trees involved had been maintained. The existence of a picnic table in *Rosales* does not rise to the level of improvement of the campground and Campsite No. 14 presented here.

3. *Rosales* departs from the plain text of the CGIA.

Both the district court in this case and the division in *Rosales* took a narrow view of and misconstrued the plain text of the CGIA. In *Rosales*, the Court relied on its own inferences in concluding that the tree involved there was not, as a matter of law, part of a public facility. Despite relying on a common and ordinary definition of the word "facility" from MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, the Court ignored an important part of that definition.

The court set forth the definition from MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY stating that the "common meaning of 'facility' is 'something (as a hospital, machinery, plumbing) that is built, constructed, installed, or *established* to perform some particular function or to *serve* or *facilitate some particular end*.'" *Rosales*, 89 P.3d at 509 (emphasis added). Nevertheless, when the *Rosales* Court applied the definition, it ignored the reference to something that is "established to perform some particular function or to serve or facilitate some particular end." The word "facility," as defined by MERRIAM-WEBSTER'S COLLEGIATE

DICTIONARY, does not impose a requirement that the facility necessarily be fabricated. A facility can be "established." In common parlance, most parks and recreations areas are "established" or as the Park Ranger testified, the "Park was created in 1959." R:75, ¶8. The State "established" the improved facilities of Campsite No. 14 and the 135-site campground and maintained these public facilities in, among, and under cottonwood trees.

No requirement is set forth in § 24-10-106(1)(e) that limits the waiver of immunity only for fabricated or manufactured features of a park or recreation area. The General Assembly used the broad phrase "any public facility" as the unit of measure to define where a dangerous condition that triggers a waiver of immunity. "Any public facility" must be construed broadly, and the use of "any" is all inclusive. The two-prong test announced by *Rosales* that a feature must be "integral" and "essential" to a specific function of a facility finds no support in the text or plain meaning of any provision of the CGIA. *Burnett*, dissent at ¶¶34, 68.

The language of § 24-10-106(1)(e) providing that "the natural condition of any unimproved property" is subject to immunity indicates that a natural condition or feature of improved property, such as the cottonwood trees surrounding Campsite No. 14, are included within the public facility. Campsite No. 14 and its tent pad are admittedly improvements to the property upon which the cottonwood trees are situated. Thus, the cottonwood trees towering over, rooted under, and

surrounding Campsite No. 14 fall within the purview of the waiver set forth by § 24-10-106(1)(e).

VII. CONCLUSION

The photographs of Campsite No. 14 depict that the tree trunks "adjacent" to that improved campsite are part of the campsite. The campsite is situated in, among, and beneath the trees. They surround the improved tent pad. The trees' trunks are within inches of the campsite's improvements. The trees also impact the condition and use of the campsite as a facility. The trees are also part of the campground itself. As such, the trees are part of two public facilities, and the recreational waiver applies to Burnett's injuries.

The State waived its immunity for Burnett's injuries because the State failed to maintain the trees as it had in the past, which in turn caused a limb to fall and strike Burnett. At the time, she was sleeping on the improved tent pad of Campsite No. 14, as the use was intended, and as the camping facilities were provided to her.

The district court and the majority viewed the evidence too narrowly. They also read the text of the recreational waiver too narrowly. The courts frustrated the General Assembly's intent to waive immunity for members of the public injured by dangerous conditions while using public recreational facilities. Therefore, dismissal of Burnett's Complaint and the court of appeals' affirmance are

erroneous and should be reversed. The case should be remanded and Burnett's Complaint reinstated.

RESPECTFULLY SUBMITTED this 23rd day of December, 2013.

LAW FIRM OF ALAN G. MOLK

/s/ Alan G. Molk
Alan G. Molk

THE FOWLER LAW FIRM, LLC

/s/ *Timms R. Fowler*
Timms R. Fowler

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of December, 2013, the foregoing **PETITIONER'S OPENING BRIEF** was filed with the Court and served via ICCES to the following:

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Pursuant to C.A.R. 30(f), this document with original signatures will be maintained by the filing party and made available for inspection by other parties or the Court upon request.

APPENDICES

1. Photos of Cherry Creek State Park Campsite No. 14 and trees

2. *Burnett v. State,*
2013 COA 42, 2013 WL 1245366, ___ P.3d ___ (Colo. App. 2013)

3. C.R.S. § 24-10-103

4. C.R.S. § 24-10-106

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Appendix 1

Cherry Creek State Park
Campsite #14


Designated Tent Pad


Other dead branches
Previously sawn limb directly above tent pad

Tree limb that caused injury (Sara Burnett on right, July 23, 2010)

DATE FILED: December 23, 2013 2:49 PM

Appendix 2

Westlaw.

--- P.3d ----, 2013 WL 1245366 (Colo.App.), 2013 COA 42
(Cite as: 2013 WL 1245366 (Colo.App.))

Colorado Court of Appeals,
Div. V.
Sara L. BURNETT, Plaintiff–Appellant,
v.
STATE of Colorado, DEPARTMENT OF NATURAL RESOURCES, DIVISION OF PARKS AND OUTDOOR RECREATION,
Defendant–Appellee.

No. 11 CA2141
Announced March 28, 2013

Background: Camper at state park who was injured when tree branch fell on her tent brought negligence action against the Department of Natural Resources (DNR). The District Court, Arapahoe County, Gerald J. Rafferty, J., dismissed based on DNR's immunity under the Colorado Governmental Immunity Act (CGIA), and camper appealed.

Holdings: The Court of Appeals, Fox, J., held that:
(1) tree adjacent to campsite was not a "public facility" within meaning of CGIA's waiver of sovereign immunity, and
(2) DNR employees did not have duty to prune or otherwise maintain trees in a natural area of park.

Affirmed.

Carparelli, J., filed dissenting opinion.

West Headnotes

[1] Municipal Corporations 268 ⚿723.5

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723.5 k. Constitutional and statutory provisions. Most Cited Cases
Courts strictly construe the Colorado Governmental Immunity Act's (CGIA) grant of immunity and interpret its waiver provisions broadly. Colo. Rev. Stat. Ann. § 24-10-106

[2] States 360 ⚿112.2(6)

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(6) k. State parks, injuries in. Most Cited Cases
Tree adjacent to campsite at state park was not a "public facility" within meaning of the Colorado Governmental Immunity Act (CGIA), so as to waive Department of Natural Resources' (DNR) immunity for injuries sustained by camper when tree branch fell on her tent; tree was not integral to the use and enjoyment of the campsite merely because it provided shade, protection, and aesthetic value, and was not essential to the use of the campsite. Colo. Rev. Stat. Ann. § 24-10-106(1)(e)

[3] States 360 ⚿112.2(6)

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(6) k. State parks, injuries in. Most Cited Cases
State park campsite and surrounding trees were not a "functional system" that collectively constituted a "public facility" for purposes of the Colorado Governmental Immunity Act's (CGIA) waiver of immunity for injuries caused by a dangerous condition of a public facility, so as to

waive Department of Natural Resources' (DNR) immunity for injuries sustained by camper when tree branch fell on her tent, where the trees adjacent to the campsite were in an unimproved part of the park. Colo. Rev. Stat. Ann. § 24-10-106(1)(e)

[4] States 360 ⇐112.2(6)

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(6) k. State parks, injuries in. Most Cited Cases
State park personnel did not have a duty to prune or otherwise maintain trees in a natural area of a state park.

Arapahoe County District Court No. 11CV664, Honorable Gerald J. Rafferty, Judge.Law Firm of Alan G. Molk, Alan G. Molk, Englewood, Colorado; The Fowler Law Firm, LLC, Timms R. Fowler, Fort Collins, Colorado, for Plaintiff–Appellant.

John W. Suthers, Attorney General, Kathleen L. Spaulding, Senior Assistant Attorney General, Denver, Colorado, for Defendant–Appellee.

Keating Wagner Polidori Free, P.C., John F. Poor, Denver, Colorado, for Amicus Curiae The Colorado Trial Lawyers Association.

Opinion by JUDGE FOX.

***1** ¶ 1 Sara L. Burnett appeals the trial court's judgment dismissing her negligence claim against the Colorado Department of Natural Resources (CDNR). She contends that the trial court erred in determining that the CDNR did not waive immunity for her injuries under the Colorado Governmental Immunity Act (CGIA), section 24–10–106(1)(e), C.R.S.2012. Because we conclude that there is no waiver of immunity under the CGIA for dangerous conditions in an unimproved area within a state park, we affirm the trial court's dismissal.

I. Background

¶ 2 The facts recited here are not in dispute. Burnett was injured while camping in a designated campground in Cherry Creek State Park, which is operated by the CDNR. Burnett was sleeping in her tent in Campsite No. 14 when she was struck by a falling tree branch. The branch likely came from a stand of trees adjacent to and overhanging Campsite No. 14. These mature cottonwood trees likely existed before the park was established in 1959.[FN1] Some other campsites had no adjacent trees.

FN1. The parties stipulated to the park manager's affidavit, which stated that none of the trees were on improved portions of Campsite No. 14, none of the trees were planted by state or park personnel, and the trees were mature cottonwoods that likely existed before the park was created in 1959.

¶ 3 Burnett brought a negligence claim against the CDNR for her injuries. The trial court dismissed her claim for lack of subject matter jurisdiction because the state is immune from all tort claims under the CGIA, except where immunity is expressly waived, and no waiver applied. § 24–10–106(1), C.R.S.2012. This appeal followed.

II. Standard of Review

¶ 4 Because the parties stipulated to the relevant facts, the trial court did not conduct an evidentiary hearing. The trial court held, as a matter of law, that there was no waiver of immunity under the CGIA here. We review a trial court decision based on statutory interpretation de novo. *Medina v. State*, 35 P.3d 443, 452 (Colo.2001).

III. Analysis

¶ 5 The trial court held that while the campsite and campground were public facilities under the CGIA, the tree itself was not a public facility and the state retained immunity for injuries resulting from falling branches. *See* § 24–10–106(1)(e). Burnett contends that the trial court erred in

dismissing her claim because the trees adjacent to Campsite No. 14 were part of a public facility, and the tree branches hanging over the campsite constituted a "dangerous condition of a public facility." *See id.*

¶ 6 Under the CGIA, the state waives immunity for injuries caused by a "dangerous condition of any ... public facility located in any park or recreation area maintained by a public entity." § 24–10–106(1)(e). The act further states, "[n]othing in this paragraph ... 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.*

***2** [1] ¶ 7 The CGIA weakened the common law of negligence by immunizing the government from tort liability, except where immunity is expressly waived. *See* § 24–10–106; *Medina,* 35 P.3d at 453; *Herrera v. City & County of Denver,* 221 P.3d 423, 425 (Colo.App.2009). We thus strictly construe its grant of immunity and interpret its waiver provisions broadly. *Medina,* 35 P.3d at 453; *Herrera,* 221 P.3d at 425. Nonetheless, we interpret a statute to give words and phrases their plain meaning in order to give effect to the intent of the legislature. *Medina,* 35 P.3d at 453; *Herrera,* 221 P.3d at 425.

A. The Pre–Existing Tree Is Not a Public Facility

[2] ¶ 8 In determining that the tree from which the branch fell was not a public facility under the CGIA, the trial court followed *Rosales v. City & County of Denver,* 89 P.3d 507 (Colo.App.2004). In *Rosales,* a division of this court held that under the CGIA, a tree in a park or recreation area is not a public facility because a tree is not manmade or constructed. *Id.* at 510. The *Rosales* division concluded that the General Assembly intended the phrase "public facility" to mean something built or constructed by a public entity for a specific purpose.[FN2] *Id.* at 509; *see also Loveland v. St. Vrain Valley Sch. Dist. RE – 1J,* 2012 WL 2581034, 2012 COA 112, ¶ 26, —P.3d — (*cert. granted* Feb. 25, 2013) (holding that under the CGIA, artificial playground equipment at a public school was a public facility because it was physically constructed). The *Rosales* division further concluded that a tree would be part of a public facility—and the state liable for injuries from it—only if it were "an integral part of the facility" and "essential for the intended use of the facility." 89 P.3d at 510.

> FN2. This conclusion was based on *Webster's Third New International Dictionary* 812–13 (1986) definition of "facility" as something that is built or constructed for a particular purpose and the placement of the phrase "public facility" in section 24–10–106(1)(e) with other constructed facilities, i.e., public hospital, jail, water facility, gas facility, sanitation facility, and electrical facility. *Rosales,* 89 P.3d at 509.

¶ 9 We agree with the trial court's application of the *Rosales* test, and its determination that the tree adjacent to Campsite No. 14 is not a public facility. Trees are not integral to the use and enjoyment of a campsite merely because they provide shade, protection, and aesthetic values, and trees are not essential to the use of a campsite because campers do not need to use trees for camping. Indeed, the record reflects that some campsites in Cherry Creek State Park do not have adjacent trees.

B. No Waiver for Conditions in Unimproved Areas

[3] ¶ 10 According to Burnett, the campsite and surrounding trees are a "functional system" and collectively constitute a public facility for purposes of a CGIA waiver. We disagree.

¶ 11 By its plain language, the CGIA expressly retains 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." § 24–10–106(1)(e). While the campground and Campsite No. 14 were in

improved areas of Cherry Creek State Park, the trees adjacent to Campsite No. 14 were in an unimproved part of the park. If the General Assembly intended to waive immunity for all dangerous conditions in public parks, it would not have limited that waiver to public facilities in parks or expressly retained immunity for natural conditions in unimproved areas. *See* § 24–10–106(1)(e); *Rosales,* 89 P.3d at 509.

***3** ¶ 12 This interpretation is fully consistent with Colorado cases holding that a condition is "dangerous" [FN3] for purposes of the CGIA's waiver of immunity only if it relates to the structural or physical condition of a facility or building. *Padilla v. School Dist. No. 1,* 25 P.3d 1176, 1183 (Colo.2001); *Walton v. State,* 968 P.2d 636, 645 (Colo.1998); *Jenks v. Sullivan,* 826 P.2d 825, 827 (Colo.1992), *overruled in part on other grounds by Bertrand v. Board of County Comm'rs,* 872 P.2d 223 (Colo.1994); *Douglas v. City & County of Denver,* 203 P.3d 615, 618–19 (Colo.App.2008) ("The supreme court has indicated that, in order for a public entity's immunity to be waived under section 24–10–106(1)(c), the dangerous condition must be associated with the construction or maintenance of the building and stem from the use of a dangerous or defective physical condition of the building itself.").

> FN3. The CGIA's definition of "dangerous condition" is:
>
> > either 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 constructing or maintaining such facility.
>
> § 24–10–103(1.3), C.R.S.2012. Having concluded that there was no waiver of immunity, the trial court here did not need to decide whether a dangerous condition existed.

¶ 13 In *Jenks,* the supreme court explained that in the CGIA's definition of "dangerous condition," the term "or the use thereof," means the use of a physical condition of a facility. 826 P.2d at 827. The *Jenks* court held that waiver only exists when injury is caused by a dangerous condition stemming from a physical or structural defect in a public building, not when it is caused merely by activities in a public building. *Id.* at 830 (holding that no waiver exists when plaintiff's injury was caused by a shooter on the steps of a courthouse because there was no physical or structural defect in the building).

¶ 14 In *Walton,* the supreme court stated, "Liability attaches for injury stemming from the public's use of a dangerous or defective physical condition of the building." 968 P.2d at 645 (holding that the state waived immunity for a student's injury when she fell off a ladder as a result of the university's negligent maintenance of a classroom).

¶ 15 In *Padilla,* the supreme court further clarified that waiver only exists when there is a defect in the physical structure itself, not when an injury is a result of the negligent use of a public facility. 25 P.3d at 1183 (holding that a plaintiff must "demonstrate a sufficient connection between use of the [building] and a construction or maintenance activity or omission for which the School District is responsible").

¶ 16 Two federal cases interpreting section 24–10–106(1)(e) hold that immunity is waived only when the alleged dangerous condition of a public facility is of a physical improvement to the park or recreation area. *DeAnzona v. City & County of Denver,* 222 F.3d 1229, 1237 (10th Cir.2000) (holding that the natural condition of land, even within a park, cannot lead to waiver of immunity); *King v. United States,* 53 F.Supp.2d 1056, 1070–71 (D.Colo.1999) (holding that a fire pit built by

students was not a dangerous condition of a physical improvement of government property), *rev'd in part on other grounds,* 301 F.3d 1270 (10th Cir.2002).

¶ 17 We are not persuaded by Burnett's argument that the trees adjacent to Campsite No. 14 together with the campsite and campground form a "functional system," and thus constitute a public facility for purposes of waiving immunity under CGIA.

***4** ¶ 18 In support of her argument, Burnett cites several cases holding that the state waived immunity for dangerous conditions of objects on a highway. *See Medina,* 35 P.3d at 458; *State v. Moldovan,* 842 P.2d 220, 225 (Colo.1992); *Belfiore v. Colorado State Dep't of Highways,* 847 P.2d 244, 246 (Colo.App.1993); *Schlitters v. State,* 787 P.2d 656, 658 (Colo.App.1989). These cases are distinguishable from the present case because the injuries in the highway cases arose from negligent maintenance of a highway, whereas here, Burnett's injuries were from natural conditions of an unimproved part of a state park.

¶ 19 In *Moldovan,* 842 P.2d at 225, the Colorado Supreme Court held that a state-maintained fence adjacent to a highway was an integral part of the highway system, and the state was responsible, pursuant to CGIA section 24–10–106(1)(d) and not under section 24–10–106(1)(e),[FN4] for keeping the fence in good repair to prevent it becoming a dangerous condition. The duty to maintain the highway and thus the fence, in turn, derived from another statute. *See* § 35–46–111(1)(a), C.R.S.2012. Here, Burnett fails to identify a corresponding duty to trim trees located in a natural area of a state park.

> FN4. CGIA section 24–10–106(1)(d), as it existed at the time of Moldovan's injuries, waived immunity for dangerous conditions of a public highway as follows:
>
> Sovereign immunity is waived by a public entity in an action for injuries resulting from:
>
> ...
>
> A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion ... of any public highway, road, [or] street.... As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof, but shall include the failure to repair a stop sign or a yield sign which reassigned the right-of-way or the failure to repair a traffic control signal on which conflicting directions are displayed, if such failure constituted a dangerous condition
>
> ....
>
> Ch. 166, sec. 5, § 24–10–106(1)(d), 1986 Colo. Sess. Laws 876.

¶ 20 Likewise, in *Medina,* 35 P.3d at 458, the Colorado Supreme Court held that the state is required to ensure a highway remains in the same general state of repair as when it was originally constructed. The court measured the scope of the state's duty—and the scope of the CGIA waiver—in relation to the original condition of the road. *Id.* at 448–49. Because the record did not disclose the state of the road as originally constructed, the supreme court could not determine if the alleged dangerous condition resulted from the lack of maintenance after initial design and construction of the road, or whether it came from the design itself. *Id.* at 449. Accordingly, it remanded the case for an evidentiary hearing. *Id.* In contrast, here Burnett and the state stipulated that the trees adjacent to Campsite No. 14 likely existed before Cherry Creek State Park was established. Unlike a constructed highway, the state did not create the stand of trees

adjacent to Campsite No. 14, and thus it has no duty to maintain the trees relative to other pre-existing trees in other natural areas.

¶ 21 According to the Colorado Supreme Court, *Belfiore* and *Schlitters* —two cases Burnett relies upon—are "only marginally instructive" because they were decided pursuant to C.R.C.P. 12(b)(5), as opposed to C.R.C.P. 12(b)(1), and before *Trinity Broadcasting, Inc. v. City of Westminster,* 848 P.2d 916 (Colo.1993). *Medina,* 35 P.3d at 456. Both cases involved injuries to motorists when a boulder fell onto the highway. *Belfiore,* 847 P.2d at 246 (holding that boulder fell as a result of blasting activities on adjacent property, about which the Department of Highways had advance notice); *Schlitters,* 787 P.2d at 658 (holding that Department of Highways negligently failed to install devices that would have prevented boulders from falling onto a highway). In both cases, the state had constructed the road and had an independent duty to maintain the road. No such independent duty to trim trees in natural areas exists here.

***5** ¶ 22 According to *Medina,* " *Belfiore* stands for no more than the legal proposition that if the plaintiff's injuries are the result of the state's negligent failure to maintain the right-of-way, then the CGIA waives the state's immunity in an action to recover therefor." 35 P.3d at 456. Similarly, *Schlitters* merely held that allegations that the state knew of numerous previous injuries involving falling rocks on the same segment of the road and negligently failed to install a device that would prevent rocks from falling were sufficient to state a claim for relief. 787 P.2d at 658. Here, however, Burnett did not allege that others were injured from tree branches falling from trees adjacent to Campsite No. 14 or that CDNR had notice that branches were falling from the tree or dangerously likely to fall. [FN5]

FN5. Burnett waived her right to an evidentiary hearing, pursuant to *Trinity,* by stipulating to the facts, and thus failed to develop a further record.

[4] ¶ 23 To the extent that Burnett argues that the CDNR had a duty to maintain the trees around Campsite No. 14, she fails to cite any authority, and we have found none, creating an affirmative duty on the part of state park personnel to prune or otherwise maintain trees in a natural area of a state park. Colorado courts have held that the state is liable for injuries caused only by its failure to maintain public buildings or highways in good repair. *See Springer v. City & County of Denver,* 13 P.3d 794, 804 (Colo.2000) (construing section 24–10–106(1)(c) waiver of immunity for dangerous conditions of public buildings); *Swieckowski v. City of Fort Collins,* 934 P.2d 1380, 1385 (Colo.1997) (construing section 24–10–106(1)(d) waiver of immunity for dangerous condition of a public highway). Colorado appellate courts have not, however, found that the state has a duty to maintain unimproved areas in parks or recreation areas. Burnett's proposed interpretation would unnecessarily expand the CGIA.

¶ 24 We decline to consider any arguments Burnett now makes that the trial court did not address. *See, e.g., Akin v. Four Corners Encampment,* 179 P.3d 139, 147 (Colo.App.2007) (declining to consider whether petitioners had a statutory right to amend their petition because the argument was not presented to the district court).

IV. Conclusion

¶ 25 By the plain meaning of the CGIA, the CDNR retains immunity for injuries from branches falling from trees in unimproved parts of a state park. § 24–10–106(1)(e). We thus conclude that the trial court did not err in dismissing Burnett's negligence claim because the CDNR did not waive immunity for her injuries.

¶ 26 Judgment affirmed.

JUDGE MILLER concurs.
JUDGE CARPARELLI dissents.

JUDGE CARPARELLI dissenting.

¶ 27 In *Rosales v. City & County of Denver,* 89 P.3d 507 (Colo.App.2004) a division of this court remanded that case to the trial court for a determination of whether a tree from which a branch had fallen was and integral part of a public facility and was essential to public use of the facility. However, the division did not derive this standard from the words of the Colorado Government Immunity Act, sections 24–10–101 to – 120, C.R.S.2012, and, in my view, it does not accurately reflect the CGIA or cases that apply it. Therefore, I conclude that the trial court erred when it applied *Rosales* and granted the Colorado Department of Natural Resources (CDNR) motion to dismiss.

¶ 28 I also disagree with the majority opinion's application of the second sentence of section 24–10–106(1)(e) (the natural condition provision).

¶ 29 Therefore, I respectfully dissent.

I. Issues Raised

¶ 30 CDNR relied on *Sanchez v. School District 9 – R,* 902 P.2d 450, 453 (Colo.App.1995), to argue that section 24–10–106(1)(e), C.R.S. 2012, does not waive sovereign immunity because "the dangerous condition must arise from *the physical or structural defect of campsite structures,* not from [plaintiff's] use of the structures." (Emphasis added.) However, the passage from *Sanchez* upon which CDNR relied has been superseded by later supreme court decisions.

***6** ¶ 31 CDNR also relied on *Rosales,* arguing that "[a] tree located in a park is not a 'public facility' within the meaning of the [Colorado Government Immunity Act, sections 24–10–101 to – 120, C.R.S.2012], unless the tree is an integral part of the structures *and* essential to their use." Consequently, the trial court applied *Rosales* and granted the motion.

II. Issues Not Raised

¶ 32 CDNR's motion did not assert that (1) the tree did not constitute an unreasonable risk to the health or safety of campsite users; (2) it did not know or through the exercise of reasonable care could not have known that the tree constituted such a risk; or (3) the allegedly dangerous condition of the campsite was not proximately caused by its negligent act or omission in maintaining the campsite facility. CDNR did not raise these issues in its motion, the trial court did not rule on them, and they are not before us on appeal.

¶ 33 In this dissent, I address only the issues raised in CDNR's motion and in the majority opinion, and provisions of the CGIA that are necessary to resolve those issues.

III. *Rosales*

¶ 34 In *Rosales,* the plaintiff was injured when a tree branch fell on her while she was picnicking in a city park. The trial court concluded that the tree constituted a public facility, and, on appeal, the defendant argued that this was error. A division of this court ruled that, contrary to the trial court's ruling, the tree was not a public facility. However, recognizing that the conclusion that the tree was not, itself, a facility, did not resolve the issue, the division opined that a tree "may be a component of [a] public facility" if a public entity incorporates it into a facility in a manner that it becomes an integral part of the facility and is essential for its intended use (integration and necessity). 89 P.3d at 510. In so doing, the division reframed the issue and, in effect, focused on whether the picnic area was a public facility and whether there was a connection between the tree and the picnic area. *Id.* Unfortunately, the *Rosales* test of integration and necessity is not derived from the statute. Moreover, because it is subjective, it is more suited to a finding of fact than a conclusion of law. In my view, it should be abandoned.

IV. Section 24–10–106(1)(e)

¶ 35 Because the CGIA is in derogation of the common law, we strictly construe the statutory grant of immunity in favor of the public entity. However, we broadly construe statutory waivers of

immunity in the interest of compensating victims of governmental negligence. *Springer v. City & County of Denver*, 13 P.3d 794, 798 (Colo.2000).

¶ 36 As pertinent here, section 24–10–106(1)(e) waives sovereign immunity in an action for injuries resulting from, among other things, "[a] dangerous condition of any ... public facility located in any park ... maintained by a public entity."

¶ 37Section 24–10–103(1.3), C.R.S.2012, defines "dangerous condition" as "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 constructing or maintaining such facility."

V. Physical Condition of a Facility

*7 ¶ 38 As I explain below, the term "physical condition," as used in section 24–10–103(1.3), refers to a physical state, condition, or situation that affects the use of a facility in a way that constitutes a risk to the health and safety of those who use it. Here, the facility is the campsite, not the tree. Contrary to CDNR's argument, neither the risk nor the injury must arise from a physical or structural defect of campsite structures. Nor must the source of the risk be essential to use of the facility.

A. Risk to Users

¶ 39 In *Jenks v. Sullivan*, 826 P.2d 825 (Colo.1992), *overruled in part by Bertrand v. Board of County Commissioners*, 872 P.2d 223 (Colo.1994) (exceptions to the waiver of sovereign immunity are not in derogation of common law and are not to be strictly construed, overruling *Jenks* to the extent that it said that otherwise), the plaintiff was in a courthouse when he was shot by a party to a divorce case. The supreme court rejected the plaintiff's contention that the phrase "or the use thereof" included the shooter's use of the building. The court held that "[t]he phrase 'or the use thereof' means the use of a physical condition of a facility." *Id.* at 827.

¶ 40 In *Jenks*, the court explained that the word "condition" is defined as "[m]ode or state of being; state or situation; essential quality; property; attribute; status or rank." *Id.* (quoting *Black's Law Dictionary* 293 (6th ed. 1990)). Continuing, the court said "the statute refers to an injury arising from the state of the building itself or the use of a state of the building," not from the dangerous activities of a person using the building. *Id.*

B. Physical Condition Defined

¶ 41 In *Walton v. State*, 968 P.2d 636 (Colo.1998), a student suffered injuries when, responding to a request from a teacher, she climbed a ladder and the ladder slipped out from under her. The evidence showed that the school's custodian had recently stripped and sealed the floor, rendering it extremely slippery. The supreme court distinguished the student's use of the facility from the shooter's use of the courthouse in *Jenks*. It explained that the school had asked members of the public to use the school, the use was connected with the school's maintenance, the school had not provided a safe means for doing so, and the school knew or should have known that injuries could result from the dangerous combination of factors. *Id.* at 645. Thus, contrary to CDNR's argument, the case turned on the public entity's failure to provide for the safety of the user, not on the existence of a physical or structural defect.

¶ 42 Indeed, the supreme court and a division of this court reached the same conclusion some years before *Walton*. *See Stephen v. City & County of Denver*, 659 P.2d 666, 668 (Colo.1983) (addressing physical conditions of roads or highways that affect their use in ways that constitutes a risk to the health or safety of the

public); *Hallam v. City of Colorado Springs,* 914 P.2d 479, 483 (Colo.App. 1995) ("A dangerous condition is not limited to those conditions that have their physical source in the highway surface itself.").

¶ 43 The supreme court provided further guidance in *Padilla v. School District No. 1,* 25 P.3d 1176 (Colo.2001). There, the court said that the decision in *Walton* "demonstrates that the case-by-case jurisdictional inquiry methodology requires courts to take into account varying definitions of 'physical condition,' 'constructing,' and 'maintaining.' " *Id.* at 1181. Continuing, the court said that although a structural defect is a "physical condition," the term "also includes other physical conditions that the governmental entity creates in association with constructing or maintaining a facility." *Id.* Reiterating the analysis in *Jenks,* the court said that "physical condition" includes a " '[m]ode or state of being; state or situation.' " *Id.* (quoting *Jenks,* 826 P.2d at 827). The court also noted that in *Jenks,* it had employed a narrow construction of the immunity waiver, that *Bertrand* overruled that aspect of *Jenks* and that Colorado courts now afford deferential construction to immunity waivers and "give broad scope to the term 'physical condition,' as evidenced in *Walton.*" *Id.*; *see Schlitters v. State,* 787 P.2d 656, 658 (Colo.App.1989) ("a dangerous condition may exist if there has been a failure to maintain the roadside so as to avoid the presence of obstructions on the traveled portion of a state highway").

***8** ¶ 44 Therefore, contrary to CDNR's argument, there need not be a physical or structural defect, nor must the instrumentality and circumstances of the injury be integrated into and essential to use of a facility. *See City of Colorado Springs v. Powell,* 48 P.3d 561, 566 (Colo.2002) (commenting that areas surrounding a facility often affect the overall condition of the facility). Instead, "dangerous condition" includes physical conditions that affect the use of a facility in a way that constitutes an unreasonable risk to the health and safety of those who use it.

¶ 45 Because CDNR's motion did not address the risk to users of the campsite, the trial court did not rule on the question.

C. Maintaining the Safety of a Facility

¶ 46 " 'Maintenance' means the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure." § 24–10–103(2.5), C.R.S.2012. It does not include any duty "to upgrade, modernize, modify, or improve the design or construction of a facility." *Id.*

¶ 47 In *Medina v. State,* 35 P.3d 443, 448 (Colo.2001), the plaintiffs were passengers on a charter bus traveling through Clear Creek Canyon on U.S. Highway 6 when they were injured by a large boulder that had dislodged from a "cut slope" above the road and crashed through the roof of the bus. The essential question was whether the dangerous condition was caused by negligent maintenance. To answer that question, the court provided a thorough discussion of the differences between negligent maintenance, for which the CGIA waives sovereign immunity, and negligent design, for which it does not. Appropriately, the court did not address whether the boulder was, itself, a public facility.

¶ 48 The supreme court held that "the CGIA waives immunity in an action for injuries resulting from the state's negligent failure to maintain a public highway." The court explained the development of a dangerous condition of a public highway creates a duty to return the road to " 'the same general *state of being, repair, or efficiency* as initially constructed.' " *Id.* (emphasis added) (quoting *Swieckowski v. City of Fort Collins,* 934 P.2d 1380, 1385 (Colo. 1997)).

D. Conclusions Regarding Dangerous Condition

¶ 49 Broadly construing this statutory waiver of immunity in the interest of compensating victims

of governmental negligence, I conclude that, as pertinent here, section 24–10–106(1)(e) waives immunity when a public entity knows or in the exercise of reasonable care should have known that the physical state of a public facility or the physical situation at a public facility constituted an unreasonable risk to the health or safety of the public using the facility and the risk is proximately caused by the negligent act or omission of the public entity that maintains the facility. CDNR's motion did not address whether the tree limbs constituted an unreasonable risk to the health and safety of the public, whether CDNR knew or should have known about the risk, or whether the injury resulted from CDNR's negligence.

¶ 50 Accordingly, I conclude that the trial court erred when it dismissed plaintiff's claims based solely on its determinations that the tree "was not integral to the improved campsite and therefore the tree was not a 'public facility' as defined under [the] CGIA."

E. Remand is Appropriate

¶ 51 I am not persuaded by CDNR's suggestion that plaintiff's stipulation of facts in this case and her waiver of a hearing on CDNR's motion enables CDNR to prevail on issues it did not raise and the trial court did not address. CDNR's argument framed the issue for the trial court, and the parties stipulated to facts relevant to that argument. Although it is plaintiff's burden to prove that the trial court has jurisdiction in this matter, I reject CDNR's suggestion that it should be permitted to prevail on issues it did not raise and the trial court did not address.

***9** ¶ 52 Therefore, on this record, I conclude that the trial court erred when it dismissed plaintiff's claims, and that neither the record nor the trial court's ruling enables us to affirm on other grounds.

V. The Natural Condition Provision

¶ 53 I also disagree with the majority opinion's conclusion that the statute does not waive sovereign immunity because the tree is a natural condition of unimproved property.

¶ 54 In accordance with the second sentence of section 24–10–106(1)(e), we may not construe subsections 106(1)(d) and (e) "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 or on a highway, road, or street right-of-way."

A. Unimproved Property

¶ 55 The CGIA does not define "unimproved property" or "improved property." Because there is no statutory definition of "unimproved property," we must assume that the General Assembly intended that it have its usual and ordinary meaning. *See Enright v. City of Colorado Springs*, 716 P.2d 148, 149 (Colo.App.1985).

¶ 56 "Unimproved property" usually refers to real property that is in its natural state. Unimproved property typically contains a variety of features such as shrubs, trees, rocks, ruts, ditches, cliffs, and watercourses. When property is unimproved, these natural features have not been disturbed.

¶ 57 For property tax purposes, the term "improvements" refers to "structures, buildings, fixtures, fences, and water rights erected upon or affixed to land." [FN6] § 39–1–102(6.3), C.R.S.2012. Considering this definition as guidance with regard to the issues here, it could be said that property is unimproved when no structures or fixtures are built on or affixed to the land.

FN6. Section 39–1–102(4.3), C.R.S.2012, defines "forest land" to mean "land of which at least ten percent is stocked by forest trees of any size and includes land that formerly had such tree cover and that will be naturally or artificially regenerated," including "unimproved roads and trails, streams, and clearings which are less than one hundred twenty feet wide."

¶ 58 Here, CDNR attached an affidavit of the park manager of Cherry Creek State Park, which said, among other things, that the campsite used by plaintiff had electric, water, and sewer connections, as well as a concrete parking pad, a level dirt pad, a picnic table, and a fire pit. I conclude that the concrete pad and electric, water, and sewer connections constitute "fixtures" because they have been physically incorporated into and affixed to the camping facility. *See* § 39–1–102(4), C.R.S.2012 (defining "fixtures"). Consequently, I also conclude that the campsite constitutes "improved property."

B. Natural Condition

¶ 59 The term "natural condition of unimproved property" is susceptible of several meanings.

1. Injuries Occurring on Unimproved Property.

¶ 60 The natural condition provision might be applied to mean that a public entity may assert sovereign immunity when an injury occurs on unimproved property and is caused by a natural condition of that property. This is a plain and reasonable application of the provision. A public entity does not construct and maintain unimproved property, and a dangerous natural condition of the unimproved property cannot be said to have been proximately caused by the negligent act or omission of the public entity. Therefore, in my view, it would be correct to apply this provision in this way.

2. Injuries Caused by Natural Objects

***10** ¶ 61 The natural condition provision could also be applied to mean that a public entity may assert immunity when an injury is caused by an object or condition that commonly exists as a natural condition of unimproved property. If the provision is applied in this way, an entity could assert immunity whenever a shrub, tree, rock, rut, ditch, cliff, or watercourse causes an injury and the injury occurs on improved public property.

¶ 62 If the natural condition provision is applied in this way, a public entity that constructs and maintains a roadway will be immune even when it knows that a dead tree is on a roadway and negligently fails to remove or warn of the hazard, and a driver is injured as the result of the obstruction. Similarly, an entity that builds and maintains a playground will be immune when it knows there is a dead and rotting tree standing in the middle of the playground and negligently fails to remove the hazard, and the tree falls and injures someone.

¶ 63 We are required to construe section 24–10–106(1)(e) and the natural condition provision in the interest of compensating victims of governmental negligence. In my view, applying the natural condition provision to permit a public entity to assert sovereign immunity in an action for injuries resulting from its negligent failure to maintain the safety of a public facility not only is contrary to the interest of compensating victims of governmental negligence, but also leads to an absurd and illogical result.

3. Injuries on Improved Property Caused by Objects on Unimproved Property

¶ 64 The natural condition provision could be applied to mean that a public entity may assert immunity when an injury occurs on improved property that is a public facility and the injury is caused by something that is natural to and is situated on unimproved property.

¶ 65 In my view, it would be erroneous to apply the provision in this way because doing so would encourage public entities to leave a modicum of unimproved land around trees adjacent to public facilities. It would also encourage public entities to refrain from pruning those trees, lest the trees be considered "improved property." The reasoning would be that so long as the improvements do not touch the trunk of a tree, (1) the tree is situated on unimproved property; (2) the tree, itself has not been "improved"; and (3) the entity has no duty to ensure that the tree does not constitute an unreasonable risk to the health and safety of those who use the area of the facility immediately adjacent to the tree and under the branches of the

tree.

¶ 66 Here, the photographs suggest that the vehicle pad and tent area may touch or nearly touch one side of the tree, but do not surround it. This presents yet another difficulty. When a public entity constructs improvements that touch one side of a tree, but do not surround the tree, and the tree's limbs overhang the public facility, courts would be required to determine whether the improvement causes the tree to be situated on improved or unimproved property. We would also be required to determine whether tree limbs that overhang a public facility are a natural condition of unimproved property or a physical condition or situation of improved property.

¶ 67 Once again, applying the natural condition provision to permit a public entity to assert sovereign immunity in an action for injuries resulting from the entity's negligent failure to maintain the safety of a public facility is contrary to the interest of compensating victims of governmental negligence.

VI. Conclusion

***11** ¶ 68 I conclude that the *Rosales* test of integration and necessity is not derived from the statute, unduly subjective, and should be abandoned. I also conclude that the natural condition provision must be applied in the interest of compensating victims of governmental negligence. Accordingly, I conclude that the trial court erred when it dismissed plaintiff's action based on its determination that the tree "was not integral to the improved campsite and therefore the tree was not a 'public facility' as defined under [the] CGIA."

¶ 69 Because the trial court considered and ruled only on these issues, I do not address issues regarding the existence of a risk, CDNR's knowledge of a risk, or CDNR's alleged negligence. I would reverse and remand for further proceedings.

¶ 70 For these reasons, I respectfully dissent.

Colo.App., 2013
Burnett v. State Department of Natural Resources, Division of Parks and Outdoor Recreation
--- P.3d ----, 2013 WL 1245366 (Colo.App.), 2013 COA 42

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Appendix 3

C

Effective: August 7, 2013

West's Colorado Revised Statutes Annotated Currentness
Title 24. Government--State
Administration
Article 10. Governmental Immunity (Refs & Annos)
§ 24-10-103. Definitions

As used in this article, unless the context otherwise requires:

(1) "Controlled agricultural burn" means a technique used in farming to clear the land of any existing crop residue, kill weeds and weed seeds, or to reduce fuel buildup and decrease the likelihood of a future fire.

(1.3) "Dangerous condition" means either 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 constructing or maintaining such facility. For the purposes of this subsection (1.3), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. A dangerous condition shall not exist solely because the design of any facility is inadequate. The mere existence of wind, water, snow, ice, or temperature shall not, by itself, constitute a dangerous condition.

(1.5) "Health care practitioner" means a physician, dentist, clinical psychologist, or any other person acting at the direction or under the supervision or control of any such persons.

(2) "Injury" means death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant.

(2.5) "Maintenance" means the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure. "Maintenance" does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.

(2.7) "Motor vehicle" means a motor vehicle as defined in section 42-1-102, C.R.S., and a light rail car or

engine owned or leased by a public entity.

(3)(a) "Operation" means the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital, jail, or public water, gas, sanitation, power, or swimming facility. "Operation" does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.

(b) The term "operation" shall not be construed to include:

(I) A failure to exercise or perform any powers, duties, or functions not vested by law in a public entity or employee with respect to the purposes of any public facility set forth in paragraph (a) of this subsection (3);

(II) A negligent or inadequate inspection or a failure to make an inspection of any property, except property owned or leased by the public entity, to determine whether such property constitutes a hazard to the health or safety of the public.

(3.5) "Prescribed fire" means the application of fire in accordance with a written prescription for vegetative fuels and excludes a controlled agricultural burn.

(4)(a) "Public employee" means an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed, but does not include an independent contractor or any person who is sentenced to participate in any type of useful public service. For the purposes of this subsection (4), "authorized volunteer" means a person who performs an act for the benefit of a public entity at the request of and subject to the control of such public entity and includes a qualified volunteer as defined in section 24-33.5-802(9).

(b) "Public employee" includes any of the following:

(I) Any health care practitioner employed by a public entity, except for any health care practitioner who is employed on less than a full-time basis by a public entity and who additionally has an independent or other health care practice. Any such person employed on less than a full-time basis by a county or a district public health agency and who additionally has an independent or other health care practice shall maintain the status of a public employee only when such person engages in activities at or for the county or the district public health agency that are within the course and scope of such person's responsibilities as an employee of the county or the district public health agency. For purposes of this subparagraph (I), work performed as an employee of another public entity or of an entity of the United States government shall not be considered to be an independent or other health care practice.

(II) Any health care practitioner employed part-time by and holding a clinical faculty appointment at a public entity as to any injury caused by a health care practitioner-in-training under such health care practitioner's

supervision. Any such person shall maintain the status of a public employee when such person engages in supervisory and educational activities over a health care practitioner-in-training at a nonpublic entity if said activities are within the course and scope of such person's responsibilities as an employee of a public entity.

(III) Any health care practitioner-in-training who is duly enrolled and matriculated in an educational program of a public entity and who is working at either a public entity or a nonpublic entity. Any such person shall maintain the status of a public employee when such person engages in professional or educational activities at a nonpublic entity if said activities are within the course and scope of such person's responsibilities as a student or employee of a public entity.

(IV) Any health care practitioner who is a nurse licensed under article 38 of title 12, C.R.S., employed by a public entity. Any such person shall maintain the status of a public employee only when such person engages in activities at or for the public entity which are within the course and scope of such person's responsibilities as an employee of the public entity.

(V) Any health care practitioner who volunteers services at or on behalf of a public entity, or who volunteers services as a participant in the community maternity services program;

(VI) Any release hearing officer utilized by the department of corrections and the state board of parole pursuant to section 17-2-217(1), C.R.S. A release hearing officer shall maintain the status of a public employee only when the release hearing officer engages in activities that are within the course and scope of his or her responsibilities as a release hearing officer.

(VII) Any administrative hearing officer utilized by the department of corrections and the state board of parole pursuant to section 17-2-201(3) (c)(I), C.R.S. An administrative hearing officer shall maintain the status of a public employee only when the administrative hearing officer engages in activities that are within the course and scope of his or her responsibilities as an administrative hearing officer.

(5) "Public entity" means the state, the judicial department of the state, any county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

(5.5) "Public sanitation facility" means structures and related apparatus used in the collection, treatment, or disposition of sewage or industrial wastes of a liquid nature that is operated and maintained by a public entity. "Public sanitation facility" does not include: A public water facility; a natural watercourse even if dammed, channelized, or containing storm water runoff, discharge from a storm sewer, or discharge from a sewage treatment plant outfall; a drainage, borrow, or irrigation ditch even if the ditch contains storm water runoff or discharge from storm sewers; a curb and gutter system; or other drainage, flood control, and storm water

facilities.

(5.7) "Public water facility" means structures and related apparatus used in the collection, treatment, or distribution of water for domestic and other legal uses that is operated and maintained by a public entity. "Public water facility" does not include: A public sanitation facility; a natural watercourse even if dammed, channelized, or used for transporting domestic water supplies; a drainage, borrow, or irrigation ditch even if dammed, channelized, or containing storm water runoff or discharge; or a curb and gutter system.

(6) "Sidewalk" means that portion of a public roadway between the curb lines or the lateral lines of the traveled portion and the adjacent property lines which is constructed, designed, maintained, and intended for the use of pedestrians.

(7) "State" means the government of the state; every executive department, board, commission, committee, bureau, and office; and every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof. "State" does not include the judicial department, a county, municipality, city and county, school district, special district, or any other kind of district, instrumentality, political subdivision, or public corporation organized pursuant to law.

CREDIT(S)

Amended by Laws 1982, H.B.1232, § 6; Laws 1986, H.B.1196, § 2; Laws 1987, S.B.108, § 1; Laws 1988, S.B.59, § 1; Laws 1992, H.B.92-1291, § 1, eff. July 1, 1992; Laws 1993, S.B.93-181, § 1, eff. April 30, 1993; Laws 2002, Ch. 156, § 1, eff. May 24, 2002; Laws 2003, Ch. 182, § 2, eff. July 1, 2003; Laws 2004, Ch. 316, § 61, eff. Aug. 4, 2004; Laws 2007, Ch. 262, § 1, eff. July 1, 2007; Laws 2008, Ch. 14, § 1, eff. March 13, 2008; Laws 2008, Ch. 174, § 2, eff. Aug. 5, 2008; Laws 2008, Ch. 406, § 2, eff. July 1, 2008; Laws 2012, Ch. 242, § 1, eff. June 4, 2012; Laws 2013, Ch. 313, § 1, eff. May 28, 2013; Laws 2013, Ch. 316, § 51, eff. Aug. 7, 2013.

HISTORICAL AND STATUTORY NOTES

The 1992 amendment, in subsec. (1), inserted the second sentence, and deleted the former last sentence; rewrote subsec. (5); and added subsec. (6). Prior to being rewritten, subsec. (5) had read:

" 'Public entity' means the state, county, city and county, incorporated city or town, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision of the state organized pursuant to law."

Section 8 of Laws 1992, H.B.92-1291, provides:

"Effective date--applicability. Sections 1 through 5 and 7 through 9 shall take effect July 1, 1992, and shall apply to injuries occurring on or after said date. Section 6 of this act shall take effect January 1, 1993, and shall apply to injuries occurring on or after said date."

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Appendix 4

C

Effective: June 5, 2008

West's Colorado Revised Statutes Annotated Currentness
Title 24. Government--State
Administration
Article 10. Governmental Immunity (Refs & Annos)
§ 24-10-106. Immunity and partial waiver

(1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment, except emergency vehicles operating within the provisions of section 42-4-108(2) and (3), C.R.S.;

(b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;

(c) A dangerous condition of any public building;

(d)(I) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof. Nothing in this subparagraph (I) shall preclude a particular dangerous accumulation of snow, ice, sand, or gravel from being found to constitute a dangerous condition in the surface of a public roadway when the entity fails to use existing means available to it for removal or mitigation of such accumulation and when the public entity had actual notice through the proper public official responsible for the roadway and had a reasonable time to act.

(II) A dangerous condition caused by the failure to realign a stop sign or yield sign which was turned, without authorization of the public entity, in a manner which reassigned the right-of-way upon intersecting public

highways, roads, or streets, or the failure to repair a traffic control signal on which conflicting directions are displayed;

(III) A dangerous condition caused by an accumulation of snow and ice which physically interferes with public access on walks leading to a public building open for public business when a public entity fails to use existing means available to it for removal or mitigation of such accumulation and when the public entity had actual notice of such condition and a reasonable time to act.

(e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. 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 or on a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, **or** swimming facility by such public entity;

(g) The operation and maintenance of a qualified state capital asset that is the subject of a leveraged leasing agreement pursuant to the provisions of part 10 of article 82 of this title;

(h) Failure to perform an education employment required background check as described in section 13-80-103.9, C.R.S.

(1.5)(a) The waiver of sovereign immunity created in paragraphs (b) and (e) of subsection (1) of this section does not apply to claimants who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction, and such correctional facility or jail shall be immune from liability as set forth in subsection (1) of this section.

(b) The waiver of sovereign immunity created in paragraphs (b) and (e) of subsection (1) of this section does apply to claimants who are incarcerated but not yet convicted of the crime for which such claimants are being incarcerated if such claimants can show injury due to negligence.

(c) The waiver of sovereign immunity created in paragraph (e) of subsection (1) of this section does not apply to any backcountry landing facility located in whole or in part within any park or recreation area maintained by a public entity. For purposes of this paragraph (c), "backcountry landing facility" means any area of land or water that is unpaved, unlighted, and in a primitive condition and is used or intended for the landing and takeoff of aircraft, and includes any land or water appurtenant to such area.

(2) Nothing in this section or in section 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of

act for which the public employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

(4) No rule of law imposing absolute or strict liability shall be applied in any action against a public entity or a public employee for an injury resulting from a dangerous condition of, or the operation and maintenance of, a public water facility or public sanitation facility. No liability shall be imposed in any such action unless negligence is proven.

CREDIT(S)

Amended by Laws 1979, H.B.1499, § 76; Laws 1986, H.B.1196, § 5; Laws 1987, S.B.112, § 1; Laws 1992, H.B.92-1291, § 2, eff. July 1, 1992; Laws 1994, H.B.94-1284, § 1, eff. July 1, 1994; Laws 1994, S.B.94-1, § 53, eff. Jan. 1, 1995; Laws 2002, Ch. 26, § 1, eff. March 22, 2002; Laws 2004, Ch. 280, § 1, eff. May 21, 2004; Laws 2008, Ch. 434, § 4, eff. June 5, 2008.

HISTORICAL AND STATUTORY NOTES

The 1979 amendment, in par. (1)(c), substituted "correctional facility as defined in section 17-1-102" for "penitentiary, reformatory".

The 1986 amendment substantially rewrote provisions in subsecs. (1) and (2), and added subsec. (3).

The 1987 amendment added subsec. (4).

The 1992 amendment rewrote par. (1)(d), which had read:

"A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof, but shall include the failure to repair a stop sign or a yield sign which reassigned the right-of-way or the failure to repair a traffic control signal on which conflicting directions are displayed, if such failure constituted a dangerous condition as defined in section 24-10-103(1)."