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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Court of Appeals Case No. 2011CA2141
Judge Fox; Miller, J., concurs; Carparelli, J. dissents

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

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SARA BURNETT,

Petitioner,

v.

STATE OF COLORADO DEPARTMENT OF NATURAL RESOURCES, DIVISION OF PARKS AND RECREATION,

Respondent.

▲COURT USE ONLY▲

Case No. 2013SC306

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RESPONDENT'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) in that it contains 7,023 words.

The brief complies with C.A.R. 28(k) in that it contains, under a separate heading, a statement that Respondent agrees with Petitioner's statements concerning the standard of review and preservation for appeal.

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/ *Kathleen Spalding*

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Respondent the State of Colorado Department of Natural Resources, Division of Parks and Recreation ("State"), by and through the Office of the Colorado Attorney General, submits the following Answer Brief pursuant to C.A.R. 31(a).

References to the appellate record shall be made by stating the document title followed by the appropriate record page designation.

ISSUE PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

Sara Burnett and a companion entered a designated camping area in Cherry Creek State Park the evening of July 18, 2010. Complaint, CD p. 3 ¶ 9. The camping area contained 135 sites, some of which included sewer, water, and electrical hook-up capability for recreational

vehicles. Affidavit of Tim Metzger, CD p. 41 at ¶ 6. All the sites had an improved, leveled camping pad along with a picnic table and fire pit on the pad. *Id.* Some of the sites had trees adjacent to the improved camping pad. *Id.* Some camping sites had no trees adjacent to the camping pad. *Id.* at ¶ 7.

Although Burnett was camping only with a tent, she chose a full hook-up site campsite that was flanked by several mature cottonwood trees. *Id.*, p. 42 at ¶ 8. She pitched her tent on the improved camping pad. Id. Sometime in the early morning of July 19, 2010, a branch from a cottonwood tree fell on Burnett's tent, causing her injuries. Complaint, CD p. 4 at ¶ 14. Due to the dense foliage created by the tree canopy, Park employees who subsequently investigated the campsite were unable to determine the source of the branch. Affidavit of Tim Metzger, CD p. 42 at ¶ 9.

On April 1, 2011, Burnett filed suit against the State of Colorado, Department of Natural Resources, Division of Parks and Outdoor Recreation ("State"). Complaint, CD pp. 1-9. She claimed that the State knew or should have known of the existence of dead tree branches

in trees adjacent to her campsite and either removed the dead branches or warned her of their existence. *Id.*, CD p. 8 at ¶¶ 32-34. She alleged that governmental immunity had been waived for the incident pursuant to § 24-10-106(1)(e), C.R.S., because dead branches existed in the trees adjacent to her campsite, and the dead branches were a "dangerous condition of a public facility." *Id.* at pp. 5-8, ¶¶ 20-34.

On May 30, 2011, the state filed a motion to dismiss pursuant to C.R.C.P. 12(b)(1). Defendant's Motion to Dismiss and Request for Attorney Fees, CD pp. 29-39. The state contended that Burnett's claims were barred by the Colorado Governmental Immunity Act (CGIA) because the trees adjacent to Burnett's campsite from which the branch presumably fell were natural conditions that did not come within any immunity waiver. *Id.*, CD pp. 33-37. The motion was supported by the Affidavit of Tim Metzger, Cherry Creek State Park's park manager. Affidavit of Tim Metzger, CD pp. 40-42.

In its motion to dismiss, the state denied being aware of any unreasonable risk of harm with respect to the trees adjacent to Burnett's campsite. Defendant's Motion to Dismiss, CD p. 31.

However, the State's Motion to Dismiss was limited to the question of whether the trees were part of a "public facility." *Id.* Because the Motion to Dismiss was limited to this issue, there is no evidence in the record that any failure on the part of the state to maintain the trees caused a tree limb to fall onto Burnett's tent.[1]

Burnett initially requested an evidentiary hearing. *See* Plaintiff's Response to Defendant's Motion to Dismiss, CD p. 58. She withdrew the request after the parties stipulated that all the facts set forth in the affidavit of Tim Metzger were undisputed and that the following additional facts were undisputed: 1) Burnett paid a fee to enter Cherry Creek State Park; 2) Burnett 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; 3) Burnett was injured when her tent was

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[1] In Petitioner's Opening Brief, Burnett claims that the state was aware of the dangerous condition of dead branches in trees adjacent to the campsite. *See*, e.g., Opening Brief at pp. 4-6. The issue of whether the State was aware of any dangerous condition was not before the trial court, and there is no evidence in the record supporting this contention. A complaint's allegations are not taken as true for the purposes of a motion to dismiss brought pursuant to C.R.C.P. 12(b)(1). *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

struck by a tree branch; 4) the branch that struck Burnett's tent likely fell from a tree adjacent to the improved campsite; 5) the improved campsite was a "public facility" within the meaning of the Colorado Governmental Immunity Act; and, 6) Park personnel, or individuals contracted by the Park, had trimmed trees adjacent to the improved campsite on past occasions.[2] *See* Reply Brief in Support of Defendant's Motion to Dismiss, CD pp. 66-67; *see* also Order Granting Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and Awarding Reasonable Attorney Fees, CD pp. 102-103.

On September 8, 2011, the district court granted the State's motion to dismiss. *See* Order Granting Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and Awarding Reasonable Attorney Fees, CD pp. 102-105. The district court recognized, as stipulated by the parties, that Burnett's improved campsite was a "public facility" within the meaning of the CGIA. *Id.,* p. 102. However, the district court concluded that the State retained immunity because the tree was a

[2] In Petitioner's Opening Brief, Burnett contends that the state had "ceased" pruning trees in the camping area. Petitioner's Opening Brief, p. 11. There is no evidence in the record supporting this allegation.

natural feature that was not part of the "public facility." *Id.*, CD pp. 103-104. The court acknowledged that natural objects in a park generally were excluded from the definition of "public facility." *Id.,* CD p. 104. However, a natural feature could be part of a public facility if it was so incorporated into the facility that it became "integral" to the facility and "essential" to the facility's intended use. *Id.* Based on facts to which the parties had stipulated, the district court determined that trees adjacent to the improved campsite were a natural feature that was neither "integral" nor "essential" to the campsite. *Id.*

Burnett appealed the trial court's order of dismissal, and the court of appeals affirmed the trial court's order of dismissal. *See* Notice of Appeal, CD p. 97; *see* Court of Appeals opinion dated March 28, 2013, Appendix 2 to Petitioner's Brief. A dissenting opinion was filed along with the majority opinion. *Id.* at pp. 7 – 12, ¶¶ 27 – 70.

Petitioner filed a petition for a writ of certiorari, and the petition was granted.

STATEMENT OF THE FACTS

Cherry Creek State Park is located on land owned by the Army Corps of Engineers and leased to the State of Colorado. Affidavit of Tim Metzger, CD p. 41 at ¶ 4. The 4,200-acre Park offers a wide variety of recreational activities and serves as an important habitat for birds and animals. *Id.* The Park contains 30 miles of trails, 15 miles of which are paved. *Id.*.

The Park contains thousands of trees located in areas frequented by the public. Many trees line the Park's trails. *Id.* at ¶ 5. Some trees are located in the Park's campground area. *Id.*

The Park's mature trees provide a habitat for great horned owls and bald eagles. *Id.* The thick cover is used by whitetail and mule deer for bedding. *Id.* Woodpeckers and northern flickers eat the insects that are inside the trees, and pheasants use the vegetation for cover and roosting. *Id.*

The Park's designated campground contains 135 basic and full hook-up campsites. *Id.* at ¶ 6. Each full hook-up campsite consists of a

concrete parking pad, electrical, water and sewer hook-ups, and a level dirt area with a picnic table and fire pit. *Id.* Basic campsites contain a parking pad and a level dirt area with a picnic table and fire pit. *Id.* Campers with tents can pitch their tents on the level dirt area of the campground site, but they are not restricted to that particular location. *Id.* at ¶ 7.

Some campsites are flanked by trees with overhanging branches. *Id.* Some camping areas have no trees around the sites. *Id.*

The improved site where Burnett was camping is flanked by several cottonwood trees. *Id.,* p. 42 at ¶ 8. The trees are mature, and some reach heights of approximately 75 feet. *Id.* It is likely that all the trees existed at the time the Park was created in 1959. *Id.* None of the trees were planted by Park staff, and none of the trees were located on the improved portions of Burnett's campsite or any other campsite. *Id.*

On July 19, 2010, Sara Burnett was camping in the Park at a full hook-up site (even though she was using only a tent) when her tent was struck by a tree branch that likely fell from a tree adjacent to her improved campsite. *Id.* at ¶8.

Park employees investigated the campsite after the accident occurred. Due to the dense foliage provided by the trees around the campsite, the Park employees were unable to determine the location or tree from which the branch fell. *Id*. at ¶ 9.

PRESERVATION OF ISSUES AND STANDARDS OF REVIEW

Respondent agrees with Petitioner's statement that this Court reviews the order of dismissal *de novo*. The court may affirm the trial court's order of dismissal on any ground supported by the record. *See Regional Transportation District v. Lopez*, 916 P.2d 1187, 1196 (Colo. 1996).

Respondent agrees with Petitioner's statement regarding the preservation of the issues on appeal.

ARGUMENT SUMMARY

The CGIA has two basic competing interests: the interest of citizens in obtaining a remedy when injured by governmental wrongdoing, and the interest of insuring that governmental entities are able to provide public services effectively at a reasonable cost. The

balance between these two competing interests is for the legislature alone to reach. The court's task in interpreting the CGIA is to determine and implement the balance struck by the General Assembly.

The CGIA retains governmental immunity for the risk of injury inherent in the design of public facilities such as Burnett's campsite. The duty of a public entity to "maintain" a public facility requires only that the entity keep a facility in the same general state of repair or efficiency as initially constructed. § 24-10-103 (1.3), C.R.S. (2013). For the purposes of the CGIA, a public entity's acceptance of the final design of a public facility, including whatever risk is present at the end of the design phase, determines the general state of a public facility's "being" when initially constructed. In this case, the parties stipulated that the trees surrounding Burnett's campsite likely existed at the time the campsite was constructed. The risk of branches falling from the trees onto the campsite was thus inherent in the design and accepted at the time the campground was constructed. Because these risks were

the sole cause of Burnett's injuries, the state is entitled to governmental immunity.

The circumstances giving rise to Burnett's injuries do not fall within any of the CGIA's waivers of governmental immunity. In order to fall within the waiver for the dangerous condition of a public facility, § 24-10-106(1)(e), C.R.S. (2013), the "dangerous condition" at issue must stem from the physical condition of the improved facility or from the use of the physical condition of the improved facility. Burnett was injured while she was sleeping in a tent that was situated on an improved campsite pad. Her injuries were not caused by the physical condition of her campsite, and her injuries did not arise from her use of the physical condition of the campsite.

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 . . . ." § 24-10-106(1)(e). C.R.S. (2013). This statement of legislative intent plainly indicates that the General Assembly did not intend to waive immunity for natural conditions in a park. As applied to this case, the waiver exception means that the state

is immune for injuries arising from the trees adjacent to Burnett's campsite.

Finally, the legislative history of the CGIA leaves no doubt that the General Assembly intended to retain immunity for unimproved natural conditions in parks such as mountains, rocks, or trees. Prior to enacting the CGIA, the General Assembly appointed a special committee to commission a study with the goal of developing legislation to define and limit governmental immunity. Courts have relied on the resulting commission report in interpreting the legislative intent of the CGIA's waivers of immunity and the exceptions to those waivers. With respect to the meaning of the then-proposed waiver for a public facility in a park, the report concluded that if a governmental entity constructed a facility in a park, the entity was liable for failing to maintain the facility. But a public entity was not required to maintain natural, unimproved property. The report concluded that governmental immunity did not apply to man-made objects in a park, but that immunity was retained under the statutory scheme for natural objects in a public park.

ARGUMENT

I. Interpretation of the Colorado Governmental Immunity Act

The CGIA generally immunizes governmental entities and employees from tort liability, but waives this immunity under limited circumstances. *See* § 24-10-106, C.R.S. (2013). The Act recognizes that governmental entities provide many essential services that unlimited liability could disrupt or make prohibitively expensive. See § 24-10-102, C.R.S. (2013). At the same time, the CGIA "allows the common law of negligence to operate against governmental entities except to the extent that it has barred suit against them." *Medina,* 35 P.3d at 453. The balance between these two competing interests "is for the legislature alone to reach." *Id.*

The court's task in interpreting the CGIA is to determine and implement the balance struck by the General Assembly. *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1387 (Colo. 1997). Courts must give the words and phrases of statutory language their plain and ordinary

meaning. *Padilla v. School District No. 1*, 25 P.3d 1176, 1180 (Colo. 2001). "While [immunity created by the CGIA] is in derogation of common law and therefore must be strictly construed, forced, subtle, strained or unusual interpretations should never be employed where the language of the statute is plain and its meaning clear. *Willer v.City of Thornton*, 817 P.2d 514, 518 (Colo. 1991). A court may not substitute its view of public policy for that of the General Assembly. *Swieckowski*, 934 P.2d at 1387.

II. The state retains immunity for the risk of injury inherent in the design of a public campsite.

Burnett's injuries arose solely from the state's discretionary decision to place a camp site adjacent to cottonwood trees. To the extent this "design" was faulty, the state retains immunity under the plain terms of the CGIA.

The CGIA waives immunity for the "dangerous condition" of a public facility located in a park maintained by a public entity. § 24-10-106(1)(e), C.R.S. (2013). A "dangerous condition" is defined as either a

physical condition of a public facility "or the use thereof" caused by the negligent construction or maintenance of the public facility. § 24-10-103(1.3), C.R.S. (2013).

This immunity waiver is limited by the CGIA's provision that "maintenance" requires only that a public entity keep a facility in the same general state of repair or efficiency as initially constructed. § 24-10-103(2.5), C.R.S. (2013). "Maintenance does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility." *Id.* The CGIA explicitly retains immunity for injuries arising from a facility's inadequate design. § 24-10-103(1.3) (2013).

In *Medina v. State*, 35 P.3d 443 (2007), the Court clarified the relationship between the state's duty to maintain a public facility and the Act's provision that the state retained immunity for injuries resulting solely from inadequate design. An injury results solely from an inadequate design when the dangerous condition causing the injury is inherent in the design itself and is allowed to persist to the time of injury. *Medina* at 34, citing *Swieckowski*, 934 P.2d at 1386. In contrast,

an injury results from the failure to maintain "when it is caused by a condition . . . that develops subsequent to the initial construction and design." *Id.* at 36.

For the purposes of the CGIA, the state's acceptance of the final design, including whatever risk is present at the end of the design phase, determines the general state of a public facility's "being" when initially constructed. *Id.*

In this case, the parties stipulated – and Burnett does not dispute – that the trees adjacent to Burnett's improved campground existed at the time the campground was created. *See* Affidavit of Tim Metzger, CD p. 42 at ¶ 8. The risk of branches falling from the trees onto the campsite was thus inherent in the design and accepted at the time the campground was constructed. *See Medina,* 35 P.3d at 440 (the risk of falling rocks is inherent in designing a mountain highway with very steep highway clearance rock cuts). In Burnett's case, because the risk of tree leaves, twigs, and branches falling onto Burnett's campsite was accepted as part of the campground design, the state retained immunity for the conditions that caused Burnett's injuries.

Burnett admits that the placement of the campsite near trees with overhanging branches is properly considered a "design" defect for which recovery would be barred. *See* Petitioner's Opening Brief at pp. 31, 32. But, citing *Medina*, she contends that the trees were part of the campsite, and that her injuries were partially attributable to an increase in the risk of branches falling due to "lack of maintenance." *Id.* at p. 32. To the contrary, unlike *Medina*, there is no evidence in this case that the trees adjacent to Burnett's campsite were a functional part of the campsite for which maintenance was required.

Interpreting a similar immunity waiver for the "dangerous condition of a public highway," the court has held that the dangerous condition of man-made features that are not a part of the highway surface can nonetheless be considered part of the highway, and thus subject to the waiver, if the features are an "integral part" of the highway. *See Medina*, 35 P. 3d at 460 (state had the duty to maintain a cut slope created in the course of a highway's construction because the cut slope was an integral part of the highway); *see also State v. Moldovan,* 842 P.2d 220, 226 - 228 (Colo. 1992) (state had a duty to

maintain a fence installed by the state to keep livestock from wandering onto the highway because the fence was an integral part of the highway system); *Stephen v. City and County of Denver*, 659 P.2d 666, 668 (Colo. 1983) (discussing the functionally integrated nature of a highway system and concluding that a "dangerous condition" of the highway should not be limited to the roadway surface). Consistent with *Medina* and *Moldovan*, a tree can be part of a public facility in a park – and the state can be liable for injuries from its falling branches – only if the tree is "an integral part of the facility" and "essential for the intended use of the facility." *Rosales v. City and County of Denver*, 89 P.3d 507, 510 (Colo. App. 2004), citing *State v. Moldovan*, 842 P.2d 220 (Colo. 1992).

Burnett claims that the trees adjacent to her campsite were "incorporated" into the campsite, but she cites no facts in the record establishing the kind of essential or integral connection contained in *Medina* and *Moldovan*. *See* Petitioner's Opening Brief at p. 22. She states simply that tree trunks were close to the campsite, tree branches reached over the campsite, and roots from the adjacent trees passed

beneath the campsite.[3] *See* Petitioner's Opening Brief at p. 21. These factors show that the trees were close to the campsite, but they fall far short of showing the trees were "integral" to the campsite.

The facts to which the parties stipulated establish the following: 1) trees adjacent to Burnett's campsite existed at the time the campsite was built; and, 2) other similar improved campsites in the park had no trees, no overhanging branches, and no shade. *See* Affidavit of Tim Metzger, CD p. 42 at ¶8. Trees are aesthetically desirable, but they were not "integral" to Burnett's camping experience, and they were not necessary for Burnett's use of any feature of the improved campsite. Burnett does not claim otherwise.

Burnett's injuries are attributable solely to the discretionary decision of state officials to place a campsite adjacent to cottonwood trees. Regardless of whether this design decision was wise, the risk inherent in this design existed at the time the campsite was constructed. The state thus retains immunity for Burnett's injuries

[3] There is no evidence in the record supporting this allegation. Burnett has asked the court to take judicial notice of the likely location of tree roots. See Petitioner's Opening Brief at p. 21.

pursuant to CGIA's provision retaining governmental immunity for "inadequate" design.

III. The circumstances giving rise to Burnett's injuries do not fall within any waiver of governmental immunity.

The CGIA generally immunizes governmental entities and employees from tort liability, but waives this immunity under limited circumstances set forth in the Act. *See* § 24-10-106, C.R.S. The state is immune in this case because the circumstances surrounding Burnett's injuries do not fall within any waiver of governmental immunity.

Relevant to the facts of this case, the CGIA waives governmental immunity for the "dangerous condition of any . . . public facility located in any park or recreation area maintained by a public entity . . . ." § 24-10-106(1)(e), C.R.S. (2013). A "dangerous condition" is defined as "a physical condition of a facility or the use thereof that poses an unreasonable risk to the health or safety of the public" caused by an entity's negligence in "constructing or maintaining" the facility. § 24-10-103(1), C.R.S. The term "facility" refers to a structure or improvement built or constructed to serve a public purpose. *Padilla v.*

School District 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 in *Bertrand v. Board of County Commissioners*, 872 P.2d 223 (Colo. 1994). The language "or use thereof" contained in the definition modifies the term "physical condition" and not the term "facility." *Sanchez v. School District 9-R*, 902 P.2d 450, 453 (Colo. App. 1995), citing *Jenks v. Sullivan*, 826 P.2d 825, 830 (Colo. 1992); *Douglas v. City and County of Denver,* 203 P.3d 615, 618 – 619 (Colo. App. 2008).

Thus, in order to fall within the waiver for the dangerous condition of a public facility, the dangerous condition must stem from the physical condition of the improved facility or from the use of the physical condition of the facility. *Id.*

A. Burnett's injuries did not arise from the condition of the improved camping area because the trees were not integral to the improved camping facility.

Burnett claims that the trees adjacent to her campsite were part of the campsite's "physical condition" and thus were part of the

improved campsite the state was required to maintain. *See* Petitioner's Opening Brief at p. 20. As indicated elsewhere in this Brief, Burnett reasons that the trees were an actual part of the improved campsite because they were close to the improved camping area, because the roots probably passed beneath the camping pad, because tree canopy shaded the site, and because the trees were located within the confines of the campground area. *Id.* at pp. 21, 22. These tenuous connections to the campsite are insufficient to establish the trees as actually incorporated into the campsite. In order for a natural feature to be part of a public facility, the feature must be so connected to the functioning of the facility that it becomes "integral" to the facility. *See Medina,* 35 P. 3d at 460 (a man-made cut slope adjacent to and above a mountain highway was an integral part of the highway because it was built as part of the highway's construction); *Moldovan,* 842 P.2d at 226 - 228 (a fence installed by the state to keep livestock from wandering onto the highway was an integral part of the highway system); *Stephen v. City & County of Denver*, 659 P.2d 666,668 (Colo. 1983) (a stop sign may be an

"integral part" of a highway requiring maintenance by a public entity);[4] *Rosales,* 89 P.3d at 510 (a tree can be part of a public facility in a park only if the tree is "an integral part of the facility" and "essential for the intended use of the facility.")

Relevant to Burnett's campsite and her use of campsite structures, the following facts are before the court: 1) Burnett had pitched her tent on a "full hook up" campsite that consisted of a concrete parking pad, electrical, water, and sewer hook-ups, and a level dirt area with a picnic table and fire pit. Affidavit of Tim Metzger, CD p. 41 at ¶ 6, and p 42 at ¶ 8. 2) Some of the 135 campsites at Cherry Creek State Park had no trees on or around the campsite, while other campsites were flanked by trees with overhanging branches. *Id.* p. 41 at ¶¶ 6, 7. 3) The campsite used by Burnett was flanked by several cottonwood trees, none of which were located on the improved portions of the campsite. *Id.,* CD p. 42 ¶ 8. 4) None of the trees adjacent to

[4] This case was reversed by legislative action. Subsequent to the *Stephen* case, the General Assembly added the following language to §24-10-106(1)(d)(I), C.R.S.: "the phrase 'physically interferes with the movement of traffic' shall not include traffic signs, signals, or markings, or the lack thereof."

Burnett's campsite were planted by Park staff. The trees were mature, and they likely existed at the time the Park was created in 1959. *Id.* Finally, 5), the tree branch that struck Burnett's tent likely fell from a tree adjacent to her campsite. *See* Reply Brief in Support of Defendant's Motion to Dismiss, CD pp. 66-67; *see* also Order Granting Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and Awarding Reasonable Attorney Fees, CD pp. 102-103.

Burnett does not contend that the trees adjacent to her campsite were integral to the camping site or "essential" to the intended use of any of the campsite's structures. The improvements at the campsite provided an area for Burnett to pitch a tent and park a vehicle, and provided the amenities of water, a picnic table, and a fire pit. The trees surrounding the campsite were not integral or essential to using a tent site or parking site, to using water at the campsite, or to using the campsite's picnic table or fire pit. Many campers at Cherry Creek State Park used campsites with no surrounding trees, no shade, and no tree canopy.

Lacking a connection of the trees to the campsite that is more than proximity and presence, Burnett has not shown, and cannot show, that the trees were "incorporated" into the campsite and that the waiver of immunity for the dangerous condition of a public facility thus applied to Burnett's injuries.

B. Burnett's injuries did not stem from her "use" of the camping pad.

As indicated elsewhere in the Brief, in order for a public entity's immunity to be waived for the dangerous condition of a public facility or building, the "dangerous condition" must stem from the use of a dangerous or defective physical condition of the facility or building. *Sanchez,* 902 P.2d at 453, citing *Jenks v. Sullivan*, 826 P.2d 825, 830 (Colo. 1992); *Douglas,* 203 P.3d at 618 – 619. Burnett does not contend that her injuries were in any way connected to her use of the condition of the campsite. She was sleeping in a tent on the improved camping pad when the accident occurred, and her injuries did not stem from her use of the physical condition of the pad itself. Lacking a connection between Burnett's injuries and her use of the condition of the campsite,

Burnett has not shown, and cannot show, that the waiver of immunity for the dangerous condition of a public facility applied to her injuries.

IV. Governmental immunity is not waived for the natural condition of unimproved property.

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 . . . ." § 24-10-106(1)(e). C.R.S. (2013). This is a clear and unambiguous expression of legislative intent. This provision "makes clear that the General Assembly did not intend to waive immunity unless a public facility is built or constructed in a park or recreation area." *Rosales*, 89 P.3d at 509. As applied to this case, the waiver exception means that the state is immune for injuries arising from the natural condition of the trees[5]

[5] Burnett claims that the trees adjacent to her property were not "natural" because the state had pruned dead branches from trees in the campground area. *See* Petitioner's Opening Brief at p. 24. The parties cannot identify which tree shed the branch that fell on Burnett's tent. However, even if the culprit tree could be identified and had been trimmed, the state's pruning actions do not change the essential natural condition of the trees. Nor should the State, for the purpose of maintaining trees in a "natural condition," refrain from removing

adjacent to Burnett's campsite because the trees are the "natural condition" of "unimproved property."

The court of appeals dissenting opinion objects to a statutory interpretation that results in governmental immunity when a natural object of unimproved property causes injury to individuals on an improved "public facility." In the court's view, such an interpretation results in two unwanted scenarios. First, a public entity that constructs and maintains a roadway will be immune even when it knows that a dead tree is on a roadway but fails to remove the hazard. *See* Court of Appeals opinion dated March 28, 2013, dissent p. 11 at ¶ 62, Appendix 2 to Petitioner's Brief. Second, an entity that builds a playground will be immune when it knows there is a "dead and rotting tree standing in the middle of the playground" and fails to remove the hazard. *Id.* These two scenarios will be addressed in turn.

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hazardous dead branches from large, overhanging trees in areas frequented by the public.

In general, a downed tree on a roadway surface likely would fall within the CGIA's immunity waiver for the "dangerous condition of a public highway . . . which physically interferes with the movement of traffic . . . . § 24-10-109(1)(d)(I), C.R.S. (2013). Each situation must be treated based on the facts presented. But given this waiver of immunity, it is unlikely that a public entity would enjoy immunity for a known downed tree on a roadway surface that interfered with the movement of traffic.

The dissent's example of a dead tree in the middle of the playground creates a more nuanced situation. Under the scenario the dissent offers, several possibilities exist. It is possible that the existence of trees in the middle of playground facilities was contemplated at the time the playground was created, thus leading to a determination that any injuries arising from the presence of the trees is a design defect for which a public entity is immune. It is possible that such a tree would be integral to playground structures, thus giving rise to a maintenance obligation. It is possible that such a tree was not so integrated into any improved public facility as to give rise to any

maintenance obligation. Under the scenario presented by the dissent, a public entity might or might not be able to claim immunity.

The dissent prefers an interpretation of the "natural condition" exception contained in § 24-10-106(1)(e) that would allow a public entity to assert governmental immunity only when an injury occurs on unimproved property and is caused by a natural condition of that property. C.R.S. (2013). This approach ignores the resulting significant burden on governmental entities that such an interpretation would cause.

If governmental entities are liable whenever a natural feature of unimproved property impacts a public facility or highway, the state will be liable for injuries to motorists whose cars are struck by boulders that every year fall onto Colorado highways. Governmental entities will be liable for injuries to citizens who are struck by the branches of trees adjacent to the many miles of improved trails in Colorado state parks. In Cherry Creek State Park alone, the state would have to choose between monitoring and cutting the thousands of trees lining the Park's miles of improved paths and trails, moving the improved trails

and public facilities away from trees, or closing improved "facilities" adjacent to trees. Cherry Creek State Park is only one of many parks in the state park system that would be faced with these prohibitively expensive choices.

Burnett urges this Court to ignore the consequences of the statutory interpretation she urges this Court to adopt. *See* Petitioner's Opening Brief at p. 33. Courts cannot do so; the determination of legislative intent naturally leads to a consideration of the consequences of statutory construction. In construing statutory provisions, courts must endeavor to give effect to the intent of the General Assembly, even when the result is in some circumstances inequitable. *Swieckowski ,* 934 P.2d at 1384 – 1385; *see also* § 24-10-102, C.R.S. (2013). The plain language of the CGIA excepts natural conditions of unimproved property from the immunity waiver cited in § 24-10-106(1)(e), C.R.S. (2013), and this expression of legislative intent should be given full force. Applying the waiver exception to this case, the state is immune for Burnett's injuries because the injuries were caused by the natural condition of unimproved property.

V. The CGIA's legislative history supports the determination that the General Assembly did not intend to waive immunity for natural conditions in parks and recreation areas.

The primary goal in construing legislation is to give effect to the intent of the legislature. *Schubert v. People,* 698 P.2d 788, 793 (Colo. 1985). The history of, and policy behind, the CGIA informs the court's analysis. *Medina,* 35 P.3d at 23. The legislative history of the CGIA leaves no doubt that the General Assembly intended to retain immunity for unimproved natural conditions in parks such as mountains, rocks, or trees.

In 1968, the General Assembly appointed a special committee to commission "a study of the problem of governmental civil immunity" in Colorado with the goal of developing legislation to define and limit governmental immunity. *See* Colorado Legislative Council, Report to the Colorado General Assembly: Governmental Liability in Colorado, Research Publication No. 134 at 126 (1968) (the "Report"). The Colorado Supreme Court and several divisions of the Colorado Court of Appeals have relied upon the committee's report "to aid in deciphering

the General Assembly's intent regarding the situations in which sovereign immunity is to be waived under the Act." *Loveland v. St. Vrain Valley School District,* 2012 Colo. App. LEXIS 1080, at *24 ftn. 2, citing *State v. Defoor*, 824 P.2d 783, 788 (Colo. 1992) and *Lauck v. E-470 Public Highway Authority*, 187 P.3d 1148, 1151-52 (Colo. App. 2008).

The Report contains proposed governmental immunity legislation along with "policy considerations" for the legislation. *Id.* at xxvii-lii, 136. In 1971, the General Assembly adopted the legislation proposed in the Report as the first version of the CGIA. The legislation included a waiver for public facilities in parks:

> A dangerous condition of any public facility . . . located in parks or recreation areas and maintained by such public entity; but nothing in this paragraph . . . shall be construed to prevent a public entity from asserting the defense of sovereign immunity to 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. at xxx-xxxi.

The Report includes the following explanation of the intended meaning of the proposed waiver for a public facility in a park:

> With respect to the liability of public entities for injuries caused by dangerous conditions in parks, recreation facilities, etc. . . . . The committee concluded that a distinction should be made between (1) injuries caused by negligence in the construction, maintenance, failure to maintain, etc. of artificial, man-made objects (swing sets, buildings, etc.) and (2) injuries caused by the natural conditions of a park (the Flat Irons in Boulder or the Red Rocks west of Denver). In other words, ordinary negligence is sifficient [sic] to impose liability for injuries caused by the dangerous condition of artificial objects. *For injuries caused by natural dangerous conditions, immunity should be retained.*

Id. at 140 (emphasis added).

The Report further explains that if a governmental entity constructs or builds a facility in a park, the facility must be maintained "at the risk of being liable for failing to do so." *Id.* But "if there is property which was not constructed, but is natural and unimproved, a public entity is not required to maintain it . . . ." *Id.* at 140-141. The Report concludes that "[i]n short, this means that sovereign immunity does not apply with respect to man-made objects *and does apply to natural objects [in a park]." Id.* at 141 (emphasis added).

The CGIA's legislative history unambiguously establishes that the General Assembly adopted the public facility waiver with the clear understanding that despite waiving immunity for the dangerous condition of man-made objects, the CGIA still provided governmental entities with immunity for injuries resulting from the dangerous condition of natural objects on unimproved property, such as trees. *Id.* at 141. Applying that legislative intent to this case, the tree from which a branch fell and caused injury to Burnett is a natural, unimproved feature of the park for which immunity applies.

VI. The State is entitled to attorney fees and costs.

A party that prevails in a motion to dismiss pursuant to C.R.C.P. 12(b) is entitled to an award of reasonable attorney fees. *See* C.R.S. § 13-17-201. The award of attorney fees pursuant to a 12(b) dismissal is mandatory. *Smith v. City of Snowmass Village,* 919 P. 2d 868, 872-873 (Colo. App. 1996). The State requests this court to award attorney fees for the defense of the appeal of the trial court's order upon the

presentation to the trial court of appropriate time records pursuant to C.R.C.P. 121, § 1-22.

CONCLUSION

The State requests this Court to affirm the trial court's dismissal of Burnett's claims.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Answer Brief upon all parties herein by filing electronically through the Court's ICCES electronic filing system or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 10th day of March 2014 addressed as follows:

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