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COURT OF APPEALS, STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80202

District Court, City and County of Denver
The Honorable Michael J. Vallejos
Civil Action No. 2016CV33401

Defendant-Appellant:
CITY AND COUNTY OF DENVER,

v.

Plaintiff-Appellee:
REBEKAH BUTTERFIELD.

▲ COURT USE ONLY ▲

Court of Appeals Case Number: 2017CA1913

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

Pursuant to C.A.R. 32(h) 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 those rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g) because it does not exceed 9,500 words. It contains 7,900 words.

This brief complies with C.A.R. 28(a) because it contains, under a separate heading, the standard of review for appeal and a citation to where the issues were preserved in the record.

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/ Jamesy Owen
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STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff alleges that she tripped and fell at Red Rocks Park the night of September 18, 2014 on a gap in a walkway that was under construction. CF, p 2, ¶ 5. Earlier that day, and every day prior to the evening of September 18, since the walkway construction began in January 2014, the construction area had been enclosed by an orange construction fence to keep the public out of the active construction site. TR Ex., pp 11, 18-19; TR 06/28/17, pp 111:8-17, 130:23-132:16;

TR 06/29/17, pp 40:13-42:4, 44:10 – 49:10, 56:4-57:6, 65:4-66:21, 75:2-12. Additionally, orange stanchions were placed in front of the fence and an alternate dirt path had been created for the public to use to walk around the construction area. TRIAL EX, pp 11, 18-19, 28-29; TR 06/28/17, pp 123:6-20, 125:1-130:22; TR 06/29/17, pp 46:20-47:6, 56:11-18, 65:4-66:6. Unbeknownst to Denver, on the evening that Plaintiff allegedly tripped and fell, third parties apparently tore down and trampled the construction fence. TR 06/29/17, pp 61:24 – 62:5; 75:2 – 76:23. Plaintiff claims to have suffered injuries from her fall and filed a Complaint alleging premises liability, negligence, and negligence *per se* claims against Denver. CF, pp 3-4.

Denver filed a motion to dismiss the Complaint pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, contending that Denver was immune from Plaintiff's claims under the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-101, *et seq*. Specifically, Denver argued that Plaintiff failed to establish (1) that the walkway upon which she was allegedly injured was a "public facility" located in a park or recreation center under C.R.S. § 24-10-106(1)(e) and did not meet the definition of a "sidewalk" for the purposes of a waiver of immunity under § 24-10-106(1)(d)(I). CF, pp 20-35. Denver further claimed that Plaintiff was unable to show that her injuries were caused by a "dangerous condition" as defined

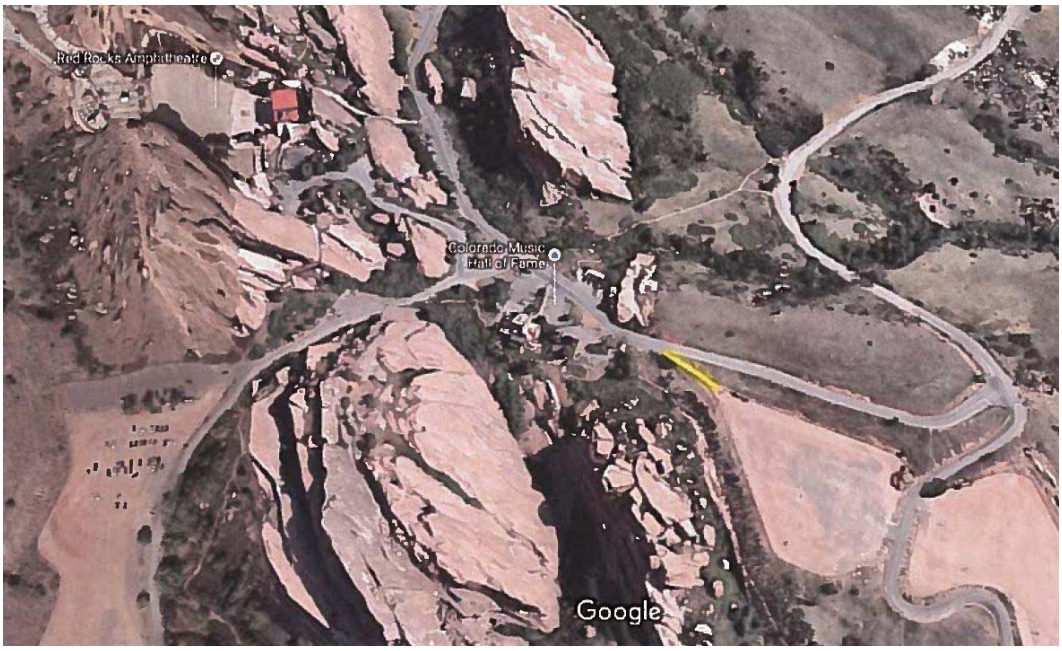
by C.R.S. § 24-10-103(1.3), a necessary element for the waivers of immunity under C.R.S. §§ 24-10-106(1)(d)(I) and 20-10-106(1)(e). CF, pp 20-35. After briefing, the district court set an evidentiary hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). *See* TR 06/28/2017, p 1; TR 06/29/2017, p 1.

Following the two-day *Trinity* hearing, on October 10, 2017, the district court denied Denver's motion to dismiss, finding that: (1) the walkway was a "public facility" located in a park or recreation area pursuant to C.R.S. § 24-10-106(1)(e); (2) the walkway was also "sidewalk" pursuant to C.R.S. § 24-10-106(1)(d)(I); and (3) Plaintiff met her burden of demonstrating the existence of a "dangerous condition" for which immunity was waived under either waiver provision. CF, pp 238-247. Thereafter, Denver filed its Notice of Interlocutory Appeal pursuant to C.R.S. § 24-10-108.

B. Statement of the Facts

This case arises out of Plaintiff's claim that she sustained injuries when she tripped and fell while on a walkway in Red Rocks Park after attending a concert at

Red Rocks Amphitheatre on September 18, 2014. CF, p 2, ¶ 5. The walkway in question is pictured below, highlighted in yellow.[1]



The walkway serves to connect various parts of Red Rocks Park, and visitors use it for many different purposes, including hiking, biking, exercising, watching movies, attending concerts, attending weddings/events, and many other activities. TRIAL EX, pp 28-29;[2] TR 06/28/17, pp 77:3 – 78:3, 106:5-20, 120:10 – 121:18; TR 06/29/17, pp 5:17 – 7:14, 42:5 – 43:13. It also leads to one of the lower south parking lots in Red Rocks Park. *Id*.

[1] This photograph was admitted into evidence during the *Trinity* hearing and is part of the record in this case. TR 06/29/17, pp 11:12-12:1.
[2] The yellow highlighted portion on both pictures is the walkway in question.

The portion of the walkway upon which Plaintiff was walking when she claims to have fallen was under construction on the date of the incident. TRIAL EX, pp 3-21; TR 06/28/17, pp 123:6-20, 125:1-130:22; TR 06/29/17, pp 7:15 – 8:3, 40:13 – 42:4, 45:9 - 47:6. On September 18, 2014, the walkway was at a stage of construction during which an approximately one-foot-wide gap for a chase drain that was being constructed and the concrete for the drain had been poured. TR 06/28/17, p 130:8-21; TR 06/29/17, pp 43:14 – 44:18, 45:9 – 46:4, 57:7 – 58:21. The cover for the drain, however, was not yet ready for installation and the concrete had not dried sufficiently to allow any covering to be secured into the gap. TR 06/29/17, pp 53:4-58:21.

The walkway was part of a larger construction project which began in January 2014 and included the addition of amenities, improving water drainage, upgrading buildings, and improving accessibility within the park. TR 06/29/17, pp 40:13-42:4. Between the beginning of the project and the night Plaintiff alleges she fell, numerous events, including many nighttime concerts, had taken place at Red Rocks Amphitheater. TR 06/28/17, pp 121:19 – 124:11; TR 06/29/17, p 70:12-25.

The construction area was designed so that members of the public visiting the park could detour around the unfinished construction site by walking on a temporary dirt path, which led to and from the lower south parking lot, one of multiple parking

lots where members of the public can park to access various areas of Red Rocks Park, including the Amphitheater. TRIAL EX, pp 11, 18-19, 28-29; TR 06/28/17, pp 123:6-20, 125:1-130:22; TR 06/29/17, pp 46:20 – 47:6, 65:4 – 66:6. As depicted in the photograph below,[3] an orange construction fence was placed around the portion of the walkway under construction to warn and stop the public from entering the area. TRIAL EX, pp 11, 18-19; TR 06/28/17, pp 111:8-17, 130:23 – 132:16; TR 06/29/17, pp 44:10 – 49:10, 56:4 – 57:6, 65:4 – 66:21, 75:2-12.

The fence was secured with ties to a wooden fence and a post on each side of the

[3] This photograph was admitted into evidence during the *Trinity* hearing and is part of the record in this case. TR 06/28/17, pp 41:18-41:24.

walkway. TR 06/29/17, p 48:2-25. The construction fence and the manner in which it was secured met construction industry safety standards for pedestrian walkways. *Id*. In addition, orange stanchions were placed in front of the fence to alert people to the construction fence. *Id.* at p. 56:11-18.

Safety was a top consideration throughout the construction project. *Id*. at 50:16 – 51:7, 78:15-79:8. Numerous safety checks and site visit meetings took place to ensure that the project was proceeding in a safe and efficient manner. *Id*. Construction in the area took place on a daily basis, and at the end of each day, including September 18, the orange fencing was put up around the walkway and secured by the construction crew, and orange stanchions were placed with the fence to block off the area. *Id*. at 47:7-48:25, 56:11-18. At night, lights illuminated the parking lot and lighting was also present on a post located on the street nearby the walkway, along with a light post at the top of the walkway. TRIAL EX, pp 11, 19; TR 06/29/17, pp 49:1-50:3.

Notably, throughout the construction project that began in January 2014, chase drains had also been installed in a similar fashion for other pedestrian walkways within Red Rocks Park. *Id*. at 43:14-45:6. The same orange construction fencing was used to block pedestrians from entering those areas and pedestrian detours were created. *Id*. at 44:10-24; 56:25-57:6. Prior to September 18, 2014, no

problems with the fencing or stanchions had been reported and no complaints were received of any injuries occurring in any area that was under construction using the same safety measures. TR 06/28/17, pp 122:9 – 124:11, 148:22 – 149:6; TR 06/29/17, pp 17:22 – 18:9, 32:1-4, 44:25-45:8, 61:24 – 63:18, 70:2-6. In fact, the night of September 17, 2014, a concert was also held at the Amphitheater, and there was no indication of the same construction fence being torn down or otherwise disabled, or of any injuries occurring in the area where Plaintiff alleges she was injured. TR 06/28/17, pp 122:9 - 124:11, 145:20 – 146:12.

At some point during the night of the September 18, 2014 concert, the construction fence was torn down and trampled or otherwise disabled by unknown third parties. TR 06/29/17, pp 61:24 – 62:5; 75:2 – 76:23. While the fence was down, Plaintiff walked over it into the construction area, where she alleges she tripped and fell on the gap for the chase drain, causing her injuries. CF, p 2, ¶ 5; TR 06/29/17, pp 43:14-45:21. The construction fence had never been torn down or trampled prior to the evening of September 18, 2014. TR 06/28/17, pp 148:22 – 149:6; TR 06/29/17, pp 17:22 – 18:9, 32:1-4, 61:24 – 63:18, 70:2-6.

SUMMARY OF THE ARGUMENT

The district court lacks subject matter jurisdiction over the allegations contained in Plaintiff's Complaint because Plaintiff failed to meet her burden of demonstrating that her injuries resulted from any of the specific provisions for which immunity is waived under the CGIA. Specifically, immunity was not waived under C.R.S. § 24-10-106(1)(e) for the dangerous condition of a public facility located within a public park or recreation area because the walkway in Red Rocks Park, which was under construction at the time of Plaintiff's alleged trip and fall, did not qualify as a "public facility" within the meaning of that provision.

As previously recognized by the supreme court, neither the legislative history nor the statutory context of the CGIA supports the contention that a walkway is a "public facility," and the specific walkway at issue here is not connected to any single public facility and it was designed for multiple purposes. The walkway is merely a transit way which connects various parts of Red Rocks Park to enable the public to use the park for a variety of purposes, including getting to and from parking lots, hiking, biking, and attending concerts.

The walkway at issue is also not a "sidewalk" for which immunity is waived under § 24-10-106(1)(d)(I) for the dangerous condition of a public road, highway, or street which physically interferes with the movement of traffic because it is not a

portion of a roadway between the curb or lateral lines of the traveled portion and the adjacent property lines. Although the walkway was being constructed near a road, it does not run adjacent to it; rather, the walkway is bordered by a vast natural area consisting of grass, dirt, and, natural habitat and permits visitors to move through Red Rocks Park. As a result, Plaintiff is unable to establish that immunity was waived for the injuries she suffered in this case.

Moreover, even assuming *arguendo* that the walkway at issue could be construed as a "public facility" for the purpose of the recreation waiver or a "sidewalk," Plaintiff failed to meet her burden of demonstrating that the safety measures put in place around the walkway which was being constructed constituted a "dangerous condition" as specifically defined by the CGIA. The evidence presented at the *Trinity* hearing showed that prior to and on the date of the incident, the construction area of the walkway was blocked off by orange construction fencing secured on each side of the walkway, and the fence was marked with orange stanchions with reflective tape. The fencing was the same fencing that had been used at multiple prior construction sites within Red Rocks Park, and had never fallen, been knocked down, or otherwise disabled prior to the night of September 18, 2014. Further, no prior reports of injury or complaints had been received regarding the walkway.

In addition, the record is devoid of any evidence to show that the unreasonable risk allegedly created by the fence failing to remain in place the night of September 18 was proximately caused by the negligent act or omission of Denver in constructing or maintaining the walkway. Rather, the only evidence in the record showed that third parties must have taken down the fence after the construction crew left the area for the evening and Plaintiff walked into the construction area after this occurred. However, Colorado law establishes that injuries caused by third parties cannot form the basis for a waiver of immunity.

Finally, the existence of a "dangerous condition" cannot exist solely because of the design of the facility may be inadequate. In its order denying Denver's motion to dismiss, the district court relied on Plaintiff's expert's testimony regarding the inadequacy of the orange construction fencing to serve as a barricade, lighting, and signage in the construction area, and such reliance is erroneous because immunity is not waived for design defects in the construction barricade. A "dangerous condition" does not exist solely because the design of the facility may be inadequate. C.R.S. § 24-10-103(1.3). The construction fencing, the detour around the construction zone, and the warning stanchions consisted of the chosen construction design to keep the public out of the construction area. The district court's conclusion that immunity

was waived because Denver should have used different fencing and provided more lighting and signage was in error and should be reversed.

For all of these reasons, the district court lacks subject matter jurisdiction over the claims asserted in Plaintiff's Complaint. Therefore, this Court should reverse the trial court's denial of Denver's Motion to Dismiss and remand this case back to the district court with instructions to dismiss the Complaint, with prejudice.

ARGUMENT

A. Standard of Review

The question of governmental immunity raises a jurisdictional issue. *Springer v. City and County of Denver,* 13 P.3d 794, 798 (Colo. 2000). The issue of whether a trial court has subject matter jurisdiction over a claim brought under the CGIA is a question of statutory interpretation that an appellate court reviews *de novo* where, as here, the underlying facts are undisputed. *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L. by & through Loveland*, 325 P.3d 1014, 1018 (Colo. 2014) (*St. Vrain II*); *Medina v. State,* 35 P.3d 443, 452 (Colo. 2001).

Denver argued at each stage of the proceedings in this matter–in its motion to dismiss, at the *Trinity* hearing, and in its written closing argument requested by the district court–that under the circumstances of this case, Plaintiff failed to establish a waiver of immunity under C.R.S. §§ 24-10-106(1)(e) or 24-10-106(1)(d)(I),

including that Plaintiff failed to meet her burden of proving the existence of a "dangerous condition" as defined by C.R.S. § 24-10-103(1.3) for either waiver provision. *See* CF, pp 20-34, 61-70, 145-161; TR 06/28/17, pp 10-15.

B. The Park or Recreation Area Waiver of Immunity Does Not Apply to the Walkway Where Plaintiff Allegedly Fell

The CGIA provides a waiver of governmental immunity for injuries caused by: "[a] dangerous condition of any…public facility located in any park or recreation area maintained by a public entity…." C.R.S. § 24-10-106(1)(e). A public facility must be located inside a park or recreation area for C.R.S. § 24-10-106(1)(e) to apply. The term "public facility" is not specifically defined in the CGIA, however, the Colorado Supreme Court has held that the legislature intended the term to apply to larger, more permanent structures, not the type of walkway at issue in this case. *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 579-80 (Colo. 2014).

In *Young*, the supreme court identified three ways in which a facility may qualify as a "public facility" for the purposes of the park or recreation area waiver: (1) if the facility shares common features with the other items listed in the recreation area waiver; (2) if the legislative history provides strong evidence that the legislature intended that the facility should qualify; and (3) if the facility is a component of a larger collection of items that promote a broader, common purpose. *Id.* at 578-79. The district court, however, disregarded the holding in *Young*, finding instead that

the facts of this case were "more akin to the facts" in *Daniel v. City of Colo. Spring*s, 327 P.3d 891 (Colo. 2014). Thus, the district court erroneously concluded that the walkway was a public facility because:

> the sidewalk in question is also open to and used by the public. It is not restricted to members of a private club, for example. Further, it is not restricted to attendees for a specific event, like the concert in question here. Rather, the sidewalks, paths and roads are used for any number of recreational activities, including concerts, biking, hiking, walking, and running.

CF, p 241. While these factual findings may be accurate, the district court's application of the holding in *Daniel* to determine that the walkway is a "public facility," was erroneous.

In *Daniel*, in finding that the parking lot qualified as a "public facility," the supreme court recognized there were strong indications from the legislative history that the legislature specifically intended that a parking lot be considered a "public facility. *Daniel*, 327 P.3d at 895-897; *see also Young*, 325 P.3d at 580. In direct contradiction to this finding, however, when considering the walkway at issue in *Young*, the Colorado Supreme Court found that an "examination of legislative history reveals no evidence that the legislature intended to define a public facility as a walkway." *Young*, 325 P.3d at 579.

Additionally, as the *Young* court recognized, the walkway did not qualify as a "public facility" because it did not share common features with the other items listed in the recreation area waiver:

> [T]he company kept by the term "public facility" suggests that the legislature intended the term apply to larger, more permanent structures, because the term is grouped alongside public hospitals and jails, as well as public water, gas, sanitation, electrical, power, and swimming facilities. § 24–10–106(1)(e). Walkways are fundamentally different in size and permanence from the other items listed alongside the term "public facility" in the recreation area waiver. Unlike walkways, these other structures are generally enclosed by walls, equipped with doors and roofs, and more permanent in nature.

Id. at 579-580. Thus, the Colorado Supreme Court has made it clear that a walkway, like the walkway at issue here, is not considered a public facility in and of itself. *Id*.

The walkway at issue in this case is also not a component of a larger public facility because it does not promote the broader, overall purpose of a single public facility within Red Rocks Park, such as the Amphitheatre or any other structure within Red Rocks Park. Rather, the component analysis is only applied "when there is a *strong relationship* between the various individual components such that together they promote a broader, common purpose." *Id.* at 580 (emphasis in original). In *Young*, the Court found that the walkway between a school playground and school building did not promote a broader, common purpose because it was not designed solely to promote a specific play activity and instead, functioned as a path

for people to use when moving around the outside of the school for reasons not necessarily connected to the playground, like accessing the school. *Id.* at 580-81.

Like the walkway in *Young*, the walkway at issue here functions as a path for people moving around Red Rocks Park for a variety or reasons, including accessing parking lots, hiking, biking, exercising, watching movies, attending concerts, attending weddings/events, and many other activities. TRIAL EX, pp 28-29; TR 06/28/17, pp 77:3 – 78:3, 106:5-20, 120:10 – 121:18; TR 06/29/17, pp 5:17 – 7:14, 42:5 – 43:13. Thus, the walkway is not part of one specific brick and mortar facility at Red Rocks, but serves as an access point to parking lots, buildings, and natural areas within the Park. *Id*.

The supreme court's determination in *Daniel* that a golf course parking lot may qualify as a "public facility" contrasts starkly from the walkway at issue here. In fact, the supreme court in *Young* specifically distinguished the walkway at issue in that case where the child slipped and fell from the parking lot at issue in *Daniel*, finding that the parking lot at issue:

> was not a mere transit way but was specifically designed for the purpose of providing visitors with a convenient place to park their vehicles while using the golf course's amenities…and [the] Zoning Code explicitly tied the number of required parking spaces to the number of holes on the golf course.

Id. at 580. The court also recognized that "the parking lot, which was built adjacent to the golf course, was intrinsically tied to recreation, because cars facility golfing by transporting visitors and their golf clubs to the golf course." *Id*.

In relying upon *Daniel* and discounting the holding in *Young*, the district court erred in finding that the walkway at issue in this case constitutes a "public facility" for the purposes of § 24-10-106(1)(e). Consequently, the district court's finding should be reversed as *Young* conclusively demonstrates that the walkway at issue in this case is not a "public facility" and, as a result, the park or recreation area waiver of immunity is not applicable to this case.

C. The Walkway Is Not a "Sidewalk" as Defined by the CGIA

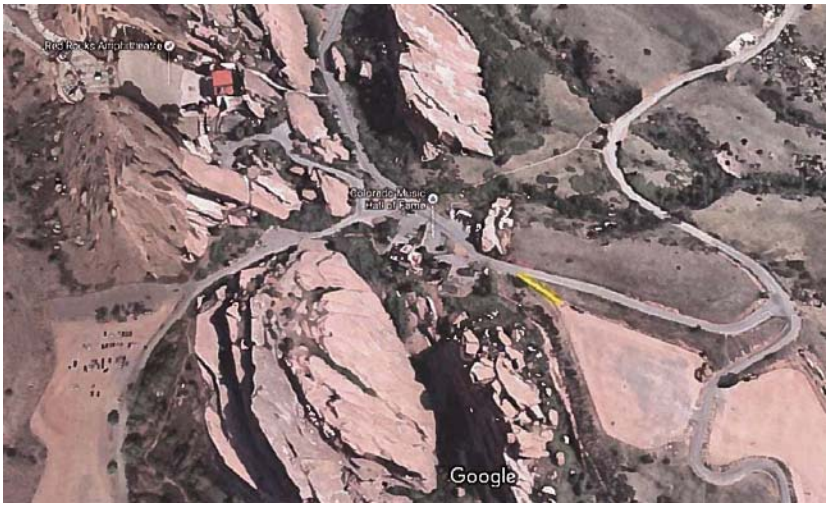
In addition to its erroneous finding that the walkway at issue constituted a "public facility" for the purpose of § 24-10-106(1)(e), the district court also determined that the walkway was a "sidewalk," as defined by the CGIA and, as a result, the immunity waiver pursuant to § 24-10-106(1)(d)(I) was also applicable to the incident alleged in Plaintiff's Complaint. Specifically, the court held that because there was a "roadway to the left of the sidewalk and adjacent property to the right" of the walkway, the walkway was a sidewalk under C.R.S. § 24-10-103(6) and "by any common sense definition." CF, p 242.

The CGIA defines a sidewalk as "that portion of a roadway between the curb lines or the lateral lines of the traveled portion and the adjacent property line, which is constructed, designed, maintained, and intended for the use of pedestrians." C.R.S. § 24-10-103(6). However, the record is devoid of any evidence from which the court could have reached its conclusion that the characteristics of the walkway at issue meets this definition.

In *Colucci v. Town of Vail*, 232 P.3d 218, 221 (Colo. App. 2009), the court interpreted the statutory requirement that a sidewalk be located between the curb lines of a road and the adjacent property lines, finding that the dispositive factor in determining whether a walkway is a sidewalk under the CGIA is whether the walkway "crosses an adjacent property line, and not whether it is parallel or perpendicular to it."

Here, the evidence presented at the *Trinity* hearing demonstrates that the walkway does not meet the definition of a "sidewalk." Rather, the evidence shows that while it is used by the public, the walkway is used as a mere transit way within a mountain park, but it cannot be said to be a portion of a roadway which is located between the curb lines or the lateral lines of the traveled portion and the adjacent property line. Rather, as can be seen by the picture below, the walkway (which is depicted in yellow) is merely near a road, but does not have any specific connection

to it. Thus, the walkway does not "cross an adjacent property line," but instead is bordered by a vast natural area consisting of grass, dirt, and, natural habitat. *See* TRIAL EX, pp 28-29; TR 06/28/17, pp 77:3 – 78:3, 106:5-20, 120:10 – 121:18; TR 06/29/17, pp 5:17 – 7:14, 42:5 – 43:13.



Importantly, the walkway does not originate at the curb line of the road, and it crosses the adjacent natural property line, spilling out into a dirt parking lot. Thus, the walkway in question is not a "sidewalk" as defined by the CGIA; it is a walkway in a natural park, a portion of which is near a road. As a result, C.R.S. § 24-10-106(1)(d)(I) cannot apply to waive immunity in this case and the district court's denial of immunity should be reversed.

D. Plaintiff Failed to Meet Her Burden of Proving the Existence of a "Dangerous Condition"

Even assuming *arguendo* that the waiver provisions of §§ 24-10-106(1)(e) or 24-10-106(1)(d)(I) could apply to the walkway at issue, Denver is nonetheless entitled to immunity because Plaintiff failed to meet her burden of demonstrating that her injuries were caused by a known "dangerous condition," a necessary element for both waivers of immunity. *See* C.R.S. § 24-10-106(1)(e) (providing a waiver of immunity for injuries resulting from a dangerous condition of any public facility located in any park or recreation area maintained by a public entity) and C.R.S. § 24-10-106(1)(d)(I) (providing a waiver of immunity for injuries resulting from a dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic).

Under the CGIA, a "dangerous condition" is defined, in relevant part, 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. 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 ….

C.R.S. § 24-10-103(1.3). To demonstrate the existence of a dangerous condition, Plaintiff was required to present evidence sufficient to establish that: (1) her injuries resulted from the physical condition of the walkway or the use thereof; (2) the condition of the walkway constituted an unreasonable risk to the health or safety of the public; (3) Denver knew or should have known of the unreasonable risk to the health or safety of the public posed by the walkway or the use thereof; and (4) the condition of the walkway was proximately caused by the negligent act or omission of Denver in constructing or maintaining it. C.R.S. § 24-10-103(1.3); *see also Padilla ex rel. Padilla v. Sch. Dist. No. 1 in City & Cnty. of Denver*, 25 P.3d 1176, 1180 (Colo. 2001).

Under the circumstances of this case, since the construction of the walkway was not completed at the time of Plaintiff's alleged injuries, Plaintiff was also required to establish that her injury was not caused solely by a defect in the design of the construction because the duty to maintain the walkway was not yet triggered. *See, e.g., Estate of Grant v. Colorado*, 181 P.3d 1202 (Colo. App. 2008) (failure to require or install barriers or similar devices during the construction period, which required temporarily rerouting highway traffic travelling north into southbound lanes while the highway was being upgraded, did not create a "dangerous condition" under the CGIA because the duty to maintain was not yet triggered). A review of the

record confirms that the district court erred when it found that Plaintiff met her burden of showing the walkway constituted a "dangerous condition."

a. The walkway did not constitute an unreasonable risk to the health or safety of the public because of the safety measures utilized in the construction area

The evidence presented to the district court during the *Trinity* hearing confirms that the under-construction portion of the walkway did not present an unreasonable risk to the public because Denver installed safety measures to prevent pedestrians from entering the active construction area. To demonstrate a dangerous condition pursuant to C.R.S. § 24-10-103(1.3), Plaintiff was required to present evidence demonstrating that her injuries resulted from a physical condition of the walkway, or use thereof, that constituted an unreasonable risk to the health or safety of the public. *See* C.R.S. § 24-10-103(1.3); *see also Padilla*, 25 P.3d at 1180. The record demonstrates that Plaintiff failed to make such a showing and, as a result, the district court erroneously determined that subject matter jurisdiction exists over Plaintiff's claims.

Although construction was occurring on the walkway, safety measures were implemented to stop the public from entering that area and, therefore, no unreasonable risk existed. The construction project that included the area where Plaintiff fell started in approximately January 2014. TR 06/28/2017, p 121:19-24.

During the entirety of the project, the same orange fencing and stanchions used on the walkway where Plaintiff allegedly fell were used to block pedestrians from entering the construction area. *Id.* at p 122:9-124:11. Prior to September 18, 2014, the night that Plaintiff states she was injured, no other reports of injury had been received on the walkway or any other areas under construction since January 2014. *Id.* at p 122:9-124:11.

The construction site, which included the walkway, was designed so that the public could detour around the unfinished construction area. TR 06/29/17 pp 38:6-24; 39:18-40:6; 46:20-47:6, 65:4-66:6. An orange construction fence was placed around the portion of the walkway under construction to warn and stop anyone from entering the area. *Id*. at pp 44:10-49:10, 56:4-57:6, 65:4-66:21, 75:2-12. The fence was secured with ties to a wooden fence and a post on each side of the walkway. *Id*. at p 48:2-25. The construction fence and the manner in which it was secured met construction industry safety standards for pedestrian walkways. *Id*. Numerous safety checks and site visit meetings took place to ensure that the project was proceeding in a safe and efficient manner. *Id.* at 50:16-51:7. Construction in the area occurred daily, and at the end of each day the orange fencing was put up and secured. *Id*. at p 47:7-48:9. At night, lights illuminated the parking lot, light posts were located on

the street directly above the walkway, and a light post was at the top of the walkway. TRIAL EX, pp 11, 19; TR 06/29/17, pp 49:1-50:3.

On September 18, 2014, the walkway was at a stage of construction during which an approximately foot-wide chase drain was constructed and the concrete was poured, but had not yet dried sufficiently for any cover to be placed over the gap it created. TR 06/29/17, pp 43:14-44:18, 45:9-46:4, 53:4-58:21. The orange construction fence and stanchions blocked off this area. *Id*. Throughout the construction project that began in January 2014, chase drains were installed in other pedestrian walkways within Red Rocks Park, which were blocked by the same orange construction fence. *Id*. *See also* at 44:10-24; 56:25-57:6. Prior to September 18, 2014, no injuries had been reported in any area that was under construction using the same safety measures. *Id*. at 44:25-45:8. At some point on the night of September 18, 2014, the construction fence blocking the portion of the walkway under construction was taken down and trampled by unknown third parties. TR 06/29/17, pp 61:24 – 62:5; 75:2 – 76:23. The construction fence had never been taken down or trampled prior to September 18, 2014. TR 06/29/17, pp 18:5 – 18:9, 32:1-4, 61:24 – 63:18, 70:2-6.

Plaintiff's expert, Ann Stodola, without pointing to any construction industry standards for pedestrian walkways, opined that the safety measures used in the

construction area of the walkway, including the construction fencing, stanchions, alternate walkway, the lighting, and the signage were not sufficient to guard the area. CF, pp 110-113, 122-125. However, an unreasonable risk does not exist solely because different materials could have been used, especially when considering that the same safety measures implemented in this case had been used in previous construction areas involving pedestrian walkways within Red Rocks Park without incident.

The term unreasonable modifies the term risk in the dangerous condition definition. Therefore, an unreasonable risk must necessarily mean more than a mere possibility of risk of harm. Based on the evidence presented at the *Trinity* hearing, the walkway did not pose an unreasonable risk to the public because safety measures, which had been used on similar construction projects throughout Red Rocks Park prior to Plaintiff's alleged fall, were in place to prevent the public from entering the area. The construction fencing, stanchions, and alternate walkway met construction safety standards and were designed to block off the area from pedestrians. But for the actions of third parties who took the fencing down the night of September 18, 2014, Plaintiff would not have entered the area. For these reasons, Plaintiff failed to meet her burden of showing that the walkway and the safety measures put in place

around the construction area constituted an unreasonable risk to the public. Therefore, the district court erred in holding that immunity was waived in this case.

b. There is no evidence that Denver knew, or should have known, of any dangerous condition of the walkway

The district court found that Denver knew of the risk posed by the walkway because a chase drain had been cut across the width of the sidewalk that "presented a falling hazard," and the orange mesh fencing, according to Ms. Stodola, was insufficient to act as a barrier for the public because the fencing had been torn down and the "project managers would know of the unreasonable risk to the public walking down the sidewalk at night." CF, pp 245-246. However, Ms. Stodola's speculation is not sufficient to demonstrate that Denver had notice of a dangerous condition of the walkway. On the contrary, the evidence established that the construction fence and the manner in which it was secured met construction industry safety standards for construction of pedestrian walkways. TR 06/29/17, p. 48:2-25. Therefore, the first time Denver became aware of *any* concern regarding the fencing of the area was after Plaintiff's alleged fall.

In fact, prior to the evening of September 18, 2014, construction fences just like the orange construction fence erected during the construction of the walkway at issue had been used to prevent the public from entering such areas. TR 6/29/17, p 44:10-24, 56:25-57:6. During the hearing, the manager of the construction project,

the Venue Director, and the Red Rocks event manager all testified that prior to September 18, 2014, the same orange fence had been customarily used at multiple construction sites in the past in Red Rocks, had never fallen, been knocked down, or otherwise disabled in a way that would allow the public to access a construction site. TR 06/28/17, pp 148:22 – 149:6; TR 06/29/17, pp 18:5 – 18:9, 32:1-4, 61:24 – 63:18, 70:2-6.

Further, between January 2014, when the construction project began, and the night of September 18, when Plaintiff alleges that she fell, numerous events occurred such as nighttime concerts at the Amphitheater, including on September 17. TR 6/28/17, p 123:1 – 124:11. During the eight months when construction was being completed, Denver had no knowledge of any concerns related to the stability of the orange construction fences and the fences were never found to be torn down or trampled by the construction workers who reported to the construction site on a daily basis after Plaintiff fell on September 18. TR 6/28/17, p 123:9 – 124:11, 148:22 – 149:6. Additionally, no complaints of injuries were received in any area that was under construction using the same safety measures during this eight-month period of time, *id.*, nor were there any reports of any alleged injuries or concerns with respect to the walkway at issue in this case. TR 06/28/17, pp 123:12 – 124:11, TR 06/29/17, pp 17:22 – 18:4, 44:25-45:8, 61:24 – 63:18. The record is devoid of any

evidence which establishes that Denver had actual notice of an unreasonable risk allegedly posed by the safety measures used to keep the public out of the construction area.

Furthermore, Plaintiff did not present evidence sufficient to meet her burden of proving that Denver in the exercise of reasonable case *should* have known that the safety measures it previously utilized and continued to utilize to keep the public out of construction areas, including the walkway at issue, posed an unreasonable risk to the public. "[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." C.R.S. § 24-10-103(1.3). The record is devoid of any evidence to show that the fence was down prior to the construction crew leaving the site for the evening such that in the exercise of reasonable care Denver should have known that the walkway construction presented an unreasonable risk to the public. In fact, the record establishes that Denver had every reason to believe that the fence was securely in place the evening of September 18, just as it was the previous night when a concert also took place at the Amphitheatre and, on prior occasions when the same safety measures were used. TR 06-29-17 pp. 42:5 - 45:8. Because the evidence in the record is not sufficient to establish notice that an unreasonable risk was posed

by the safety measures surrounding the walkway, the district court erred when it found that Plaintiff had met her burden of establishing this element of a "dangerous condition."

c. There is no evidence in the record to show that Denver's actions or omissions proximately caused Plaintiff's alleged injuries

Pursuant to the CGIA, Plaintiff was required to demonstrate at the *Trinity* hearing that the condition of the walkway, *i.e.*, access to the area of the chase drain, was proximately caused by the negligent act or omission of Denver in constructing or maintaining the walkway. C.R.S. § 24-10-103(1.3); *see also Padilla*, 25 P.3d at 1180. Plaintiff made no such showing. Rather, the record evidence showed that the condition of the walkway was proximately caused by the actions of third parties, not Denver. Thus, the district court erred when it found that Plaintiff met the proximate cause component of a dangerous condition. CF, pp 244-46.

"[A] public entity may proximately cause a condition not only by affirmatively creating it, but also by its omission in failing to reasonably discover and correct the unsafe condition." *Springer v. City and Cnty. of Denver*, 13 P.3d 794, 801 (Colo. 2000). Here, Denver neither created the condition by leaving the area of the walkway that was under construction open to the public nor did it fail to reasonably discover that the fencing had been knocked down and correct it.

As discussed above, Denver blocked public access to the unfinished portion of the walkway with orange construction fencing, placed stanchions in front of the fencing to warn pedestrians of the area under construction, and erected a detour around the construction area. TRIAL EX, pp 3-21, 22-24, 28-29; TR 06/28/17, pp 111:8-17, 119:9-14, 123:6-20, 125:1-130:22; TR 06/29/17, pp 44:10 – 49:10, 56:4 – 57:6, 65:4 – 66:21, 75:2-12, 119:9-14, 125:1- 132:16. Multiple witnesses testified that the construction fence erected around the area of the walkway that was under construction was in place prior to the time that the concert began on September 18, 2014. TR 06/28/17, p 127:12-14; TR 06/29/17, pp 60:24 – 62:13. This evidence establishes that neither Denver nor its contractor proximately caused the condition at issue.

To the contrary, the evidence showed that the condition was created by the actions of third parties. After the concert, third parties knocked down or otherwise disabled the construction fence, causing it to collapse, and trampled the fence, allowing others to walk over it, though the fencing remained bunched up on the ground. TR 06/29/17, pp 61:24 – 62:5; 66:10 – 68:14, 70:2-6, 75:2 – 76:23; TRIAL EX, pp 22-24. Denver cannot be held liable for third parties who knocked down a safety fence Denver placed to protect members of the public. It was the actions of these third parties that allowed Plaintiff to enter an area that was closed to the public,

proximately causing her alleged injuries when she tripped and fell on the unfinished portion of the walkway.

The supreme court has made it clear that injuries caused by third parties cannot form the basis of waiver of immunity under the CGIA. *See Jenks v. Sullivan,* 826 P.2d 825 (Colo. 1992). In *Jenks*, the plaintiff was shot while attending a hearing inside a courthouse, and the court found that the plaintiff's injury arose not from the dangerous condition of the public building where the injuries occurred, but from the intervening actions of a third party; therefore, immunity was not waived pursuant to the CGIA. *Id*. at 830. Similarly, the alleged dangerous condition of the walkway at issue in this case was caused by the affirmative acts of third parties, rather than any act that could be attributed to Denver.

Furthermore, the alleged dangerous condition of the walkway was not proximately caused by an omission of Denver in failing to reasonably discover and correct the unsafe condition. As stated above, before September 18, 2014, the orange fence had never been knocked down or otherwise disabled, either in the area under construction in which Plaintiff fell, or in any other construction areas used during the same project at other locations. TR 06/28/17, pp 123:12 – 124:11, 148:22 – 149:6; TR 06/29/17, pp 17:22 – 18:9, 32:1-4, 44:25-45:8, 61:24 – 63:18, 70:2-6. There had also been no reports of injuries in the area before Plaintiff's alleged fall.

TR 06/29/17, pp 44:25-45:8. This evidence established that Denver did not fail to reasonably discover and correct the unsafe condition, and therefore no omission of Denver proximately caused the condition at issue.

Accordingly, the district court's finding that Plaintiff met her burden to show that her injuries were proximately caused by negligent actions of Denver should be reversed and Plaintiff's Complaint should be dismissed because Denver is entitled to immunity under the CGIA.

d. There is no evidence in the record to show that Plaintiff's alleged injuries were not caused by a design defect

Under the CGIA, a "dangerous condition shall not exist solely because the design of any facility is inadequate." C.R.S. § 24–10–103(1.3); *see also Estate of Grant*, 181 P.3d at 1206-07. Here, the failure to require different fencing and/or the use of signage and additional lighting – as proposed by Plaintiff's expert – did not create a "dangerous condition" within the meaning of § 24-10-103(1.3) because Denver had no duty to maintain the area until the construction was complete. *Id*. at 1207. Immunity is not waived merely because – as alleged by Plaintiff's expert – there purportedly was a safer design for the construction of the walkway. *Id*. (citing *Medina*, 35 P.3d at 457).

Additionally, Denver was not required to post warning signs (or have an employee in the area warning individuals of the construction site) nor was it required

to increase lighting in the area. A failure to post a warning sign or increase lighting in an area does not result in a waiver of governmental immunity because warnings and additional lighting are related to the issue of design. *See, e.g., Douglas v. City & Cty. of Denver*, 203 P.3d 615, 619-621 (Colo. App. 2008) (no waiver of immunity based on a failure to post warning signs about weight-lifting equipment or to provide personnel to observe, assist and warn individuals using the equipment); *Medina*, 35 P.3d at 462 ("For the purposes of the CGIA, the state's acceptance of the final design–including the level of risk remaining at the end of the design phase–determines the general state of being, repair or efficiency of the road as initially constructed."); *Willer v. City of Thornton,* 817 P.2d 514, 519 (Colo. 1991) (no waiver of immunity under the CGIA based on a failure to warn others of known dangerous conditions when the alleged defect is incorporated in the initial design); *Szymanski v. Dep't of Highways,* 776 P.2d 1124, 1125 (Colo. App. 1989) (failure to post warning sign advising traffic that the intersection was dangerous was a design defect for which immunity was not waived); *Mason v. Adams,* 961 P.2d 540, 546 (Colo. App. 1997) (stating that "failure to post warning signs cannot serve as the basis for finding a dangerous condition" of a public highway).

Accordingly, the district court erred when it found, apparently based upon evidence offered by Plaintiff's expert that a safer design of the walkway construction site was warranted, that Denver failed to take "sufficient precautions to give notice of the construction area and to move large numbers of people away from the hazard," and thereby proximately caused a "dangerous condition" by negligently constructing or maintaining the walkway. For this reason as well, the district court's finding that Plaintiff met her burden of proving a dangerous condition of the walkway existed must be reversed.

CONCLUSION

To demonstrate a waiver of sovereign immunity in this case, Plaintiff was required to present sufficient evidence at the *Trinity* hearing to meet her burden of establishing a waiver of immunity under C.R.S. § 24-10-106(1)(e) and/or § 24-10-106(1)(d)(I). Plaintiff failed to meet this burden because she cannot show that the public walkway at issue is a "public facility" for the purposes of § 24-10-106(1)(e) or that walkway met the definition of a "sidewalk" for which immunity may be waived if the conditions of § 24-10-106(1)(d)(I) are satisfied. Further, even if Plaintiff could demonstrate that either §§ 24-10-106(1)(e) or 24-10-106(1)(d)(I) applied to the walkway at issue in this case, her claim against Denver nevertheless fails because the evidence in the record does not show the existence of a "dangerous

condition" posed by the walkway, which is a necessary element to establish a waiver of immunity under either statutory provision. Because Plaintiff failed to meet her burden of establishing a waiver of immunity under C.R.S. § 24-10-106, the district court lacks subject matter jurisdiction over Plaintiff's Complaint. Accordingly, the City respectfully requests that this Court reverse the district court's order denying the City's Motion to Dismiss and remand this case to the district court with instructions to dismiss the Complaint, with prejudice.

REQUEST FOR ATTORNEY FEES

C.R.S. § 13-17-201 provides in relevant part:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

Pursuant to this statute, an award of attorney fees is mandatory when a trial court dismisses an action under C.R.C.P. 12(b). *Smith v. Town of Snowmass Village*, 919 P.2d 868, 872-73 (Colo. App. 1996). An award of attorney fees incurred upon appeal which results in the dismissal of an action pursuant to C.R.C.P. 12(b)(1) is also mandatory. *See Wark v. Board of County Comm'rs*, 47 P.3d 711, 717 (Colo. App. 2002). Accordingly, if Denver prevails on this appeal, it respectfully requests that this Court remand this matter to the district court to enable Denver to file a motion

for its reasonable attorney fees incurred in responding to Plaintiff's Complaint and the reasonable attorney fees Denver incurred upon appeal.

Dated this 6th day of March, 2018.

Respectfully submitted,

By: *Jamesy Owen*
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2018, the foregoing **OPENING BRIEF** was filed with the Clerk of the Court of Appeals via the *CCE* system which will send a notification of such filing to the following:

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