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COURT OF APPEALS
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80202

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

Defendant-Appellant:
CITY AND COUNTY OF DENVER

vs.

Plaintiff-Appellee:
REBEKAH BUTTERFIELD

▲COURT USE ONLY▲

Case Number: 2017CA1913

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ANSWER 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 8,280 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/ David A. Klibaner
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B. Whether the district court properly found that the walkway where Ms. Butterfield was injured, which was adjacent to the road and used for pedestrian travel was a "sidewalk" for which immunity may be waived under C.R.S. § 24-10-106(1)(d).

C. Whether the district court's finding, after a two-day evidentiary hearing, that Ms. Butterfield was injured by a "dangerous condition" under C.R.S. § 24-10-103(1.3) was clearly erroneous.

STATEMENT OF THE CASE

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

Rebecca Butterfield fell and was injured, on September 18, 2014, when she stepped into an unmarked open trench on the paved walkway leading from the Red Rocks Amphitheatre to the South Parking lot.

To protect the thousands of people walking the path from inadvertently stepping into the trench and falling, Denver placed an orange mesh fence across the walkway, apparently secured with zip ties. Anne Stodola Preservation Deposition Testimony, 55:13, PR p 201. No other measures were taken, such as use of a rigid barricade, signs, or temporary lighting to redirect pedestrians to the dirt path detour that Denver intended pedestrians to take.

Although an employee at Red Rocks saw that the fence was down, and that people were in danger before Ms. Butterfield fell, no action was taken to protect pedestrians from walking across the trench until after Ms. Butterfield stepped into the trench and was injured. TR 06/28/17, pp 59:22-25-60:1-6.

Denver filed a motion to dismiss the Complaint, contending that as a matter of law Denver was immune from Ms. Butterfield's claims because Ms. Butterfield could not establish that the walkway was part of the Red Rocks public facility, the pedestrian walkway was not a sidewalk, which would waive immunity under C.R.S. § 24-10-106(1)(d)(I), and the open trench, because it was marked by a plastic mesh fence, was not a dangerous condition under C.R.S. § 24-10-103(1.3).

A two-day evidentiary hearing was held on June 28-29, 2017. The district court denied Denver's motion to dismiss, finding that the walkway was part of the Red Rocks' public facility, was located in a park or recreation area, was a sidewalk under the CGIA, and was a "dangerous condition." PR pp 238-247.

Denver filed a Notice of Interlocutory Appeal challenging the district court's findings, and in addition, challenging the district court's ruling that Ms. Butterfield's safety expert, Anne Stodola, was qualified to render opinions that the City violated industry standards, building codes and City codes by only positioning a plastic mesh fence in front of the trench in order to redirect pedestrians to a detour and to protect pedestrians from walking across a concrete trench.

Denver has apparently decided not to challenge the court's ruling that Ms. Stodola was qualified to offer expert opinions.

B. Statement of the Facts

Red Rocks Park is a popular tourist destination in the metropolitan area and is owned and regulated by the City of Denver. The Red Rocks Amphitheatre, the centerpiece of Red Rocks Park, is a world-famous concert venue and the site of numerous events each year including Film on the Rocks and Yoga on the Rocks. PR p 53. In addition, there are numerous other recreational activities that go on at Red Rocks. *Ibid.* Denver does not dispute that Red Rocks meets the definition of "recreation area or park" under Section 24-10-106(1)(e) and that visitors including paying concertgoers use the paved walkways for multiple recreational purposes. Denver Opening Brief, p. 4, TR 06/28/17, p 106:5-20. The venue director of Red Rock, Tad Bowman, estimated that the area had a million visitors from January until September, 2014. TR 06/28/17, p 122:20-25.

On September 18, 2014, Rebekah Butterfield age 31, along with 3 female friends attended a Jason Aldean Concert held at the Red Rocks Amphitheatre. Ms. Butterfield carpooled with her friends and they parked in one of the 2 lower south parking lots. Venue director Tad Bowman estimated attendance at the event that night exceeded 9,000 concertgoers and that approximate 2000 people would use the walking paths to go to the lower south parking lots. TR 06/28/17, p 115:15-25-116:1-2.

Ms. Butterfield, who works for Aircraft Performance Group as a senior airport analyst, was returning to her car after the concert at approximately 11 p.m. via one of the few improved concrete walkways within the park when she unexpectedly stepped into an uncovered concrete trench which caused her to fall face first into the concrete and sustain serious injury. TR

06/28/17, pp 81:18-25, 82:1-22. In the vicinity where Ms. Butterfield fell, some orange mesh material was laying on the ground. TR 06/28/17, p 23:3-20.

The walkway where Ms. Butterfield fell was part of the pedestrian route for concertgoers to reach the south parking lot as opposed to walking over unimproved uneven terrain. Denver's overhead view of a portion of Red Rocks Park shows that this was the primary path pedestrians used to get back to the lower south parking lots. Denver Opening Brief, p 4.

The concrete walkway was in the process of being installed in sections (to replace a previous asphalt path) as part of a larger improvement project at Red Rocks that involved improving pedestrian and wheelchair accessibility as well as placement of storm drains in the park. TR 06/28/17, p 124:21-15, TR 06/28/17, p 41:5-25, p 42:1. On September 18, 2014, this particular section of walkway had recently been poured and included a "chase drain." TR EX p 5, 12, 21-27. A "chase drain" is essentially a cement trench that is usually covered by a metal plate that is flush with the rest of the walkway surface that allows drainage of water from one side of a walkway to the other. According to the testimony of the Denver Public Works employee that worked as a project manager for Denver at the Red Rocks Park site, since this portion of the walkway had just been poured and the cement needed to "cure," no covering, either of metal or plywood, had been affixed to protect pedestrians from falling into the concrete trench on the night Ms. Butterfield was injured. TR 06/29/17, p 58.

Denver admits this section was "under construction" and that no cover had been placed over the trench spanning the walkway and that without some way to prevent the public from walking across the trench, the trench was a dangerous condition. TR 6/28/17, p 110:14-25; p 111:1-17.

To prevent concertgoers and other pedestrians from entering the construction zone and encountering the concrete trench, and to direct them to go off the walkway, Denver placed a plastic mesh fence secured by zip ties at either end in front of the trench. *Ibid.*

It is undisputed that on September 19, 2014, the day after Ms. Butterfield and others were injured by stepping into the uncovered trench, Denver placed a cover of what appears to be plywood over the trench. TR EX, p 20. The Denver Public Works project manager stated that this step was taken not to prevent more injuries but because the concrete of the trench had cured sufficiently. TR 6/29/17, p 57:10-25; p. 71:20-25; p. 72:12-23. In any event, Red Rocks management placed an employee next to the orange mesh fencing after the concert the next night to make sure crowds of pedestrians walking to the parking lot did not trample over the fencing and instead used the makeshift detour to the left of the concrete walkway.

As shown in the photo above, TR EX, p. 23, the walkway was dark when Ms. Butterfield fell. TR 06/28/17, p 60:16-20.[1] Denver admits there were no flashing lights atop a rigid barricade in the area to alert pedestrians to any detour -- the sole source of lighting for the "detour" from the walkway was from streetlights over the adjacent road some distance away and lighting from the parking lot. Nor were there any "Keep Out," "Do Not Enter," or reflective arrow signs on or near the walkway that could have helped notify pedestrians of the alternate dirt path to the left of the walkway. The sole indication to thousands of people leaving the concert late at night in the dark that there was a detour off the main walkway was a single layer of orange mesh fencing affixed at either end with zip-ties along with 2 plastic stanchions with reflective tape.[2] TR 06/29/17, p 56:4-13; p 62:22-23; p 68:9-14.

One of Ms. Butterfield's friends, Candace Adamek, a naval reserve pilot, took photos and a video of the scene minutes after Ms. Butterfield fell. In the video shown at the hearing, numerous people can be seen jumping over the open cement trench. Right before Ms. Adamek began shooting video, another concertgoer stepped into the trench, fell and was carried to the parking lot. TR 06/28/17, p 24:4-13**.** Additional injuries occurred. TR 06/28/17, p 28**:**7-16. Many more people might have been injured but for the warnings of an alert street musician off to the side of the walkway who occasionally called out "watch your step" in between saxophone riffs and other concertgoers yelling "watch out." TR EX Plaintiff's video, Appendix A, TR 06/28/17, p 61:13-21.

[1] The bright light in the photo is a reflection of the flash from Ms. Adamek's cell phone.
[2] Denver did not introduce any evidence in support of its claim that the fencing was intentionally "vandalized" by a third party.

Another of Ms. Butterfield's friends at the concert, Jennifer Blocker, a project manager for a utility contractor, testified that after Ms. Butterfield fell, she saw an employee wearing a reflective vest who stated, "I was wondering when somebody was going to step in there, when somebody was going to be hurt, let me go see if I can get help." TR 06/28/17, p 59:9-25.

After Ms. Butterfield's fall, Ms. Butterfield's friends attempted to alert the management as well as the parking lot attendant of the dangerous condition so that others would not be injured. TR 06/28/17, pp 45:23-25-46:1-2. By the time that the group made it to their car in the parking lot, a parking lot attendant with a reflective vest asked them if they were the party that was injured. TR 06/28/17, pp 62:21-15-63:1-8. The day after she fell, Ms. Butterfield contacted Denver to inform it of her fall. A Denver city employee told Ms. Butterfield that other people had fallen. TR 06/28/17, p 91:11-21, 21-25. Parking lot employees working that night documented multiple pedestrian falls, at least one of which (not Ms. Butterfield) required emergency medical assistance and they recommended that a staff person be placed in the area to prevent further injury. TR EX Plaintiff's EX 11 (see footnote below).

Ms. Butterfield's Exhibit 11 is an e-mail forwarded to Tad Bowman, the Venue Manager of Red Rocks for Denver. The original e-mail is a post-event report sent on September 19, 2014 (the day after Ms. Butterfield's fall) from an Argus assistant parking manager to the Argus Parking Manager as a part of the company's regular reporting that included tallying the number of cars in each lot from the head of parking and summarizing any employee injuries or other problems. Under the heading, "Major Issues," is the following:

> In the pedestrian walkway leading from the trading post to the lower south lot, **a detour in the construction area was somehow knocked down by egressing foot traffic**. **Several patrons fell in the area due to the fact that it was improperly marked**, causing inside managers to respond with

> medics to the site of the incident. It was recommended that we add the construction zone as a staffed egress spot until it is safe enough for patrons to navigate by themselves.

Ms. Butterfield's TR EX. 11 (emphasis supplied). [3]

SUMMARY OF ARGUMENT

The trial court properly found that the walkway in question is a public facility or a component of a public facility of a park or recreation area for which immunity is waived pursuant to C.R.S. Section 24-10-106(1)(e). The trial court's findings of fact should not be disturbed unless they are clearly erroneous. *Springer v. City and County of Denver,* 13 P.3d 794 (Colo. App. 1996). Using the Court's analysis in *Daniel v. City of Colo. Springs*, 327 P. 3d 891 (Colo. 2014), the trial court found that 1) the sidewalk is within the "putative recreational area;" 2) the purpose of the sidewalk is the promotion of multiple recreational purposes relating to Red Rocks Park; and 3) the sidewalk is located within the boundaries of Red Rocks.

The trial court's four-part factual findings as to the "dangerous condition" are supported by the evidence. *Padilla ex rel. Padilla v. School Dist. No. 1 in city and County of Denver*, 25 P.3d 1176 (Colo. 2001). First, it is undisputed that Ms. Butterfield was injured by stepping into the uncovered concrete trench. Second, Ms. Butterfield's engineering expert Anne Stodola testified that the orange mesh fencing did not meet either Denver City Code nor industry standards and created an unreasonable risk to the health and safety of the public given the thousands of people Denver knew were walking on the path in the dark after concerts. TR

[3] Exhibit 11, was tendered to the trial court at the hearing and admitted. TR 06/28/17, p 27. A video exhibit showing conditions when Ms. Butterfield fell was also admitted. TR 06/27/17, p 32. Both exhibits were inadvertently omitted in the Court File section of the Record. Ms. Butterfield has attached a copy of both exhibits in Appendix A, and has simultaneously filed a request for supplementation of the record pursuant to C.A.R. 10(f).

06/28/17, pp 115:22-25, 116:1-2. Third, the evidence shows that Denver was aware or should have been aware of the risk of the construction site to the public but failed to take sufficient precautions to give notice of the construction area and to safely redirect large numbers of pedestrians away from the danger. Fourth, the proximate cause of Ms. Butterfield's injury was caused by Denver's negligence in failing to adequately guard the uncovered concrete trench under construction while keeping the path open to the public.

ARGUMENT

A. Standard of Review

Denver incorrectly claims that the facts are undisputed and therefore, the trial court's decision is subject to de novo review. Important facts are disputed: whether the orange mesh fencing was intentionally vandalized by third parties or inadvertently trampled by crowds of concertgoers and whether the uncovered concrete trench or the mesh barricade violated both industry standards as well as Denver's own zoning code for sidewalks and constituted a "dangerous condition." After a 2-day *Trinity* hearing under C.R.C.P. 12(b)(1), the trial court made multiple findings of fact, all related to its subject matter jurisdiction. First, the trial court found that the improved walkway under construction at Red Rocks Park is used by the public for recreational purposes and therefore, it is a recreational facility (or a component of a recreational facility). Second, the trial court found that the walkway as it existed the night of September 18, 2014 with an uncovered concrete trench spanning its width protected only by an unmarked, unlit orange mesh fence presented a dangerous condition to the public as defined by C.R.S. Section

24-10-103(1.3). The trial court's findings of fact cannot be reversed unless they are clearly erroneous. *Springer v. City & County of Denver, supra,* 13 P.3d. at 799.

B. The Trial Court Properly Found that the Park or Recreation Area Waiver of Immunity Applied to the Walkway Where Plaintiff Was Injured.

The open trench Ms. Butterfield fell into was located on one of the paved sidewalks in Denver's Red Rocks Park. Denver does not contest that Red Rocks Park is a park and recreation area. Denver's employee, venue director Tad Bowman, testified that Red Rocks is both a recreation area and a park. TR 06/28/17, p 106:5-7.

The next question is whether Red Rocks Park is a public facility. Denver does not dispute Red Rocks Park is a public facility, but Denver does not directly address the question. Although the answer to the question of whether Red Rocks Park is a public facility may be obvious, the issue, nevertheless, deserves brief analysis.

The Colorado Supreme Court in *St. Vrain Valley School District RE-IJ v. A.R.L,* 325 P.3d 1014 (Colo. 2014), noted that "facility" is an undefined term in the CGIA, and is ambiguous. *Id*. at 1020**.** To assist in interpreting the term, the Court noted "it is helpful to consider the overarching purposes of the CGIA." *Id.* at 1019. The law is designed to shield public entities from tort liability unless the claim is brought "within one (or more) of the statute's expressly defined waiver provisions." *Ibid.* But, the Court held, "[b]ecause governmental immunity under the CGIA derogates Colorado's common law, we narrowly construe the CGIA's immunity provisions, and as a logical corollary, we broadly construe the CGIA's waiver provisions." *Ibid. (citing*, *Springer v. City and County of Denver,* 13 P.3d 794, 798 (Colo. 1996)).

The Supreme Court, in another case interpreting the CGIA, held that the waiver provisions are broadly construed in order to permit "parties to seek redress for injuries caused by a public entity," 'one of the basic but often overlooked' purposes of the CGIA.'" *Daniel v. City of Colorado Springs,* 327 P.3d 892, 895, *citing State v. Moldovan*, 842 P.2d 220, 222 (Colo. 1992).

In *St. Vrain, supra,* the Court, applying the analysis and the dictionary meaning of the word facility, held that a facility within the meaning of the CGIA comprises permanent brick and mortar structures as well as collections of individual items that "considered together, promote a broader common purpose" such as recreation. *St. Vrain,* 325 P.3d. at 1021. The Court held that a collection of playground equipment was a facility, and an individual piece of playground equipment, while not a facility was nevertheless a component of the facility and if dangerous, falls within the recreation immunity waiver provision of the CGIA.

Applying the logic of *St. Vrain, supra,* the Red Rocks Amphitheatre, Trading Post Building, which is a retail facility and houses the Music Hall Fame and other permanent structures (TR 06/29/17, p 12:7-24) are "facilities" or collectively, comprise a "facility" under the park and recreation immunity waiver provision.

Red Rocks Park is also a "public" facility, since it is "accessible to the public, and maintained by a public entity to serve a beneficial public purpose." *St. Vrain, supra*, 325 P.3d at 1023.

The next question is whether the paved sidewalks throughout Red Rocks Park are a public facility or a component of the Red Rocks Park public facility. That determination rests on whether the walkways promote and advance the recreational use of Red Rocks Park.

The trial court, relying in part on *Daniel v. City of Colo. Springs*, 327 P.3d 891 (Colo. 2014), found that the "sidewalks, paths and roads are used for any number of recreational activities, including concerts, biking, hiking, walking, and running. *See* testimony of Tad Bowman and Steve Jorgensen regarding activities at Red Rocks." PR, p 241. The trial court applied the three-part analysis used in *Daniel* in which the Colorado Supreme Court found that a parking lot adjacent to a golf course was a public facility.

Applying the three-part analysis, the trial court held:

1) the sidewalk is within the putative "recreational area;"
2) the purpose of the sidewalk is used to direct people to concerts as well as simply engage in other exercise activities such as walking, jogging, biking, and running, and thereby promotes the overall purpose of the park and;
3) the sidewalk is located within the boundaries of the recreational area - Red Rocks. PR, pp 243-246.

The trial court's analysis is supported by *Daniel.* As the trial court noted, the Supreme Court held that a parking lot next to a golf course was a public facility since it promotes recreation by allowing golfers a convenient place to park after transporting themselves and their golf clubs to the golf course. *Daniel, supra,* 327 P.3d at 897. Here the sidewalks, the primary way to access the amphitheatre from the parking lots, as well as the main way of walking throughout much of Red Rocks Park and accessing the buildings in the park, promote the recreational use of Red Rocks Park.

Denver concedes that the sidewalks serve this purpose:

> "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 [in the amphitheatre], attending concerts [in the amphitheatre], 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. It also leads to one of the lower south parking lots in Red Rocks Park. *Id*."

Yet, Denver argues that the sidewalks, collectively, are neither a public facility nor a component of a public facility. Denver relies on dicta in *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571 (Colo. 2014). In *Young,* the Court held that where a sidewalk is placed between a school and a playground, allows access to the school, and access to the playground, and allows people to traverse the school grounds, such a walkway is not a public facility or a component of the playground, which was a recreational public facility. *See id*. at 579.

The Court, however, distinguished this situation from *Daniel*, where the parking lot was a public facility because it had as its main purpose facilitating use of the golf course. *Id*. at 578. Moreover, in *Young,* the Court held that a sidewalk can be a component of a public facility subjecting a governmental entity to legal liability for negligently maintaining the sidewalk. *Id.* at *583*:

> [11]In holding that this particular walkway was not a component of a "public facility," we do not imply that a walkway could never qualify as a component of a larger "public facility." If a strong relationship exists between the walkway and other recreational equipment such that together the walkway and equipment promote a broader, common purpose of recreation, such a walkway could so qualify. For example, a walking/running path that traverses a system of exercise equipment located at intervals along that path might have a strong enough relationship to the exercise equipment to render the walking path and the equipment together a "public facility."

As the trial court found, there is no substantive difference between the purpose of the sidewalks in Red Rocks Park and the parking lot adjacent to the golf course at issue in *Daniel.*

Finally, in *Daniel*, the Court held that if it so narrowly defined "facility" so the recreational immunity waiver did not apply to parking lots, such a holding "would undermine the

practical effect of the recreational area waiver for plaintiffs who are injured in parking lots which are common features of modern life." *Id*. at 897.

Sidewalks in recreational areas such as Red Rocks Park are similarly "common features of modern life" for which the recreational area waiver must apply to people such as Ms. Butterfield seeking redress for dangerous conditions causing injury.

Young v. Brighton Sch. Dist. 325 P.3d 571 (Colo. 2014) involved a school walkway leading to a playground. Cognizant that the CGIA did not waive immunity as to school's walkways, the Court in *Young* found that a walkway serving both the school and the recreational area – the playground – did not meet the test of serving recreational purposes, but rather served primarily as an access point to the school.

Denver misapplies the *Young* holding arguing that because the walkway had multiple recreational purposes, the walkway could not qualify as a component of a public recreation facility. Here, it is undisputed that the Red Rocks walkways serve multiple recreational purposes. The walkway where Ms. Butterfield was injured is an improved pedestrian path for concertgoers and other visitors traveling from the parking lot to the Trading Post building or the Amphitheatre located in Red Rocks Park. Thus Young's 3-part analysis would support the trial court's finding that the legislature intended immunity be waived for this particular improved walkway as a component of a public facility.

C. The Trial Court Properly Found the Walkway Is a Sidewalk Under the CGIA.

C.R.S. § 24-10-106(1)(d)(I) waives a public entity's immunity for injuries resulting from a dangerous condition "of any public highway, road, street, or sidewalk within the corporate limits of any municipality." The CGIA defines "sidewalk" as "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." C.R.S. § 24-10-103(6). The trial court found that the walkway in question met the definition of "sidewalk" under the statute.

Red Rocks Park is considered to be within the city limits of Denver. The question is whether or not the walkway at Red Rocks fits within the definition of a "sidewalk." If it does, then Denver has waived immunity for dangerous conditions that existed during construction of this particular walkway. This is true even, assuming for the sake of argument, that the walkway was not a component of the Red Rocks public facility.

Denver argues that the walkway is not a sidewalk because the roadway, which curves around before it returns to the Red Rocks Park south parking lot is not exactly parallel to the walkway. But, there is no authority for exempting a sidewalk that is not parallel to a road.

In *Colucci v. Town of Vail*, 232 P.3d 218 (Colo.App. 2009), the Court of Appeals held that a pedestrian overpass met the definition of sidewalk in the statute. Although not parallel to the roadway, it was adjacent to it and it did not cross any adjacent property lines (meaning the City retained jurisdiction over the walkway). Similarly, here, the walkway is not parallel to the road at all points, but snakes from the Trading Post back around to both of the south lower parking lots due to the elevation change but serves entirely as a pathway for pedestrians who choose not to walk either in the road or on the side of the road. The statute was intended to cover improved pedestrian walkways within the boundaries of the city.

The trial court correctly found that the sidewalk at Red Rocks Park meets the definition under the CGIA as well as the common dictionary definition and therefore, the City has waived its immunity under the CGIA for sidewalks within its boundaries.

D. The Trial Court's Finding that the Walkway Was a "Dangerous Condition" Is Supported by Evidence and Must Be Upheld Because It is Not Clearly Erroneous.

C.R.S. § 24-10-103 (1.3) defines a 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….

The trial court, following a two-day hearing, held in its Findings of Fact and Conclusions of Law that "Denver was aware of the risk of the site to the health and safety of the public, and did not take sufficient precautions to give notice of the construction area and to move large numbers of people away from the hazard." PR, p 246.

In order to reverse this finding, this Court must find that the trial court's factual findings were clearly erroneous. Denver cannot make this showing.

In determining whether the open trench across the paved walkway was a "dangerous condition," the trial court applied a four part test: (1) whether Ms. Butterfield's injuries resulted from the physical condition of the walkway, or its use; (2) that the walkway constituted an unreasonable risk to the health or safety of the public; (3) that Denver knew or should have known of the unreasonable risk posed by the walkway; (4) that the condition of the walkway caused by Denver's negligence resulted in Ms. Butterfield's injuries. *Id.* at 243-246. The Court

applied the test set forth by this Court in *Padilla ex rel. Padilla v. School Dist. No. 1 in City and County of Denver*, 25 P.3d 1176 (Colo. 2001).

The trial court noted it was undisputed that Ms. Butterfield was injured as she walked down the walkway and stepped into the open chase drain and fell. PR, p. 240.

Next the Court considered whether the actions Denver took to block the chase drain were insufficient and caused an unreasonable risk to the thousands of people using the paved walkway. The trial court considered the evidence raised by Denver in its appellate brief, namely that Denver's witnesses testified that the orange mesh placed across the open trench was a reasonable method of blocking thousands of people who were walking on a paved path from accidentally walking across an open trench. *Id.* at 244.

The Court also recognized that Denver's employees testified that a similar crowd had not knocked down the fence the previous night, and that Denver's project manager testified that the mesh complied with industry construction standards. *Ibid.*

The Court contrasted Denver's testimony to that of Ms. Butterfield's witnesses. The court noted that Anne Stodola, a safety engineer, testified that the orange mesh fell below construction standards and was, under the circumstances, an insufficient barrier to protect Ms. Butterfield and other pedestrians from potential injury. *Ibid*[4]. The Court noted that Ms. Stodola testified that a proper barrier should have withstood at least 150 pounds per square inch to be a safe barrier under applicable industry construction standards and municipal codes, and that the plastic fence failed that test. *Ibid.* The court also cited Ms. Stodola's testimony that a firmer, heavier barrier should have been used.

[4] Anne Stodola was unavailable for the Trinity Hearing and the trial court relied on her preservation deposition testimony. The transcript of the deposition is at PR pp 127-138

The court found persuasive Ms. Stodola's testimony that when deciding what appropriate barrier should be used to guard people from inadvertently walking into the uncovered trench, Denver's project managers should have considered that thousands of people would be walking through the area at night. *Id.* at 245-246

The Court recognized that Ms. Stodola's testimony was disputed by Denver's project manager Patrick Riley, who testified that the fence could not have been inadvertently knocked down and was more probably cut with a sharp object. *Id.* at 245. The court found there was no evidence to support this theory. *Ibid.* Further, the Court found persuasive Ms. Stodola's testimony that the orange mesh could be easily torn-- she had torn similar fencing with her bare hands and, "while orange mesh fencing is commonly used to surround a construction site that it is insufficient to act as a barrier. A firmer barrier, she opined, is what was needed here where hundreds of people, in poor light, without obvious direction would easily trample fencing." *Id.* at 245-46. Finally, the Court found credible Ms. Stodola's testimony that engineering safety standards do exist that apply to a walkway in a mountain park and that they were not met and "project managers would know of the unreasonable risk to the public walking down the sidewalk at night." *Id.* at 246.

Applying the fourth test, the court found that the dangerous condition of the walkway was caused by Denver's negligent act or omission in constructing or maintaining the walkway and that "Denver was aware of the risk to the health and safety of the public, and did not take sufficient precautions to give notice of the construction area and to move large numbers of people away from the hazard." *Id.*

In sum, the evidence supports that at the least, Denver had constructive knowledge of the dangerous condition it created.

Denver disputes Ms. Stodola's knowledge of construction standards in its opening brief but presented no evidence at the hearing to disqualify Ms. Stodola as an expert witness. The evidence supports Ms. Stodola's qualifications to offer expert opinions as to both safe construction standards and the use of proper guarding and warnings.

Ms. Stodola testified in her video deposition, which the Court accepted in lieu of live testimony. PR, pp 189-90:

> Page 8
> Q. (By Mr. Klibaner) Let me ask you have you had experience with respect to construction sites of this nature with respect to slip and fall cases, trip and fall
> Page 9
> cases?
> A. I absolutely have. The most one that comes to mind is a very similar case in -- at the University of Colorado where they had failed to adequately protect pedestrians from an area that was muddy, and the person slip and fell and had severe injury. And fundamentally this is not a construction case. We're not talking about a building. We are talking about a guarding case.
> And guarding and engineering in general, mechanical engineers formulated the safety hierarchy. And that is you design out the hazard. If it can't be designed out, you guard against it. This is a hazard. It should have been guarded against. The least effective that wasn't even done in this case was warn of the hazard. So this is a fundamental engineering principle in terms of guarding.

Ms. Stodola testified there were no signs directing pedestrians to the path to the east side of the sidewalk. There were no signs warning of the open trench or any other dangers past the

area where the mesh fence was supposed to be present. There was no temporary lighting placed where the trench was located. PR, p 191.

Denver's Violation of Applicable Safety Codes Supports the Trial Court's Finding That Denver Had Constructive Notice That it Created and Failed to Address A Dangerous Condition:

Ms. Stodola testified that building codes require, in a case such as this, a more rigid barrier than plastic mesh to guard thousands of people against a hazard (PR, p 191):

> Page 16
> 13 Q. Was it feasible to use some kind of
> 14 different barrier that would not be easily torn down or
> 15 moved?
> 16 A. First of all, there's numerous ways they
> 17 could have done it. Yes, they could have easily put
> 18 boards. In fact, in the building code it says -- looking
> 19 at a construction site, they talk about having baseboards
> 20 and top boards so that people with vision -- seeing or
> 21 visibility issues can use their canes to detect the
> 22 presence of those, but also it's more rigid. You take
> 23 much more effort.
> 24 And in the building code it's required to
> 25 have 150 pounds per square foot resistance to a load.
> Page 17
> 1 This clearly does not have anything close to that. So
> 2 they could have done that.

Ms. Stodola noted that following this code requirement and using a proper barrier was especially important because Denver was trying to guard thousands of people from using the sidewalk and avoiding the open trench (PR, p 195):

> Page 31
> 25 …They failed to adequately guard this
> Page 32
> 1 situation with the idea that there were going to be
> 2 thousands of people flowing in this area. There were
> 3 multiple other types of guarding that they can use.

> Construction building code addresses construction sites
> and calls for at least 150 pounds per square foot of --
> that it should withstand that. This clearly did not.

Violation of this code, along with all the other violations of safe practices about which Ms. Stodola testified prove Denver had constructive knowledge that its decision to "guard" the trench only with a plastic mesh fence was unreasonable under the circumstances.

The Colorado Supreme Court has held that violation of building codes intended to protect the safety of those on the premises is evidence of both a landowner's constructive knowledge of a dangerous condition and of the landowner's failure to exercise reasonable care to protect others from the dangerous condition. *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565 (Colo. 2008).

The *Lombard* court interpreted the meaning of "constructive knowledge" noting that "to determine whether a person 'should have known' certain information, the court applies an objectively reasonable person standard and that constructive knowledge may be inferred if the knowledge could have been obtained through reasonable care and diligence." *Id.* at *571*.

The *Lombard* court next turned to the issue whether violation of a building code may be evidence that a landowner had actual or constructive knowledge of a dangerous condition. The court held that if the code provision was intended to protect the health and safety of the public, and if the landowner was responsible for the building the code applied to, then violation of the code offered sufficient evidence that the landowner knew or should have known of a dangerous condition. *Id*. at 573.

A landowner must not only have actual or constructive knowledge of a dangerous condition to be liable to an invitee; the landowner must also unreasonably fail to protect the

invitee from the dangerous condition. The Colorado Supreme Court found that violation of the building code was also relevant to "establishing the standard of reasonable care, and thus that the violation of that statute or ordinance is evidence of a failure to exercise reasonable care." *Id.* at 575.

Here, the evidence at the hearing supports that Denver violated applicable codes regarding the strength of the barrier used to prevent thousands of people from walking on the trench. But, even if the Court finds for some reason the code is inapplicable, the testimony from Ms. Stodola and the lay witness testimony support that Denver, if it had used "reasonable care and diligence" would have known that it needed to do more to make the sidewalk safe.

Denver notes its Project Manager Patrick Riley testified that the plastic mesh fence was an adequate barrier to the trench, and that it was irrelevant whether a handful or hundreds or even thousands of people were being redirected from the trench the night Ms. Butterfield fell in the trench. The trial court apparently found this testimony unpersuasive and in any event Mr. Riley did not address Ms. Stodola's testimony that the barrier violated building codes because it could not stand up to 150 pound loads. Also, Denver's assistant parking manager, Jack Truaex, found that because the fence was down, several patrons were injured and the area of the trench was improperly marked and that the area should be staffed until it was "safe enough for patrons to navigate by themselves." TR EX 11, Appendix A.

The fact that Denver, after several people were injured the same night as Ms. Butterfield, decided to add a staff person near the plastic fence the next night to insure that no pedestrian would be hurt, does not prove Denver's failure to do anything before that time was negligent. But, it is further evidence that Denver itself recognized that the fence itself, with no signs,

temporary lighting, or a rigid barrier, was insufficient to insure that patrons would not again encounter an area where they could trip and fall in an open trench. The evidence, with inferences favorable to Ms. Butterfield, shows that this recognition of danger should have been made before a number of people were injured. Denver has attempted to excuse its failure to do more than place the mesh fence in front of the open trench on the grounds that it was unaware of anyone falling before or of the mesh fence being knocked down at a previous concert. Even if this is true, Ms. Stodola testified that from a safety standpoint near misses in which a mishap does not occur are no excuse for failure to take reasonable safety measures. Deposition testimony, p 51, PR, p 200.

Prior to Plaintiff's fall, Denver had actual knowledge that the mesh fence was down and that pedestrians were at high risk for injury

The evidence presented to the trial court supports that Denver had actual knowledge of the dangerous condition it created, because Denver, through its employees, knew the orange mesh fence had been knocked down, thus exposing hundreds or thousands of concertgoers leaving the amphitheatre to a walkway with an open trench across the walkway.

Denver's witnesses admitted at the hearing that the open trench across the sidewalk created a dangerous condition and that it was necessary to take precautions to prevent Red Rocks Park patrons from encountering the open chase drain. Denver claims that the mesh fence was a sufficient and reasonable means of protecting Red Rocks Park patrons from the dangerous condition created by the trench going across the walkway. Denver claims, though, that it had no knowledge that the fence was down before Ms. Butterfield fell. The trial court found that, even if this were the case, Denver had constructive knowledge that the plastic mesh fence, in a dark

area, with no signage, was insufficient to safely insure that pedestrians would avoid the open trench. Unrebutted evidence at the hearing also supports that Denver had actual knowledge that the orange mesh fence had been knocked down and that pedestrians were entering the construction zone and encountering the uncovered concrete trench.

Ms. Butterfield's friend, Jennifer Blocker who was with Ms. Butterfield, testified that after Ms. Butterfield fell, a man wearing a reflective vest approached her and told Ms. Blocker that he had been watching people trip and fall because of the trench and was wondering "when somebody was going to step in there, when somebody was going to get hurt…" TR 06/28/17, p 59:22-25. The trench is near the parking lot. TR EX 29. Denver's witness, Tad Bowman, testified that the contract employees with Argus Event Staffing who work at the parking lots wear reflective vests. TR 06/28/17, p 116:18-22. The reasonable inference from this testimony is that at least one Red Rocks' employee saw the plastic fence was down before Ms. Butterfield was injured, yet took no action either to try to replace the fence, inform Red Rocks' personnel the fence was down, or take any other action to keep pedestrians from walking across the trench. This is despite the fact that the employee had the duty to report the fence was down. Denver's Red Rocks' employees, Tad Bowman and Steven Jorgensen, both testified that Argus employees were responsible for reporting any dangerous conditions they observed. Both testified the employees were expected and obligated to take action if they saw a condition that placed Red Rocks Park's patrons in danger. TR 06/28/17, p 133:2-15, TR 06/28/17, p 29:18-22.

This testimony shows that Denver knew, before Ms. Butterfield fell, that there was a dangerous condition, an unprotected and unguarded open trench, that could cause injury. Since Denver knew the fence was down, Denver knew there existed a dangerous condition which

Denver created, yet no action was taken until the next day. The knowledge of Denver's contracted employees is imputed to the City. Denver cannot escape responsibility for the actions of its contracted employees. *See, e.g., Springer v. City and County of Denver*, 13 P.3d 794, 801-02 (holding that a public entity is liable for the work of an independent contractor under the CGIA and explaining that a contrary conclusion would effectively nullify a CGIA waiver because a "public entity could simply hire an independent contractor . . . and escape answering for injuries to citizens using its buildings").

So, since Denver knew there was a dangerous condition before Ms. Butterfield fell, the trial court did not even have to address the issue of whether using only a plastic mesh fence to barricade two thousand pedestrians from the trench on a dark walkway was unreasonable and whether Denver had constructive notice that its actions were unreasonable.

Denver's failure to adequately guard a hazardous sidewalk construction site is not a "design" flaw -- it is a failure to exercise reasonable care in a construction project

Denver attempts to justify its failure to adequately guard an open concrete trench during construction as a "design failure" because design failures do not constitute waivers of immunity under the statute. C.R.S. § 24-10-103(1.3) states in part:

> "A dangerous condition shall not exist solely because the design of any facility is inadequate."

Denver does not introduce any evidence or testimony that use of the orange mesh is somehow attributable to bad planning on the part of the architects who designed the walkway or by any other design professional. On the contrary, the concrete trench was designed exactly as intended and the open trench was designed as intended. Ms. Butterfield has never contended that the walkway design itself is a dangerous condition. The contention is that an open trench on a

walkway used by thousands of concertgoers at night must have adequate guarding and warnings to prevent injury. This is particularly true when absence of adequate barriers or warnings lead the pedestrians directly into a construction zone.

The CGIA specifically waives liability for negligence in the construction and maintenance of a public facility. The use of these terms means the legislature intended that a public entity be held responsible to exercise its duty of care in both the maintenance and construction of enumerated public facilities and that negligence in construction is not the same thing as negligence in design.

Denver's claim that the use of orange mesh fencing as a barrier on a crowded walkway is simply an "inadequate design" for which immunity is preserved would seriously undermine a contractor's (whether public or private) duty to exercise reasonable care for the protection of those rightfully in the proximity of the work. Any contractor, whether public or private has a duty to guard, or maintain proper signs, barriers, lights or other warning signals as needed or reasonable under the circumstances in order to provide safety for pedestrians around dangerous hazards existing at the work site. Requiring adequate notice to the public (through the use of signage and lighting) and, most important, barricades for sidewalk construction is a straightforward task.

Ms. Butterfield's claim is entirely distinguishable from that in *Estate of Grant v. Colorado,* 181 P.3d 1202 (Colo. App. 2008). *Estate of Grant* involved a motorcycle passenger who was injured by the actions of a third-party driver making an illegal U-turn on a highway. There, the plaintiff argued that the contractor's failure to install concrete barriers to separate lanes of opposing traffic created a "dangerous condition" because a barrier would have prevented

the driver's illegal U-turn that led to plaintiff's being thrown off the back of a motorcycle. The appellate court found that during construction, a new road design existed (a two-way road) and the new design itself could not form the basis for a "dangerous condition" under the CGIA. To hold otherwise, the Court potentially could have required additional expensive changes to each and every road detour in the state, requiring placement of physical barriers separating lanes for all divided highway detours.

Ms. Butterfield is not arguing that the supposed detour "designed" by the City as an alternative route to walking on the open trench was dangerous. Without conceding that the detour was the result of a design decision, the detour was not the cause of Plaintiff's injuries. The dangerous condition was a concrete trench in a construction zone that failed to have proper signage, warnings, lighting, and fencing to protect pedestrians encountering the open trench on a walkway.

Ms. Butterfield's claim is more like *Hallam v. City of Colorado Springs,* 914 P.2d 479, 483 (Colo.App. 1995), in which the Appeals Court distinguished between traffic markings and traffic safety devices in holding that an unmarked 18-inch dirt embankment that extended across the highway constituted a dangerous condition. The Court held that traffic barricades are not the same as "traffic signs, signals and markings" affirming the trial court's holding that failure to maintain the barricade created a dangerous condition, stating further:

> Although the absence of a barricade may not itself create a dangerous condition, there was evidence to support the trial court's conclusion that both the failure to maintain the barricade properly in front of the dirt embankment and the dirt embankment itself created dangerous conditions. *Id.* at 483.

None of the other cases cited by Denver support its argument that use of orange mesh fencing to keep crowds away from a concrete trench can be considered a design failure. Nor did Denver provide any expert testimony that the use of orange mesh fencing for a temporary barricade should properly be considered an issue of "design."

CONCLUSION

The trial court correctly held that the open trench where Ms. Butterfield fell was a dangerous condition under the CGIA, the walkway was a sidewalk under the CGIA immunity waiver provision, the walkway was either a public facility or a component of a public facility. The trial court's factual findings were not clearly erroneous. For these reasons, the trial court's denial of the motion to dismiss should be affirmed and this case should be remanded to the trial court for trial on the merits.

OPPOSITION TO REQUEST FOR ATTORNEY FEES

The City's request for attorney fees is based on C.R.S. § 13-17-201. That statutory provision only applies in the event a tort claim is dismissed pursuant to C.R.C.P. 12(b) prior to trial. The City is not entitled to attorney fees unless it prevails on this appeal.

Dated this 15th day of May, 2018.

Respectfully submitted,
KLIBANER LAW FIRM, P.C.

s/ David A. Klibaner
David A. Klibaner

Respectfully submitted,
MIKE HULEN, PC

s/ Mike Hulen
Mike Hulen

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2018, a true and correct copy of the foregoing ANSWER BRIEF was served via ICCES upon the following:

Melania B. Lewis
Jamesy C. Owen
Assistant City Attorneys
Denver City Attorney's Office
Litigation Section
201 West Colfax Ave., Dept. No. 1108
Denver, CO 80202-5332

s/ Carly C. Kelley
Carly C. Kelley

APPENDIX A

1. Trial Exhibit 11, email, attached.

2. Trial Exhibit R, Plaintiff's video, delivered to Clerk on May 15, 2018.

Bowman, Tad R. - AVD Director

From: Jorgensen, Steven R. - Arts and Venues
Sent: Thursday, December 4, 2014 10:07 AM
To: Bowman, Tad R. - Arts and Venues
Subject: FW: 09182014 RR PATS JASON ALDEAN NIGHT 2

Post Event Report from Ty Curneen in regards to injury on egress 9/18. (This was not the claimant but shows we handled the situation after being notified.)

Steve Jorgensen
Guest Services Manager
Red Rocks Amphitheatre
Denver Coliseum
720-865-2477

From: Ty Curneen [mailto:ty.curneen@argusmanagers.com]
Sent: Tuesday, December 02, 2014 8:40 PM
To: Jorgensen, Steven R. - Arts and Venues; Brent Maertz
Subject: Fwd: 09182014 RR PATS JASON ALDEAN NIGHT 2

Here is our the post event report form September 18th.

---------- Forwarded message ----------
From: **Jack Trueax** <jack.trueax@argusmanagers.com>
Date: Friday, September 19, 2014
Subject: 09182014 RR PATS JASON ALDEAN NIGHT 2
To: Ty Curneen <ty.curneen@argusmanagers.com>

Event Date and Location: 09/18/2014 - Red Rocks, Jason Aldean Night 2

Supervisory Briefing: Jack Trueax briefed staff.

Check-in with Client: Steve E was pleased with parking.

Staffing Numbers:

Attendance: 9093

Gross Revenue:

$0.00

Per Cap:

$0.00

Lot Counts:

Upper North:704

Lower North:453

Upper South:687

Lower South:1248

Phish Lot: 262

Roads:1034

Injuries to Staff:

None

Major Issues:

In the pedestrian walkway leading from the trading post to lower south lot, a detour in the construction area was somehow knocked down by egressing foot traffic. Several patrons fell in the area due to the fact that it was improperly marked, causing inside managers to respond with medics to the site of the incident. It was recommended that we add the construction zone as a staffed egress spot until it is safe enough for patrons to navigate by themselves.

Miscellaneous:

Ingress was very smooth apart from a small traffic jam from the opening of the overflow Phish lot. With the roads being parked properly, egressing traffic was steady for its duration.

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Jack Trueax
Assistant Parking Manager | Argus PATS™ City and County of Denver Buildings - Red Rocks Amphitheatre, Denver Coliseum
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e jack.trueax@argusmanagers.com
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