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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

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Defendant-Appellant:
CITY AND COUNTY OF DENVER,

v.

Plaintiff-Appellee:
REBEKAH BUTTERFIELD.

▲ COURT USE ONLY ▲

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Court of Appeals Case Number: 2017CA1913

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# REPLY BRIEF

## CERTIFICATE OF COMPLIANCE

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

This Brief complies with the applicable word limit set forth in C.A.R. 28(g) because it does not exceed 5,700 words. It contains 5,332 words.

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/ Melanie B. Lewis*
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## INTRODUCTION

This Court should reverse the district court's denial of immunity to the City and County of Denver ("Denver") because Plaintiff-Appellee Rebekah Butterfield ("Plaintiff") failed to meet her burden of establishing that the injuries she sustained in an alleged fall on a walkway at Red Rocks Park resulted in a waiver of immunity under one of the specific provisions of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq*. ("CGIA"). Red Rocks Park is not a "public facility" under § 24-10-106(1)(e), and the walkway on which Plaintiff allegedly fell is neither a public facility nor a component of a public facility. Thus, she cannot establish a waiver of immunity for a dangerous condition of a public facility in a park or recreation area under C.R.S. § 24-10-106(1)(e). The walkway also is not a "sidewalk" under § 24-10-106(1)(d)(I) because it is not located between the curb or lateral lines of a roadway and an adjacent property line, making the waiver of that section inapplicable. No other waiver provision under the CGIA even arguably applies to the facts of Plaintiff's Complaint. Accordingly, the district court erred when it found to the contrary. Further, Plaintiff failed to meet her burden of establishing that the stanchions and fencing that were placed on the walkway to keep the public out of the construction area constituted a "dangerous condition" within

the meaning of either §§ 106(1)(e) or 106(1)(d)(I), providing an additional basis on which the district court's denial of immunity must be reversed.

## ARGUMENT

### A. The standard of review is *de novo* because Denver challenges the district court's legal conclusions

In her Amended Answer Brief, Plaintiff confuses the district court's factual findings with its legal conclusions, arguing that the clearly erroneous standard of review applies to the district court's conclusion that the walkway is a recreational facility and that the use of orange construction fencing to block a chase drain in the walkway was a dangerous condition within the meaning of the CGIA. While a district court's factual findings are reviewed for clear error, "[w]hether the facts found [by the district court] constitute a waiver under the CGIA, in contrast, is a question of law and would therefore be reviewed *de novo*." *Medina v. State*, 35 P.3d 443, 463 (Colo. 2001).

In this appeal, Denver challenges the district court's legal conclusions regarding the application of the CGIA's waivers of immunity to Plaintiff's claim. Specifically, Denver argued that the district court erred when it concluded that the walkway in Red Rocks Park where Plaintiff allegedly fell was a "public facility" within the meaning of C.R.S. § 24-10-106(1)(e) and a "sidewalk" within the meaning of § 24-10-106(1)(d)(I); and that the district court erroneously found that

the safety measures that Denver put in place around the walkway constituted a "dangerous condition" as defined in § 24-10-103(1.3). These issues challenge the district court's legal conclusion, based on the facts it found after conducting an evidentiary hearing in the case, that immunity was waived. As such, the appropriate standard of review is *de novo*. *See Medina*, 35 P.3d at 463.

### B. Red Rocks Park is not a public facility, nor is the walkway where Plaintiff allegedly fell a component of a public facility

Plaintiff's argument that the district court properly applied the immunity waiver for a public facility in any park or recreation area turns on the flawed premise that Red Rocks Park as a whole constitutes a "public facility" within the meaning of § 24-10-106(1)(e) of the CGIA. While Red Rocks Park is a mountain park, neither the evidence introduced at the *Trinity* hearing nor controlling precedent support the conclusion that Red Rocks Park in its entirety is a "public facility," of which the walkway is a component.

While a purported facility may qualify as a public facility if it shares common features with the other items listed in the recreation area waiver, as Plaintiff appears to argue is the case for the entirety of Red Rocks Park, this 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." *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 578-80 (2014) (emphasis in original). The

majority of Red Rocks Park is natural, unimproved property, for which there is no waiver of immunity under the CGIA. *See* C.R.S. § 24-10-106(1)(e); *Ackerman v. City and Cty. of Denver*, 373 P.3d 665, 670-71 (Colo. App. 2015), *as modified on denial of reh'g* (Sept. 10, 2015). The natural, unimproved land, and the various brick-and-mortar facilities within Red Rocks Park do not have a strong relationship such that the entirety of the park could be considered a "public facility."

Plaintiff recognizes that visitors come to Red Rocks and use the walkway in question for "many different purposes," including hiking, biking, exercising, and as a means to reach the Amphitheatre to watch movies and attend concerts, to attend weddings/events, and many other activities. (Am. Answer Br. at 16). Plaintiff also notes that a walkway connects Red Rocks Amphitheatre and the Trading Post Building, which includes a retail shop and the Music Hall of Fame. (*Id.* at 14-15, 19.) Nevertheless, what Plaintiff does not—and cannot—explain is how these various and different activities within Red Rocks Park have a strong relationship such that they promote a broader, common purpose, as required by *Young* for the entirety of Red Rocks Park to be considered a public facility. 325 P.3d 571. For example, an individual who visits Red Rocks Park for the purpose of biking or hiking or to go to the visitor's center is quite different from someone who goes to Red Rocks Amphitheatre for the purpose of attending a concert. These functions are separate

and distinct and do not have a strong relationship, nor could some of them—such as attending a concert or wedding even be considered "recreation."

The fact that a public facility, such as Red Rocks Amphitheatre, is built within the Park does not make the entire park a public facility, nor does the existence of several public facilities within the park mean that each of those facilities is connected to form one public facility. Just because the walkway allows visitors to participate in the various activities the park has to offer does not render it a component of a public facility. Like the sidewalk at issue in *Young*, the walkway is not a public facility, it is simply a designated path for visitors to use when moving around the park for reasons that are not necessarily connected to each other. *Young,* 325 P.3d at 581.

Plaintiff's attempts to cabin the walkway here into the holding of *Daniel v. City of Colorado Springs,* 327 P.3d 891 (Colo. 2014) —a case that addresses the legal status under the CGIA of a parking lot that serves a golf course—are similarly inapposite, just as the district court's erroneous reasoning that relied upon *Daniel* to deny the City's Motion to Dismiss. (*See* Am. Answer Br. at 15-18.) Plaintiff contends that the holding in *Daniel* supports her position because "a parking lot next to a golf course [is] a public facility since it promotes recreation by allowing golfers a convenient place to park after transporting themselves and their golf clubs to the

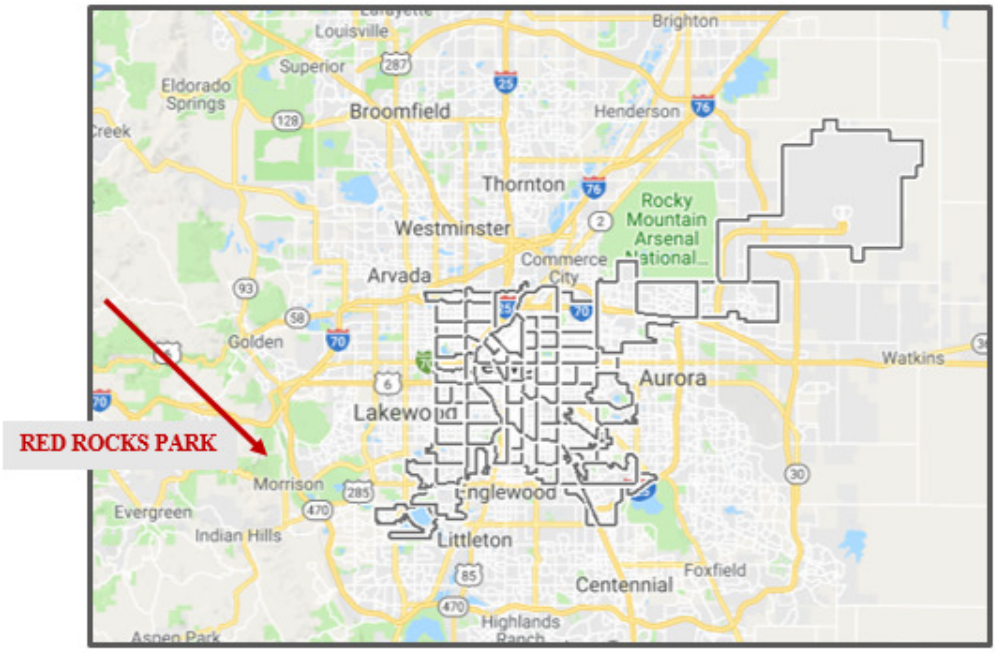
golf course," even acknowledging that the sole purpose of the parking lot was to allow golfers a convenient place to park to access the golf course. (*Id*. at 16.) However, the point that Plaintiff misses is that unlike the walkway at issue here, the parking lot at issue in *Daniel* had *one* purpose and served *one* facility—the golf course—which fell within the CGIA's definition of a public facility as the parking lot promoted the single common purpose of the recreational activity of golfing. *See Young*, 325 P.3d at 580 (distinguishing *Daniel*).

Plaintiff's contention that "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,*" (Am. Answer Br. at 17-18), is erroneous and without record support as the two are substantively different by their very nature: one is a walkway, the other is a parking lot, a distinction that is key to the public facility analysis. *See Young*, 325 P.3d at 579-580 (a walkway does not in and of itself qualify as a public facility, whereas there are strong indications that the legislature specifically intended that the *Daniel* parking lot be considered a "public facility".) Thus, Plaintiff's argument and the district court's reasoning that the walkway should be considered a "public facility" pursuant to C.R.S. § 24-10-106(1)(e) are contrary to the analysis set forth in *Young* and *Daniel*, both of which demonstrate that the

walkway at issue here is not a public facility for which immunity is waived under the CGIA.

### C. The walkway where Plaintiff allegedly fell is not a "sidewalk" as defined by the CGIA

Plaintiff's argument that the walkway in question is also a sidewalk under the CGIA rests on a misapplication of the statutory language and case law. Acknowledging the requirement that a sidewalk must fall within the corporate limits of a municipality for a waiver of immunity pursuant to C.R.S. § 24-10-106(1)(d)(I), Plaintiff erroneously claims that "Red Rocks Park is considered to be within the city limits of Denver." (Am. Answer Br. at 19; *see also Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 871 (Colo. App. 1996) ("immunity is waived in an action seeking compensation for injuries resulting from a dangerous condition on a public sidewalk within the corporate limits of a municipality.")) However, as can be seen by the map below, Red Rocks Park, located in Morrison, Colorado, is not within the limits of the City and County of Denver:



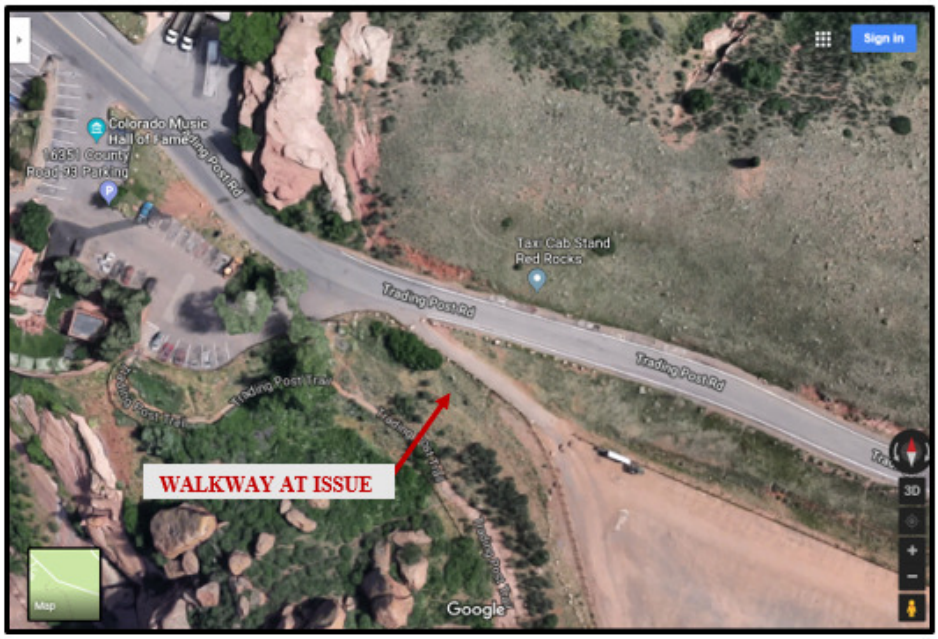

*See* Official Denver Maps, available at https://www.denvergov.org/maps/map/neighborhoods (last visited July 11, 2018); *see also* Google Maps Image of Red Rocks Park, available at https://www.google.com/maps/place/Red+Rocks+Colorado/@39.6654469,-105.4856097,10z/data=!4m5!3m4!1s0x876b82da0e6cc8d7:0x7c83e707392cd6ad!8m2!3d39.6654428!4d-105.2054583 (last visited July 11, 2018).[1] Thus, Plaintiff's argument that the walkway is a sidewalk pursuant to C.R.S. § 24-10-106(1)(d)(I)

[1] See also https://www.denver.org/listing/red-rocks-park-%26-amphitheatre/4574/ confirming the address of Red Rocks Park and Amphitheater as 18300 West Alameda Parkway, Morrison, Colorado.

must fail because it is outside Denver's corporate limits. *See also Smith*, 919 P.2d at 871.

Furthermore, the walkway in question does not meet the definition of a sidewalk under C.R.S. § 24-10-103(6). Plaintiff recognizes the statutory definition of a sidewalk is "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." (Am. Answer Br. at 19.) However, attempting to rely upon *Colucci v. Town of Vail*, 232 P.3d 218 (Colo. App. 2009), Plaintiff argues that the term "adjacent property lines" means "the City retained jurisdiction over the walkway." (Amd. Answer Br. at 20.) However, this interpretation is without basis in the CGIA or case law. In fact, this interpretation is contrary to the holding in *Colucci*, which makes clear that, in order to be a sidewalk, a walkway must be located *between* the curb lines of the traveled part of the road and the adjacent property line, regardless of who owns the adjacent property. *Colucci*, 232 P.3d at 221. Thus, "the dispositive factor is whether the pathway crosses an adjacent property line, and not whether it is parallel or perpendicular to it." *Id.*

As can be seen by the picture below, the walkway where Plaintiff alleges she fell is not contained between the curb lines of the nearby roadway, Trading Post Road, and the adjacent property line of Red Rocks Park:




Google Maps image of Red Rocks Parks, available at: https://www.google.com/maps/place/Red+Rocks+Amphitheatre/@39.6635813,-105.2016813,152m/data=!3m1!1e3!4m5!3m4!1s0x876b832411e6f51f:0xb639c2beee3f3d3e!8m2!3d39.6654245!4d-105.2057111 (last visited July 11, 2018). Rather, the walkway cuts away from Trading Post Road (which has no walkway between its curb lines and the adjacent property line on any portion of the roadway), through the natural landscape of Red Rocks Park. Accordingly, the walkway is not a sidewalk under the CGIA because it is not located between the curb or lateral lines of the

roadway and the adjacent property. Rather, the walkway separates from the roadway and *crosses through* the adjacent property line.

Plaintiff's Brief misconstrues Denver's argument, stating that "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." (Am. Answer Br. at 20.) Denver does not argue that a walkway must be parallel to the roadway to meet the sidewalk definition—this would be contrary to the holding in *Colucci,* 232 P.3d at 221 (holding that a pedestrian overpass could be considered a sidewalk, though perpendicular [not parallel] to the roadway in question because it *fell between* the curb lines of the roadway and the adjacent property line.) A comparison of the diagram of the sidewalk in *Colucci*[2] and a diagram of the walkway at issue here shows the significant difference between the two areas:

[2] *See Colucci*, 232 P.3d at 221.

*Colucci* Diagram

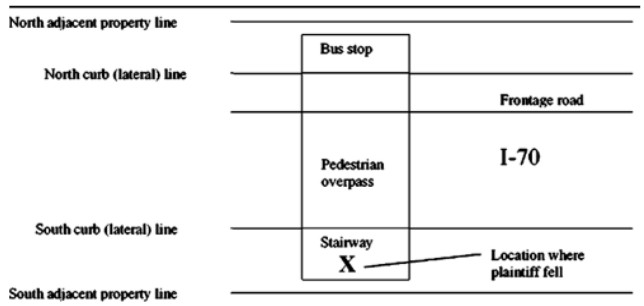
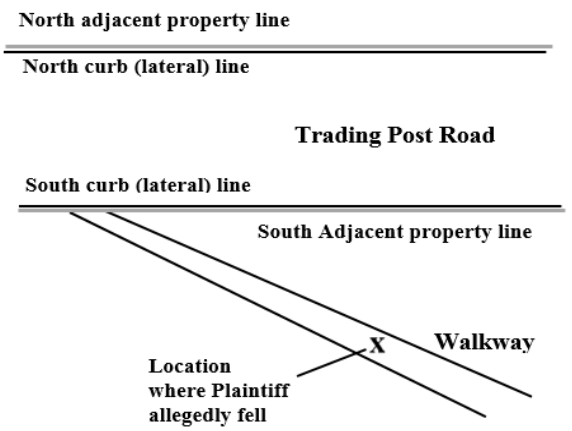



Diagram of this case




Accordingly, because the walkway in this case does not meet the definition of a sidewalk under the CGIA or case law construing the same, there is no waiver of immunity pursuant to C.R.S. § 24-10-106(1)(d)(I) and the district court's erroneous finding to the contrary should be reversed.

**D. Plaintiff failed to establish that municipal building codes applied to the walkway and therefore such codes do not show that its condition constituted an unreasonable risk to the health or safety of the public**

Plaintiff's argument that the condition of the walkway constituted an unreasonable risk to public health or safety is based on her expert's contention that Denver allegedly failed to follow building safety codes. (Am. Answer Br. at 26-27, "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).)" However, Ms. Stodola never identified any particular building code, much less a

specific provision of such a code, that applied to the walkway. In addition, Plaintiff presented no evidence to meet her burden at the *Trinity* hearing regarding the applicability of any building code to the walkway. The absence of proof on this issue is particularly problematic because it is not at all clear that the coverage of any building code extends to an outdoor walkway that is in a public park and unconnected to any building or structure. Absent any record evidence showing that the walkway falls under the coverage of a building code, Plaintiff cannot rely on standards purportedly established by unidentified sections of unidentified codes as evidence that the walkway posed an unreasonable risk to public health and safety.

Plaintiff cites to *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565 (Colo. 2008), in an attempt to support her argument that an alleged failure to comply with the building code demonstrates that the walkway at issue posed an unreasonable risk to public health and safety. (Am. Answer Br. at 27-28.) However, *Lombard* is distinguishable from the facts of this case. In *Lombard* the court considered the potential liability of a private building owner under the premises liability act and determined that the owner was liable when the plaintiff fell from a ladder *inside the building* because a violation of the applicable municipal building code led to the injury. *Lombard*, 187 P.3d at 568-76. *Lombard's* holding that a building owner may be liable for injuries inside the building when a known violation

of the building code causes an injury is entirely irrelevant here, where an alleged injury occurred on a publicly-owned outdoor walkway not governed by any identified building code. *See id.* Thus, Plaintiff's argument that the condition of the walkway constituted an unreasonable risk because the construction site did not comport with building codes must fail because building codes do not supply the requirements for walkway safety.

To bolster her claim that the condition of the walkway constituted an unreasonable risk to public health or safety, Plaintiff also cites to an internal email written by Jack Trueax, an employee of one of Denver's parking contractors, dated the day after the concert Plaintiff attended at Red Rocks. (Am. Answer Br. at 9.) In the email, Mr. Trueax stated:

> 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…. 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.

(Appx. A to Am. Answer Br., Trial Ex. 11.) Mr. Trueax's comments, however, represent nothing more than a recitation of what occurred the night prior, *i.e.*, the fence in front of the construction area on the walkway was knocked down on the night of the concert when Plaintiff was injured, which led to the construction area being improperly marked as the fence erected to warn and block pedestrians from

entering the area was no longer standing. (*See* TR 06/28/17 pp 143:23 - 144:12.) Further, Mr. Trueax is not an expert on construction standards, nor was he involved in the construction or maintenance of the walkway; he was simply relaying what occurred to internal parking staff of Denver's contractor. (*See* TR 06/29/17 pp 32:13 – 33:9, 34:24 – 35:11.) The recommendation that a staff member be placed at the construction zone site until Red Rocks employees could ensure the safety of patrons is a post-remedial measure that the district court found was not admissible pursuant to C.R.E. 407 and, thus, should not be considered here as post-remedial measures do not show knowledge of a physical condition that posed an unreasonable risk to public health or safety. (TR 06/28/17 pp. 144:13 – 145:3; TR 06/29/17 pp 24:21 – 25.)

For these reasons, Plaintiff failed to meet her burden of proving that the walkway constituted an unreasonable risk to public health or safety. An unreasonable risk under the CGIA means more than a mere chance of injury, damage, or loss; for a risk to be unreasonable there must be a "chance of injury, damage, or loss that exceeded the bounds of reason." *City and Cty. of Denver v. Dennis*, 418 P.3d 489, 498 (Colo. 2018). The record confirms that Denver installed safety measures to prevent pedestrians from entering the active construction area, including a detour for pedestrians around the unfinished construction area, an orange

construction fence around the portion of the walkway under construction to warn and stop anyone from entering the area, orange stanchions in front of the fence, and lighting from nearby streetlights to illuminate the area at night. (TR 06/29/17 pp 44:10-49:10, 56:4-57:6, 65:4-66:21, 75:2-12.) These safety measures met construction industry safety standards for pedestrian walkways. (*See id.*) Plaintiff's expert failed to point to any construction industry standards for pedestrian walkways which had not been complied with in opining that the safety measures used on the walkway were allegedly insufficient, pointing instead to irrelevant and inapplicable building codes. (*See* CF, pp 111-112, 122-125.) Accordingly, Plaintiff failed 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 and, therefore, the district court erroneously determined that subject matter jurisdiction existed over Plaintiff's claims.

### E. Denver had no notice that the construction fencing was torn down before Plaintiff allegedly fell

Denver had no notice that the orange construction fencing, which had been in place on the walkway during previous concerts without incident, was apparently knocked down on the evening of September 18, 2014, before Plaintiff allegedly walked over the fencing and fell on the walkway. Although Plaintiff contends that Denver had constructive notice that the fence was down, she hinges this argument

on the flawed premise that the building code applied to the walkway. (*See* Am. Answer Br. at 26-28). According to Plaintiff, the building code required barriers used in construction sites to withstand 150 pounds per square foot of resistance to load, and the orange construction fencing on the walkway did not meet this standard. (*See id.*). As explained above, however, no evidence was presented regarding the application of any building code to an outdoor walkway. The alleged requirements of an unidentified and inapplicable code could not put Denver on constructive notice of any alleged inadequacy of the safety devices used in the construction of the walkway.

Furthermore, the record does not show that Denver had actual notice that the fencing was down before Plaintiff allegedly fell. Plaintiff's contention that Denver had actual notice that the orange fencing had been knocked down before she fell is based solely on a comment reportedly made by an unidentified man to Jennifer Blocker, a friend of Plaintiff's who was with her when she fell. (Am. Answer Br. at 32). According to Ms. Blocker, the man, whom Ms. Blocker "would assume would have been an employee" because he was wearing a reflective vest, approached her after Plaintiff fell and said, "I was wondering when somebody was going to step in there, when somebody was going to get hurt." (R. at 6/28/17 at p. 59: 6–25). Plaintiff contends that the unidentified man must have been an employee of Argus Event

Staffing, which contracts with Denver to staff parking lots for traffic control during events at Red Rocks, because Argus employees wear reflective vests and he was wearing a reflective vest. Thus, according to Plaintiff, the knowledge of the man with the reflective vest, who may have been an employee of contractor Argus Event Staffing, should be imputed to Denver, citing *Springer v. City and Cty. of Denver*, 13 P.3d 794, 801-02 (Colo. 2000), in support. (Am. Answer Br. at 31).

*Springer*, however, did not hold that the knowledge of a contractor's employee is automatically imputed to a public entity. In *Springer*, the court addressed whether immunity was waived for an alleged dangerous condition of a public building that had been built by a construction contractor for the city. *Springer*, 13 P.3d at 799. In making its determination, the court examined the four factors required to establish a dangerous condition under the CGIA, including whether the city knew or should have known of the condition and whether the condition was proximately caused by the negligent act or omission of the city. *Id*. On the element of notice, the court found that the condition had existed for four years before the accident at issue, and that the existence of the condition in a city-owned and operated property for that length of time put the city on notice of the condition. *Id.* Having found the city was on notice through its own actions, the court had no need to address, and did not address, the knowledge of the contractor and whether such

knowledge could be imputed to the city. Instead, the court focused on the primary dispute in the case, which was causation, and found that causation could be established even when the city had hired a contractor to construct the building at issue. *Id*. at 802. Because *Springer* did not find that the knowledge of an employee of an independent contractor will automatically be imputed to a public entity, the case does not support actual knowledge here. This is especially true when the evidence does not even show whether the individual that was purportedly in a reflective vest was actually an employee of a City contractor and upon what he was allegedly basing his comments.

**F. Evidence in the record demonstrates that the acts of third parties proximately caused Plaintiff's alleged injuries**

Notably, Plaintiff fails to directly address in her Amended Answer Brief Denver's argument that immunity is not waived pursuant to the CGIA because it was the actions of third parties who trampled or otherwise knocked down the fence blocking the construction site, which allowed Plaintiff to enter the active site and caused her injuries. Rather, Plaintiff mistakenly claims that during the hearing "Denver did not introduce any evidence in support of its claim that the fencing was intentionally 'vandalized' by a third party." (Am. Answer Br. at 8, n.2.) To the contrary, however, the manager of the construction project on the walkway testified at the hearing that after the concert, third parties vandalized and trampled down the

construction fence, allowing others to walk over it. (TR 06/29/17, pp 61:24 – 62:9; 66:10 – 68:14, 70:2-6, 75:2 – 76:23; TRIAL EX, pp 22-24.) He additionally testified that the fence was secured in a manner that would require intentional vandalization for it to be taken down; it would not simply fall down or be knocked down by people falling against it. (*Id*. at pp 66:10 – 68:14.) There had never been a previous incident where a similar fence—which was used in other construction projects at Red Rocks—had been taken down or vandalized by third parties. (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.)

Thus, Plaintiff failed to meet her burden of proving at the *Trinity* hearing that the condition of the walkway leading to her alleged injuries—the removal and trampling of the fence meant to block the active construction site where she fell—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). Instead, the evidence in the record showed that the condition of the walkway that led to Plaintiff's fall was proximately caused by the actions of third parties, for which Denver cannot be held liable. *See Jenks v. Sullivan,* 826 P.2d 825 (Colo. 1992). Thus, the district court erred when it found that Plaintiff met her burden of showing that her injuries were proximately caused by an act or omission of Denver.

## G. Immunity is not waived for inadequate design

In her Brief, Plaintiff erroneously argues that she is not challenging the design of the walkway or the protective measures put in place around the construction area. Nevertheless, she casts her claim as one alleging that "[t]he 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." (Am. Opening Br. at 36) (emphasis added). More specifically, through the testimony of her expert, Plaintiff argues that Denver selected the wrong construction fencing to use as a safety measure on the walkway because the fencing could not withstand 150 pounds per square foot of resistance to a load, which is what Ms. Stodola opined was required under an inapplicable building code. (*Id*. at 23, 24, 26-27). Plaintiff also argues that Denver's use of stanchions was inadequate to warn pedestrians of the fencing and detour, and that Denver should have installed signs directing pedestrians to the detour around the construction area. (*Id.* at 26). Finally, she contends that Denver should have installed temporary lighting near the construction area. (*Id.*). There can be no reasonable dispute that the substance of Plaintiff's contentions is to directly challenge the design of the construction zone and the safety measures used to block the public from entering the zone, as opposed

to maintenance, for which immunity may be waived when a dangerous condition exists.

In an attempt to bolster her argument, Plaintiff relies upon *Hallam v. City of Colorado Springs*, 914 P.2d 479 (Colo. App. 1995), in which the court opined that inadequate safety barricades can be a "dangerous condition" for which immunity is waived and not merely a design issue. However, her reliance upon *Hallam* is misplaced. In *Hallam*, a motorcyclist was injured after he struck a dirt embankment at the end of a road at night. The city had placed barricades at the location to mark the embankment, but at the time of the accident, the barricades were lying down behind the embankment, hidden from view. *Id.* at 480. Importantly, in *Hallam*, the motorcyclist never argued that the barricades themselves were inadequate – *i.e.*, that the city should have installed a firmer barricade, more lighting, or additional signs. Rather, he argued that the city was negligent in failing to maintain the barricades by leaving them lying down. *Id*. at 481.

Here, quite unlike the facts at issue in *Hallam*, Plaintiff argues that the design of the safety measures used at the site was inadequate. Under the holding of *Estate of Grant v. State*, 181 P.3d 1202 (Colo. App. 2008), Denver is immune from such a claim. In *Estate of Grant*, an accident occurred on a portion of a multi-lane highway that was undergoing an improvement project. The Department of Transportation

developed a traffic control plan to be followed during construction on the upgrade, and the plan temporarily rerouted northbound traffic into southbound lanes with a temporary concrete barrier separating the lanes. *Id.* Later, the Department accepted a final traffic control plan that followed the same rerouting plan that was to be used during the construction project and eliminated most of the temporary concrete barriers that divided traffic. *Id.* While the final traffic control plan was in place on the project, the plaintiff was injured by a vehicle making an illegal U-turn from the southbound to the northbound lanes. *Id.*

The plaintiff argued that her injuries resulted from the Department's negligent maintenance of the highway, specifically the elimination of temporary concrete barriers dividing traffic and failing to require the contractor to employ adequate safety devices and methods of separating traffic during the construction. *Id.* The court found, however, that her injuries resulted from the design of the traffic control plan to be used during construction, not from the maintenance of the highway. *Id.* at 1206-07. Thus, because no waiver of immunity occurred, the court determined that plaintiff's claim was barred by the CGIA. *Id.*

As demonstrated by the holding in *Estate of Grant*, Denver is immune from Plaintiff's claim to the extent she is attempting to challenge the adequacy of the design of the construction project and safety measures. Plaintiff's claim that Denver

should have used a stronger grade of fencing and installed additional lighting and signage is no different from the plaintiff's claim in *Estate of Grant*, who argued that the state should have installed a different type of barrier to separate lanes of opposing traffic in the construction zone. Plaintiff further contends that the court in *Estate of Grant* purportedly reached its holding because finding immunity was necessary to avoid the expense of requiring "each and every road detour in the state" to be equipped with costly physical barriers. (Am. Answer Br. at 35). While that may have been a factor in the court's decision, the same could be said about this case. That is, if the Court adopts Plaintiff's argument that the orange, mesh construction fencing that was erected during the improvements being made to the walkway did not constitute a design issue, but rather constituted maintenance, and was inadequate to keep the public out of the walkway construction area, such finding would require municipalities to use more costly physical barriers during construction on walkways throughout the state. Plaintiff cannot rely upon the alleged inadequacies of the fencing, lighting, and/or signage at the construction site to demonstrate a waiver of immunity under the circumstances of this case.

## CONCLUSION

The district court erred when it found that the walkway at issue is a "public facility" for the purposes of § 24-10-106(1)(e) and/or that the walkway met the

definition of a "sidewalk" for which immunity may be waived under § 24-10-106(1)(d)(I). Further, the court erred in finding that the use of stanchions and orange mesh construction fencing to block the public from the construction area of the walkway was a "dangerous condition." Consequently, for the reasons set forth in Denver's Opening Brief and its Reply, this Court should reverse the district court's order finding that Denver waived its immunity under the CGIA.

Dated this 17th day of July, 2018.

Respectfully submitted,

By *s/ Melanie B. Lewis*
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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2018, the foregoing **REPLY 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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